

No.

IN THE
Supreme Court of the United States

ANDREW PIERSON,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Margaret Diane Depper
Counsel of Record
Ark. Bar No. 2009267
Fuqua Campbell, P.A.
3700 Cantrell Rd., Suite 205
Little Rock, AR 72202
(501) 975-7144
adepper@fc-lawyers.com

QUESTIONS PRESENTED FOR REVIEW

1. Whether exceptions exist for the general proposition that the Fourth Amendment exclusionary rule does not apply to foreign searches and seizure. And, if so, what those exceptions are.
2. What are the standards for establishing the “shocks the judicial conscience” and “joint venture” exceptions.

LIST OF PARTIES AND RELATED CASES

All parties appear in the caption of the case on the cover page. There are no related cases.

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The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 73 F.4th 582 (8th Cir. 2023). (App. A).

The order of the United States District Court for the Eastern District of Arkansas is unpublished but available at 2021 U.S. Dist. LEXIS 189442 (E.D. Ark. Oct. 1, 2021). (App. B).

The order of the United States Court of Appeals for the Eighth Circuit denying the petition for rehearing and rehearing *en banc* is unpublished but available at 2023 U.S. App. LEXIS 23864 (8th Cir. Sept. 7, 2023). (App. C).

STATEMENT OF JURISDICTION

The Eighth Circuit filed its opinion and judgment on July 11, 2023. (App. A).

The Eighth Circuit denied a petition for rehearing and rehearing *en banc* on September 7, 2023. (App. C). This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The U.S. Constitution, amendment IV provides,

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

STATEMENT OF THE CASE

On November 4, 2014, Pierson, a United States citizen, was charged in the Northern District of Oklahoma by a one-count indictment with felon in possession of a firearm. At the time the indictment was filed, Pierson was living in Nuevo Laredo, Mexico.

In 2017, American authorities sought assistance from Mexican authorities in locating Pierson and, with the assistance of Mexican authorities, continued their investigation into Pierson. The American agencies involved included the United States Marshals Service (“USMS”), the Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”), Homeland Security Investigations (“HSI”), and United States Customs and Border Patrol (“CBP”). In November 2018, Mexican authorities conducted a search of a mechanic shop associated with Pierson, likely at the request of CBP.

On December 10, 2018, Mexican authorities stopped Pierson in Nuevo Laredo, Mexico. The Mexican authorities searched Pierson and the vehicle he was driving, locating multiple cellphones, a laptop, and an iPod. Pierson was seized, tortured, terrorized, and interrogated by Mexican authorities. Ultimately, Pierson was taken by Mexican authorities to the U.S. border. Pierson was then forced across the border, into the custody of a waiting U.S. Marshal and CBP officer.

Shortly after his arrest at the border, and following his signing of a *Miranda* rights form, ATF and HSI agents questioned Pierson for over two hours and into the morning of December 11. Days after Pierson’s arrest, Pierson’s residence was

searched by Mexican authorities at the direction of American authorities. The evidence uncovered by that search was shared with American authorities. Pierson was ultimately transferred to the Northern District of Oklahoma to stand trial on the Oklahoma indictment, but the indictment was dismissed.

Pierson was subsequently transported to the Eastern District of Arkansas and charged by a one-count indictment on March 6, 2019, with conspiracy to traffic in counterfeit goods. Numerous superseding indictments followed, culminating in the Fourth Superseding Indictment charging Pierson and others with conspiracy to traffic in counterfeit goods, conspiracy to violate the Arms Export Control Act, attempt to violate the Arms Export Control Act, smuggling goods from the United States, and conspiracy to violate the Foreign Narcotics Kingpin Act.

Pierson filed a motion to dismiss and motion to suppress on January 10, 2021. The District Court held a two-day hearing on May 14, 2021 and May 17, 2021. On October 1, 2021, the District Court entered an order denying Pierson's motion to dismiss and motion to suppress. *United States v. Pierson*, 2021 U.S. Dist. LEXIS 189442 (E.D. Ark. Oct. 1, 2021). With respect to Pierson's motion to suppress, the District Court determined, in pertinent part, the actions of Mexican authorities did not "shock the judicial conscience" and there was no "joint venture" between Mexican authorities and American authorities. *Id.* at *2.

On November 9, 2021, Pierson entered a conditional plea to one count of Conspiracy to Violate the Arms Export Control Act, as contained in Count 2 of the Fourth Superseding Indictment, reserving the right to appeal the District Court's

adverse determinations on Pierson’s motion to dismiss and motion to suppress. The remaining counts contained in the Fourth Superseding Indictment were dismissed on motion by the Government. On April 20, 2022, the District Court sentenced Pierson to 144-months’ imprisonment. The judgment was entered on April 29, 2022, and Pierson filed timely notices of appeal.

Following his conviction, Pierson argued on appeal to the Eighth Circuit, in pertinent part, that the District Court erred in determining the actions of the Mexican authorities did not “shock the judicial conscience” and there was no “joint venture.”

With respect to this argument, the Eighth Circuit decided (1) not to adopt the “shocks the judicial conscience” and “joint venture” exceptions; and (2) even if it adopted the exceptions, which it did not, those exceptions did not apply to the circumstances of Pierson’s case. *United States v. Pierson*, 73 F.4th 582, 589-90 (8th Cir. 2022).

REASONS FOR GRANTING THE PETITION

The Eighth Circuit erred in failing to adopt the “shocks the judicial conscience” and “joint venture” exceptions to the general proposition that the Fourth Amendment exclusionary rule does not apply to foreign searches and seizures. In declining to adopt these exceptions, the Eighth Circuit is in direct conflict with decisions from other circuits. The Court has yet to rule on this issue. It is of utmost national importance for the Court to determine whether exceptions exist and, if so, what those exceptions are. The Fourth Amendment is a pillar of American constitutional jurisprudence. It protects American citizens from unlawful searches and seizures and curbs unlawful government action. It is an important matter of public policy for the Court to determine whether there are exceptions to the general rule that Fourth Amendment protections do not extend to foreign searches. It is an important matter of public policy for the Court to determine, if there are exceptions, what those exceptions are. Pierson submits that exceptions should exist and that those exceptions are the “shocks the judicial conscience” and “joint venture” exceptions.

If the exceptions exist, certiorari review is also necessary to formulate standards for those exceptions. While not adopting the “shocks the judicial conscience” and “joint venture” exceptions, the Eighth Circuit analyzed Pierson’s case under the exceptions. The Eighth Circuit erred in its interpretation of these exceptions.

1. The Fourth Amendment exclusionary rule generally does not apply to foreign searches and seizures. Circuit courts, however, have determined there are exceptions to this general proposition: the “shocks the judicial conscience” and “joint venture” exceptions.

The “shocks the judicial conscience” exception “is meant to protect against conduct that violates fundamental international norms of decency.” *United States v. Emmanuel*, 565 F.3d 1324, 1331 (11th Cir. 2009) (internal quotations and citations omitted). Further, “Evidence from foreign searches is inadmissible if the conduct of the foreign officials during the search shocks the judicial conscience.” 565 F.3d at 1330; *see also, United States v. Valdivia*, 680 F.3d 33, 51 (1st Cir. 2012); *United States v. Delaplane*, 778 F.2d 570, 573 (10th Cir. 1985). “[O]nly conduct on the part of foreign police that shocks the judicial conscience could warrant the suppression of foreign-seized evidence. Circumstances that will shock the conscience are limited to conduct that not only violates U.S. notions of due process, but also violates fundamental international norms of decency.” *United States v. Mitro*, 880 F.2d 1480, 1483-84 (1st Cir. 1989) (internal quotations and citations omitted).

The “joint venture” exception requires analysis of U.S. participation or direction in the search or seizure by foreign authorities. “[I]f U.S. agents substantially participate in an extraterritorial search of a U.S. citizen and the foreign officials were essentially acting as agents for their American counterparts or the search amounted to a joint operation between American and foreign authorities, the Fourth Amendment generally applies.” *United States v. Stokes*, 726 F.3d 880, 890-91 (7th

Cir. 2013). In *Emmanuel*, the Eleventh Circuit stated, “evidence from foreign searches is subject to the exclusionary rule if American law enforcement officials substantially participated in the search or if the foreign officials conducting the search were actually acting as agents for their American counterparts. 565 F.3d at 1330 (internal quotations and citations omitted). In *Valdivia*, the Court also determined that the “joint venture” exception applies “where American agents participated in the foreign search, or the foreign officers acted as agents for their American counterparts.” 680 F.3d at 51. In *United States v. Getto*, 729 F.3d 221, 230 (2d Cir. 2013), the Court stated, “In order to render foreign law enforcement officials virtual agents of the United States, American officials must play some role in controlling or directing the conduct of the foreign parallel investigation.”

The First, Second, Third, Fourth, Fifth, Seventh, Ninth, Tenth, Eleventh, and D.C. circuits have adopted one or both of the “shocks the judicial conscience” and “joint venture” exceptions. The First Circuit adopted both exceptions in *United States v. Valdivia*, 680 F.3d 33 (1st Cir. 2012). The Second Circuit adopted the “shocks the judicial conscience” exception in *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974). The Third Circuit adopted the “shocks the judicial conscience” exception in *United States v. Callaway*, 446 F.2d 753 (3rd Cir. 1971). The Fourth Circuit adopted both exceptions in *United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008) (exceptions analyzed under the Fifth Amendment). The Fifth Circuit adopted both exceptions in *United States v. Morrow*, 537 F.2d 120 (5th Cir. 1976). The Seventh Circuit adopted the “joint venture” exception in *United States v. Stokes*, 726 F.3d 880 (7th Cir. 2013).

The Ninth Circuit adopted both exceptions in *United States v. Barona*, 56 F.3d 1087 (9th Cir. 1995). The Tenth Circuit adopted both exceptions in *United States v. Delaplane*, 778 F.2d 570 (10th Cir. 1985). The Eleventh Circuit adopted both exceptions in *United States v. Rosenthal*, 793 F.2d 1214 (11th Cir. 1986). The D.C. Circuit adopted the “shocks the judicial conscience” exception in *United States v. Mount*, 757 F.2d 1315 (D.C. Cir. 1985), and the “joint venture” exception in *United States v. Straker*, 800 F.3d 570 (D.C. Cir. 2015) (exception analyzed under the Fifth Amendment).

These exceptions are necessary to (1) restrain United States authorities from using foreign authorities to gather evidence in a way that is prohibited by the United States Constitution and (2) preserve the integrity of the criminal justice system.

When analyzing these exceptions, it is important to examine the purpose of the Fourth Amendment exclusionary rule. According to this Court, the “sole purpose” of the Fourth Amendment exclusionary rule “is to deter future Fourth Amendment violations.” *Davis v. United States*, 564 U.S. 229, 236-37 (2011) (citing *Herring v. United States*, 555 U.S. 135, 141 (2009); *United States v. Leon*, 468 U.S. 897, 909, 921 n.22 (1984); *Elkins v. United States*, 364 U.S. 206, 217 (1960)). The Fourth Amendment guarantees that evidence used in a criminal proceeding was lawfully obtained. Law enforcement is forewarned that evidence obtained in violation of the Fourth Amendment will not be admissible in the prosecution of a criminal defendant. Their actions, therefore, must conform to the requirements of the Fourth Amendment.

The “joint venture” exception fits squarely within the sole purpose of the Fourth Amendment exclusionary rule. No doubt, if a foreign search is conducted without any involvement of United States authorities, and United States authorities therefore have no control over the search, the Fourth Amendment exclusionary rule cannot act as a deterrence. Foreign authorities are not bound by the Fourth Amendment and are not concerned if evidence obtained in their search can be used in a United States prosecution. This analysis changes if United States authorities are involved in or directing the actions of foreign authorities in the search of a United States citizen’s person, residence, or vehicle. In such a situation, American authorities have some control over the process by which the evidence is obtained. American authorities may request that foreign authorities obtain a search warrant or present reasons why a search warrant is not necessary. In such a situation, American authorities, looking at the future prosecution, are concerned with what evidence may be admissible. Applying this exception to such a situation would act as a deterrence to United States law enforcement.

In contrast, the “shocks the judicial conscience” exception does not fit squarely within the sole purpose of the Fourth Amendment exclusionary rule. This exception analyzes only the actions of foreign officials. The purpose of applying this exception, however, does not stem from the Fourth Amendment. It is based in the preservation of the integrity of the United States criminal justice system. As the Second Circuit stated in *Getto*,

The requirement of a showing that conduct “shocks the judicial conscience” stems not from the Fourth Amendment, but instead from a

federal court's authority to exercise its supervisory powers over the administration of federal justice. *See United States v. Maturo*, 982 F.2d 57, 60-61 (2d Cir. 1992). Pursuant to this authority, "we may employ our supervisory powers when absolutely necessary to preserve the integrity of the criminal justice system." *United States v. Barona*, 56 F.3d 1087, 1091 (9th Cir. 1995); cf. *United States v. Emmanuel*, 565 F.3d 1324, 1330 (11th Cir. 2009).

729 F.3d at 229. Preserving the integrity of the criminal justice system is of utmost importance. The United States criminal justice system is the gold standard. It is the system by which all other criminal justice systems in the world are judged. Indeed, the protections afforded criminal defendants in the United States are echoed in international treaties and foreign constitutions. Preserving that standard is non-negotiable. Adopting this exception will further demonstrate the serious view of the United States government in protecting United States citizens, both at home and abroad.

The Court should adopt the "joint venture" and "shocks the judicial conscience" exceptions.

2. If the Court adopts these exceptions, it should clarify what is necessary to meet each exception. Generally, this is necessary to instruct the lower courts how to apply the exceptions. It is particularly necessary for Pierson because the Eighth Circuit erred in its interpretation of these exceptions. Circuit court decisions establish (1) the "shocks the judicial conscience" exception can be met if the conduct of foreign officials violates U.S. notions of due process and fundamental international norms of decency; and (2) the "joint venture" exception can be met if American authorities direct foreign authorities to conduct a search. The Court should establish the same.

As stated in *Emmanuel*, conduct that will “shock the judicial conscience” is conduct that “violates fundamental international norms of decency.” 565 F.3d at 1331. In *Mitro*, the Court stated, “Circumstances that will shock the conscience are limited to conduct that not only violates U.S. notions of due process, but also violates fundamental international norms of decency.” 880 F.2d at 1483-84. In its analysis of this exception, the Eighth Circuit stated, “Pierson correctly avers that the search of his vehicle and residence without a warrant could be a violation of Mexican law, as well as a violation of other countries’ constitutions. But this is far from sufficient to establish conduct that shocks the judicial conscience.” Eighth Circuit Opinion, App. A., p. 7. The Eighth Circuit, perhaps because it declined to adopt the exception, failed to fully analyze Pierson’s argument that the actions of Mexican authorities violated not only international norms of decency, but also United States notions of due process, and that the violations therefore “shock the judicial conscience.”

Pierson demonstrated that United States notions of due process were violated during his arrest and the search of his vehicle and residence. The criminal process afforded individuals in the United States is considerable. United States citizens may not be detained without a warrant absent specific circumstances. A United States citizen’s vehicle or residence may not be searched without a warrant absent specific circumstances. United States citizens must be given adequate notice of offenses charged and for which they are to be tried. Upon lawful detention, United States citizens have numerous procedural rights including, without limitation, an initial appearance and hearing on bond. The evidence demonstrated Pierson was detained

without a warrant. His vehicle was searched without a warrant. A subsequent search was conducted of Pierson's residence in Mexico without a warrant. Pierson requested an attorney and bail, but these requests were denied. Pierson was expelled from Mexico without any process. United States notions of due process were violated.

Pierson also demonstrated that fundamental international norms of decency were violated. In their seizure of Pierson and search of Pierson's vehicle and residence, Mexican authorities failed to follow Mexican law.

The Mexican Constitution requires arrest warrants prior to seizure. Const. of Mexico art. XVI.

Only judicial authority can issue an arrest warrant. Such arrest warrant shall always be preceded by a formal accusation or charge of misconduct considered as criminal offence, punishable with imprisonment, provided that there is evidence to prove that a crime has been committed and that the defendant is criminally liable.

Id. The Mexican Constitution provides for limited exceptions to the requirement of a judicially issued arrest warrant. If an individual is caught in the middle of committing a criminal offense, anyone may arrest the individual. *Id.* In such a situation, the Mexican Constitution requires that the individual be turned over to authorities without delay, "which in turn, shall bring him before the Public Prosecution Service. A record of such arrest must be done immediately" and a judicial officer "shall immediately confirm the arrest or order [the individual's] release." *Id.* Another exception allows the Public Prosecution Service to order arrest, "only under the following circumstances all together: a) in urgent cases, b) when dealing with serious offence; c) under reasonable risk that the accused could evade justice and, d) because of the time, place or circumstance, accused cannot be brought before judicial

authority.” *Id.* Following the arrest, a judge “shall immediately confirm the arrest or order [the individual’s] release.” *Id.* Pierson was not presented with an arrest warrant when detained by Mexican authorities. He was not in the middle of committing a crime when detained by Mexican authorities. Further, his detention did not fit the exception allowing the Public Prosecution Service to order arrest. An arrest warrant was required for the detention of Pierson in Mexico. Mexican authorities failed to obtain an arrest warrant. The detention of Pierson was in violation of Mexican law and unreasonable.

Pursuant to Mexico’s Constitution, a search may not be conducted absent “a written order from a competent authority, duly explaining the legal cause of the proceeding.” *Id.* “No person shall be disturbed in his private affairs, his/her family, papers, properties or be invaded at home without a written order from a competent authority, duly explaining the legal cause of the proceeding.” *Id.* Further,

Only a judicial authority can issue a search warrant at the request of the Public Prosecution Service. The search warrant must describe the place to be searched, the person or persons to be apprehended and the objects to be seized. Upon the conclusion of the search, a report must be compiled at the site and before two witnesses proposed by the occupant of the place searched or, in his absence or refusal, by the acting authority.

Pierson’s vehicle and residence were searched without a warrant in violation of the Mexican Constitution.

The international community echoes the requirements for due process established in the United States and Mexico. In the United Kingdom, searches are conducted pursuant to the Police and Criminal Evidence Act of 1984. That act allows for warrantless searches in very limited circumstances, circumstances that align with

exceptions in the United States. *See* Police and Criminal Evidence Act of 1984, UK Public General Acts, 1984 c. 60. In Australia, searches are conducted pursuant to the Police Powers and Responsibilities Act. That act also allows for warrantless searches in very limited circumstances, circumstances that align with exceptions in the United States. *See* Police Powers and Responsibilities Act 2000 (Qld). International treaties also protect an individual's liberty and privacy. Article 9 of the United Nations International Covenant on Civil and Political Rights ("ICCPR") provides, in pertinent part, "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." Article 17 provides, "No one shall be subjected to arbitrary or unlawful interference in his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation." United Nations (General Assembly). "International Covenant on Civil and Political Rights." *Treaty Series*, vol. 999, Dec. 1966, p. 171, art. 17.

Pierson established that the actions taken by the Mexican authorities violated United States notions of due process and international norms of decency. Therefore, those actions "shock the judicial conscience" and the Fourth Amendment exclusionary rule applied. The Court should determine that such evidence is sufficient to meet the "shocks the judicial conscience" exception.

Pierson also presented evidence that American authorities *directed* Mexican authorities to search Pierson's mechanic shop and residence. As the Eighth Circuit

stated, “Even construed most favorably to Pierson, the most that the evidence demonstrates is that United States authorities helped Mexican law enforcement to locate and identify Pierson, *solicited a search of Pierson’s residence and a mechanic shop associated with him*, and requested that he be turned over to United States authorities.” Eighth Circuit Opinion, App. A, p. 8 (emphasis added). The direct request to search Pierson’s residence and mechanic shop is sufficient to establish a “joint venture.” As stated above, in *Getto*, the Court held, “In order to render foreign law enforcement officials virtual agents of the United States, American officials must play some role in controlling or *directing* the conduct of the foreign parallel investigation.” 729 F.3d at 230 (emphasis added). American authorities’ direction to Mexican authorities to conduct the search is sufficient to establish a “joint venture” and this Court should find as such.

For these reasons, Pierson asks that the Court grant this petition for writ of certiorari and correct the error of the Eighth Circuit Court of Appeals.

CONCLUSION

For the reasons set out above, the petition for writ of certiorari should be granted, and upon plenary consideration and oral argument, the judgment of the Eighth Circuit Court of Appeals should be vacated and the case remanded.

Respectfully submitted,



Margaret Diane Depper
Counsel of Record
Ark. Bar No. 2009267
Fuqua Campbell, P.A.
3700 Cantrell Rd., Suite 205
Little Rock, AR 72202
(501) 975-7144
adepper@fc-lawyers.com