**[Blackmun Notes Before Oral Argument 09-17-80 HAB3230056-58][[1]](#footnote-1)**

no?

79-935 Allen v. McCurry

1983 – alleged fourth amendment violation – Collateral estoppel *with regard to* constitutional issue raised in the criminal proceeding

The factual setting is tragic – gun battle and two officers shot – defendant and father emerged from house – entry and search – guns and drugs seized

Missouri Courts. St. Louis Circuit Court denied suppression in part as to “full view” items.

Court of Appeals affirmed – Search for “other occupants” OK, and plain view.

meanwhile

Federal Courts. Meredith 1983 suit versus the officers for search of home sans[[2]](#footnote-2) warrant! and also assault after handcuffed

Summary judgment granted and suit dismissed. Collateral Estoppel.

Eighth Circuit reversed – District Court should address issue of assault

Stone v. Powell prevents federal Habeas Corpus – therefore no federal forum

- Direction to hold in abeyance pending Missouri court appeal.

It would be easy to apply collateral estoppel automatically – legally logical

3 liberals on this panel[[3]](#footnote-3) – would not like Stone v Powell

The “seizure officer” issue a red herring and to be ignored

I would ignore the litigation flood statistics pro and con

As a practical matter, the jury will not have sympathy for these guys.

LP

1983 not on any

basis

**[Page 2 – HAB3230057]**

79-935 (2)

Favoring Res Judicata

1. Usual purpose of res judicata

2. State court decisions no different – Montana v. United States

3. Federalism interest –

Compare to abstention

4. 28 USC 1738 (re state court decisions)

5. Review by certiorari is sufficient oversight

6. Moribundity of 1983 for so long = KKK *reduction*

?

7. The concept of *concurrent* stare decisis

8. When plaintiff voluntarily goes to state court, any federal aspect should be waived

Not favoring

1. Legislative background of 1983

2. A new federal remedy

3. Narrow concept of collateral estoppel and res judicata when 1983 enacted

4. Federal Courts as primary and final arbiters of constitutional rights

5. Broad collateral estoppel makes state courts in criminal cases the final arbiters

6. Greater ability of federal courts on constitutional issues

**[Page 3 – HAB3230058]**

79-935 (3)

I shy away from routine application of res judicata and collateral estoppel

These facts are atrocious and feed one’s biases

But

The 1983 history of federal courts as primary arbiters is not to be escaped

- unless restricted to Ku Klux Klan stuff and moribundity

When party has a choice of forums and willingly goes to state court, he waives and collateral estoppel applies.

When a state criminal defendant, it is involuntary and no waiver

The certiorari review is not enough

Other possible exceptions to collateral estoppel

Difference in quality of procedures in the *other* court

Restatement of Judgments exceptions to be considered (do they *bow* to case law?)

I would decide this case – and refer only generally to other possible exceptions, though it will spawn litigation.

This defendant-respondent put to choice of suppression or damages.

The officer-defendants not parties to the state court criminal proceedings - **mutuality[[4]](#footnote-4)**

LP Affirm? 17 September 80

*Big Canoe,[[5]](#footnote-5)* Georgia

1. Words added by the editor for clarity are enclosed in brackets as are editor comments. Interpretations of which the editor is particularly uncertain are indicated in italics and alternative interpretations may be indicated in footnotes. Text, symbols, or underlining in red, green, or blue appears in those colors in the original. (Blue text appears to have been added later—perhaps at the conference or after oral argument—and some of the text in the margins may also have been added later.) Text and symbols in the left margin are placed approximately where they appear in the document itself. [↑](#footnote-ref-1)
2. HAB frequently used the French word *sans* for “without.” [↑](#footnote-ref-2)
3. HAB is probably referring to the Eighth Circuit panel which consisted of Donald P. Lay, Gerald W. Heaney, and Theodore McMillian. [↑](#footnote-ref-3)
4. This word appears to have been written in a different and darker pen. [↑](#footnote-ref-4)
5. Presumably indicating that this document was written in Big Canoe, Georgia, where, according to long-time resident and local historian Charlene Terrell, Justice Blackmun’s daughter Sally had a part-time residence. E-mail from Charlene Terrell to Emily Sellers (November 14, 2014) (copy on file with David Achtenberg). [↑](#footnote-ref-5)