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MEMORANDUM TO: Mr. Justice Powell

FROM: Paul Cane

DATE: October 9, 1980

RE: 79-935, Allen v. McCurry

You asked me to investigate whether voting to apply collateral estoppel in Allen v. McCurry is in any way inconsistent with general opposition to the Exclusionary Rule.

There is no inconsistency.

It is true that a strong argument against the exclusionary rule is the existence of the alternative remedy of damages. In Bivens v. Six Unknown Agents, 403 U.S. 388, 411 (1971), the Chief Justice described the unfortunate consequences of the Exclusionary Rule, and proposed that Congress provide monetary recovery for victims of unconstitutional acts by police. That alternative remedy would "give meaning and teeth to the constitutional guarantees against unlawful conduct by government officials," id. at 415, and thereby obviate the need for the Exclusionary Rule. Id. at 424; see California v. Minjares, 443 U.S. 916, 925-26 (Rehnquist, J., dissenting from denial of a stay).

Support for an alternative remedy does not, however, analytically require -- or even suggest --

abandonment of traditional collateral estoppel principles in § 1983 cases. If the Exclusionary Rule were abolished, there would be no motions to suppress evidence in state trials; "the focus of the trial, and the attention of the participants therein, [would not be] diverted" to the question of the constitutionality of the search. Stone v. Powell, 428 U.S. 465, 489-90 (1976). Therefore, without the Exclusionary Rule there would be no prior state court constitutional adjudication to preclude damages suits.

Thus, it is the Exclusionary Rule itself that sets the stage for preclusion of the § 1983 remedy.

P.W.C. 10/9/80