

MEMORANDUM TO: Mr. Justice Powell

FROM: Paul Cane

DATE: November 4, 1980

RE: Allen v. McCurry

Justice Stewart's opinion is largely fine, and I probably would join. The one difficulty that I have concerns footnote 24.

The opinion does not reveal the source of the collateral estoppel law that it purports to apply. As you recall from our conversations, the general federal principles of collateral estoppel could apply, or 28 U.S.C. § 1738 -- which requires federal courts to apply state collateral estoppel law -- could apply. The opinion skirts the issue; it discusses collateral estoppel law generally, but never really explains the source of the doctrine. Had I written the opinion, I think I would have relied on § 1738 and the congressional policy expressed therein.

It makes no difference in this case, because neither Missouri law nor federal law requires mutuality for the defensive use of collateral estoppel. But it might in another case. I think that addressing the issue not only would resolve the question for future cases, but also would strengthen the logic of this opinion by providing an analytical source for preclusion principles. The opinion,

as it now reads, more or less plucks the doctrine out of the
air.

Paul

P.W.C. 11/4/80