MEMORANDUM TO: Mr. Justice Powell

FROM: Paul Cane

DATE: October 9, 1980

RE: 79-935, Allen v. McCurry

This is a somewhat disjointed memo embodying my answers to the questions you posed today. I've also tossed in some thoughts about how you can best defend your position in Conference.

1. You asked for a memo confirming our understanding that res judicata principles generally apply in § 1983 cases. Almost without exception, courts -- at least pre-Stone v. Powell courts -- have held that they do. Justice Stewart accurately summarized the many lower court cases in Preiser v. Rodriguez, where he said:

> Principles of res judicata are, of course, not wholly applicable to habeas corpus proceedings. Hence, a state prisoner in the respondents' situation who has been denied relief in the state courts is not precluded from seeking habeas relief on the same claims in federal court. On the other hand, res judicata has been held to be fully applicable to a civil rights action brought under § 1983.

411 U.S. 475, 497 (1973) (emphasis added). But cf. id. at 509 n.14 ("The Court correctly notes that a number of lower courts have assumed that the doctrine of res judicata is fully applicable to cases brought under § 1983. But in view

of the purposes underlying enactment of the Act -- in particular, the congressional misgivings about the ability and inclination of state courts to enforce federally protected rights -- that conclusion may well be in error") (Brennan, J., dissenting).

2. The issue in Preiser was quite different from that before the Court in this case. In Preiser, the question was whether prisoners seeking restoration of "good time" credits could obtain that relief immediately in federal court in a § 1983 suit, or whether they had to exhaust state remedies before proceeding under the habeas corpus statute. The Court held that they had to exhaust state remedies and then proceed by habeas rather than § 1983. Although the language quoted above is favorable to our position in Allen v. McCurry, the case can be read to help the other side. That is so because Preiser, while denying a § 1983 remedy, held out the promise of -- indeed, relied on -- the federal habeas remedy in which collateral estoppel principles would not apply. Those circumstances are not present in our case, because Stone v. Powell deprived resp of his federal habeas forum.

3. The numerous circuit cases applying general preclusion principles are cited on pp. 17-18 of petr's brief. (I won't repeat the citations here.) I examined virtually every case cited in briefs or law reviews

for the contrary proposition. Almost every one was miscited. The sole case that does explicitly hold that normal preclusion principles are inapplicable in § 1983 suits is Ney v. California, 439 F.2d 1285 (9th Cir. 1971) (Civil Rights Act would be "dead letter" if state court adjudication were preclusive).

4. Those who would not apply collateral estoppel rely heavily on the legislative history of § 1983. To refute this forceful argument, I think we must ourselves rely on a statute: the Federal Res Judicata Act, 28 U.S.C. § 1738. That statute, which was enacted before and reenacted after § 1983, codifies Congress' belief in preclusion. That statute explicitly requires the application of state res judicata law. This is significant, I think. Justice Brennan at oral argument seemed to make much of the fact that now-outmoded mutuality principles were the rule when § 1983 was enacted. Since § 1738 demands that federal courts apply state preclusion law, this statute provides a rather neat way to avoid Justice Brennan's point: Congress, in asking federal courts to apply state preclusion law, must have recognized that state law could change, and that the federal courts were to adhere to those changes just as a state court would. Cf. Erie Ry. Co. v. Tompkins.

I hope you are successful today. If this memo did not answer your questions, or if you would like me quickly to pursue anything new, please ask.

Paul C.