MEMORANDUM TO: Mr. Justice Powell

FROM: Paul Cane

DATE: November 5, 1980

RE: Allen v. McCurry

I would be delighted to attempt some redrafting, as you suggest, but I am afraid the problem does not lend itself to so simple a solution.

Footnote 24 merely makes manifest what is implicit throughout the opinion, namely, that the Court wants some doctrine of collateral estoppel is to be applied, but that the Court is unwilling to say whether its source is to be state law or federal law. Section II of the opinion discusses general collateral estoppel principles, and Section III explains that nothing in § 1983 was intended to abrogate them. But the source of those collateral estoppel principles is never explained. Footnote 24 thus merely acknowledges that fact. Is it common law & ~~FRE~~ § 1738?

Justice Stewart obviously has tried to write as narrow an opinion as possible. But I think his effort is too cautious for two reasons. First, this case seems to be an ideal opportunity to tell the lower courts precisely what we mean when we say that they are to apply collateral estoppel law. Second, and more important, to reveal the source of the collateral estoppel law is to contribute greatly the rationale for applying collateral estoppel at

all. For example, 28 U.S.C. § 1738 instructs federal courts to apply state res judicata law. To base the opinion on § 1738 would identify a statute, and its policy of issue preclusion, as a key element of the argument rebutting the dissenters' primary contention: the legislative history of § 1983.

In sum, my view of this case would require substantial redrafting of the text to tie collateral estoppel to § 1738 rather than "general collateral estoppel principles" as now is the case.

I think the opinion would be better if drafted along those lines, but I am not sure it is worth making a fuss about.

Paul

P.W.C. 11/5/80