

FEB 19 1980 CERT. GRANTED

79-935

CERT TIMELY

L 3, P 12

ALLEN V. McCURRY

CA8: LAY, HEANEY, McMILLIAN

The issue here is whether collateral estoppel should bar a state prisoner from seeking damages under §1983 for an allegedly unlawful search and seizure that has already been deemed lawful in a prior state criminal proceeding. The CA8 held that "because of the special role of the federal courts in protecting civil rights, ..., and because habeas corpus is now unavailable [after Stone v. Powell] to [rspt]," collateral estoppel ought not to bar relief under §1983 for a Fourth Amendment claim.

That conclusion, the CA8 recognized, is contrary to the prevailing view of at least six CA's that collateral estoppel precludes the relitigation under §1983 of claims previously resolved against a §1983 plaintiff in a state criminal proceeding. The CA8 noted, however, that only two of the other CA's had addressed this issue in the context of a Fourth Amendment claim, and those two cases were decided before Stone v. Powell. The decisive factor for the CA8 in this case was the lack of an alternative

federal forum for rspt's Fourth Amendment claim.

Ptnrs argue that this decision conflicts with those of the other CA's and undermines the policies of Stone v. Powell. I am not entirely persuaded by ptnrs' reliance on Stone. After all, this case does not involve the exclusionary rule. Rspt is suing for damages, not the exclusion of reliable and probative evidence. I also think there is some merit to the CA8's view that since the overarching policy of §1983 is to provide a federal forum for federal constitutional claims and since rspt is without access to federal habeas for his Fourth Amendment claim, the decisions of the other CA's are distinguishable. There is certainly much discussion in those decisions concerning the availability of an alternative federal forum.

The issue presented here is quite interesting and important. I am inclined to think that the time is right for this Court to address itself to the issue of collateral estoppel under §1983. My only reluctance in suggesting a grant is that the Court may wish to address this issue first in a case in which the §1983 pltf has had an opportunity at

some point to litigate his claim in federal court. This case is more complicated than most inasmuch as rspt has never had an opportunity to litigate his Fourth Amendment claim in a federal forum. In a sense, this case presents a possible exception to a general rule of collateral estoppel now applicable in the CA's but not as yet endorsed by this Court. Moreover, with regard to that possible exception, the decision below is a case of first impression -- the only post-Stone Fourth Amendment decision. But, otherwise, I am inclined to

GRANT?

SBG

OPN: PTN A4

THERE IS A RESPONSE

Justice Stewart,

One addition factor to consider is that rspt's direct appeal in state court has not been decided. It is possible, therefore, that this case may be mooted if rspt prevails in that forum.

SBG