

Re: 79-935, Allen v. McCurry

Mr. Justice: I cannot see how to change the dissent, although you probably would agree with Justice Stewart that the

Having reread the majority and dissent as they presently stand, I thought I would give you the benefit of my thoughts.

It occurs to me that, having met all of your substantive disagreements with his analysis by additions to footnotes, Justice Stewart has narrowed his opinion considerably. The only point on which you and he apparently disagree is on the meaning of the legislative history and the prior precedents of this Court.

As it stands now, Justice Stewart reverses the CA only for its conclusion that the lack of habeas corpus requires provision of a federal forum. I do not think that you disagree with him on that issue. Justice Stewart leaves open, although he does not encourage, the possibility of the lower court's applying "standard" (or expansive) notions of collateral estoppel to give resp a second chance. I do not see that the majority gives the lower court much direction, or any direction at all, as to how to go about applying collateral estoppel rules to this case. I believe that the dissent caused him to do this narrowing and, therefore, it has had a beneficial effect. The dissent now, in substance, serves as potential encouragement (with such weight as it may carry) to the lower court on remand to apply preclusion rules with a broad hand and to consider the



tors that you lay out.

For this reason, I cannot see how to change the dissent.

✓ Although you probably would agree with Justice Stewart that the CA erred in relying entirely on the habeas issue, you likely would rather affirm the CA's result on a different analysis.

11/26/80

SGL