Journal of Criminal Law and Criminology

Volume 67 | Issue 2 Article 7

1976

Recent Trends in the Criminal Law

THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 67, No. 2

Printed in U.S.A.

RECENT TRENDS IN THE CRIMINAL LAW

MISREPRESENTATIONS IN SEARCH WARRANT AFFIDAVITS

Within the past few years, several federal appellate courts[1] have addressed the question whether an attack upon a search warrant affidavit can be made, alleging not that it was facially insufficient to supply probable cause,[2] but that when made it was actually false or fraudulent, or both.[3] The circuits are presently applying different standards to this issue, creating confusion and inconsistency in the federal courts. To compound this problem, the courts have seen fit to delineate two categories of variables relevant to the question. The first is whether the misstatement in the affidavit is material or immaterial to the establishment of probable cause. The second category might be termed the degree of culpability on the part of the affiant. Thus far, the courts have discussed five possible degrees of culpability. The misstatement might be made: innocently, negligently, recklessly, intentionally, or with the specific intent to deceive the court. Therefore, there are a total of ten circumstances for which judicial guidelines might be indicated.

The Sixth Circuit is the latest of the federal courts to examine this question and has added its own definition of the legal standards to be applied in this type of situation.[4] In *United States v. Luna* the government appealed from the suppression of wiretap evidence in its prosecution of Luna and three other defendants.[5] In the suppression opinion, the district judge identified as false one sentence of a fifteen-page affidavit filed by an FBI agent. The sentence pertained to information concerning thefts at the Detroit Metropolitan Airport and the subsequent fencing of the stolen materials. The statement in question alleged that Luna was providing means of payment to men actually performing the thefts.[6] At the suppression hearing the informant denied unequivocally that such statement in the agent's

[1] The Supreme Court has not yet passed on the extent to which a court may permit an examination with respect to the validity of a warrant facially valid, and when the allegations of the underlying affidavits establish probable cause. Rugendorf v. United States, 376 U.S. 528, 531–32 (1964).

[2] It is well established that a defendant may challenge the sufficiency of the affidavit's allegations by examining the affidavit on its face. *See* United States v. Ventresca, 380 U.S. 102 (1965).

It is also well established that a defendant may challenge the credibility and reliability of an informant whose information is utilized by a peace officer seeking a search warrant. Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964). According to these cases, the reliability of confidential informants is to be evaluated on a two-pronged test which requires that the affiant have sufficient information to establish (1) the reliability of the informant, and (2) the conclusion that a crime has been committed. Thus, under this test the defendant may challenge affiant's statement that an informant reported criminal activity by the defendant, but may not contest the truth of hearsay evidence reported in good faith by the affiant. *Cf.* United States v. Harris, 403 U.S. 573 (1971).

[3] The federal appellate courts have only dealt with the veracity of government affiants, not nongovernment affiants. *See* United States v. Damitz, 495 F.2d 50 (9th Cir. 1974).

Numerous legal commentators have also discussed this question. *See, e.g.*, Kipperman, *Inaccurate Search Warrant Affidavits as a Ground for Suppression*, 84 HARV. L. REV. 825 (1971); Mascolo, *Impeaching the Credibility of Affidavits for Search Warrants; Piercing the Presumption of Validity*, 44 CONN. B.J. 9 (1970); Note, *Testing the Factual Basis for a Search Warrant*, 67 COLUM L. REV. 15 (1967).

[4] United States v. Luna, 525 F.2d 4 (6th Cir. 1975). The Sixth Circuit has previously dealt with unintentional error in affidavits. In United States v. Bowling, 351 F.2d 236, 241–42 (1965) the court said:

> While we have noted that the intent to deceive the magistrate charge was never presented to the District Judge, he did have clearly before him the factual errors in the affidavits upon which appellant now relies. Under this circumstance, we read the denial of the motion to suppress evidence as a holding that there was probable cause for the warrant and that errors in the affidavit were either immaterial or unintentional. . . .

However, the court refused to allow expression on the controversy on the basis that the factual situation presented in that case did not lend itself properly to the issue. *Id.* at 242 n.2.

[5] The four had been indicted on four counts charging conspiracy to extort money. After originally denying defense motions to suppress the evidence, the district judge subsequently took testimony on a supplemental motion to suppress and thereafter granted that motion in a bench opinion.

[6] The statement was as follows:

> FBI-1 told me that Hines told him that Joseph "Joe" Tocco and Gilbert Luna provide the means of payment to the men actually performing the thefts and receive money from the sales of the freight and merchandise stolen, as well as some of the stolen freight and merchandise.

United States v. Luna, 525 F.2d 4, 5–6 (6th Cir. 1975).

affidavit was ever made and the court concluded that it was false.[7]

According to the Sixth Circuit, there are two circumstances wherein an affidavit may be impeached even though it is facially sufficient for the establishment of probable cause. The first consists of the knowing use of a false statement by the affiant with intent to deceive the court. The court noted that such perjury must lead to suppression of the evidence in order to prevent fraud upon the judicial process.[8] The second circumstance arises when a law enforcement agent *recklessly* asserts a statement essential to establishment of probable cause which is false.[9] The court stated the test necessary in showing recklessness. The movant must offer affidavits showing (1) that the statement sought to be attacked was false when made, and (2) that when made the affiant did not have reasonable grounds for believing it.[10] The court felt that in the future, it will be important for the hearing judge to "determine whether means had been available to the agent to establish the truth or falsity of the statement without such delay as would defeat a legitimate enforcement purpose."[11]

The Sixth Circuit was concerned with the issue of good faith. It noted that while intentional falsification or utter recklessness as to truth or falsity would be a lack of good faith in the performance of the agent's duty to the judicial officer, a good faith error should not be held to require suppression of evidence even where the erroneous allegation was essential to establishment of probable cause. The court made a special distinction between perjury and human error. However, the court appears to waver regarding its notion of the importance of good faith. On one hand it states that utter recklessness as to truth or falsity of allegations to affidavits shows lack of good faith, but on the other hand, this lack of good faith will only affect suppression of evidence if the statement is false when made. Thus, a reckless statement that coincidentally proves true will be allowed to admit evidence at the trial. Although the court attempts to promote careful police work, it is conceivable that governmental agents might risk reckless statements knowing that the evidence will be admissible if the allegations ultimately turn out to be true.[12]

The standards set out by the Sixth Circuit appear less favorable to the defense than the standards formulated by any of the other circuits thus far. In *United States v. Carmichael*[13] the affidavit alleged that an informant whose information had led to six prior convictions had stated that defendant and others had items stolen from mails in their possession. The affidavit described one particular check and stated that one party advised informant that the checks would be cashed by the defendants. The trial judge refused to allow defense counsel to elicit evidence at the hearing on the motion to suppress that would cast doubt on the reliability of the informant.[14] The Seventh Circuit held that the affi-

[7] United States v. Luna, 525 F.2d 4 (6th Cir. 1975). The reason the court found the statement false was that there was no evidence presented in the hearing to contradict the informant's denial.

The district judge found the statement not only false but also material and held that any material false statement in the affidavit required suppression of the evidence seized under the intercept order. He declined to find that the falsity was an intentional effort to deceive the court, but concluded that the misrepresentation was knowing and not inadvertent. After a motion for rehearing was denied, the government appealed, claiming that the case should be remanded for further testimony and for a square resolution of the credibility of the witnesses. Although the appellate court agreed with the desirability of remand for resolution of credibility, it felt compelled to define the legal standards applicable in a situation of this type.

[8] United States v. Luna, 525 F.2d 4 (6th Cir. 1975).

[9] *Id.* at *8*.

[10] *Id.*

[11] *Id.* The court stated that if the agents were allowed to freely employ false allegations in order to secure warrants, the result would be a mockery of the magistrate's role. Unfortunately, however, it gave no indication as to how the hearing judge might measure the means available to the affiant to establish the truth or falsity of his statements. In addition, the court gave no suggestions as to how the hearing judge might effectively establish the criteria necessary to resolve the question as to whether a legitimate enforcement purpose was defeated by an undue delay. The length of "delay," "means available" and "legitimate enforcement purposes" are all ambiguous terms which need defining in order to make the Sixth Circuit's statement meaningful.

More importantly, this power given to the district judge seems as if the Sixth Circuit is carving out a significant exception to its holding. It is not clear whether the language used in the holding is inconsistent or whether the court, in fact, wished to allow situations where an agent knowingly makes false or reckless statements in his affidavit because it was his opinion that otherwise a legitimate law enforcement purpose would be defeated.

[12] Note also that the evidence would not be suppressed if the statements in the affidavit were recklessly made but immaterial to establishing probable cause. This should hold true even for those statements recklessly made in bad faith.

[13] 489 F.2d 983 (7th Cir. 1973) (en banc). *Accord,* United States v. Bridges, 499 F.2d 179 (7th Cir. 1974).

[14] The defense counsel made the following offer of proof:

> If the witness [agent] were allowed to answer my questions with respect to the reliable informant, his answers would show that no information had been given [by informant] at any previous time that led to the arrest or conviction of anybody; that he [inform-

davit was sufficient to show probable cause to support an arrest warrant.[15] However, the court also held that a defendant was entitled to a hearing which delves below the surface of the facially sufficient affidavit if he has made an initial showing of either of the following: (1) any misrepresentation by the government agent of a material fact, or (2) an intentional misrepresentation by the government agent, whether or not material.[16] But, once such a hearing is granted, the Seventh Circuit established a test more rigorous than the hearing prerequisites in order for evidence to be suppressed. They noted that evidence should not be suppressed unless the trial court finds that the government agent was *recklessly* or *intentionally* untruthful.[17] A completely innocent misrepresentation would not be sufficient for suppression of evidence, regardless of whether it was material or immaterial for probable cause. The reasoning for this parallels the Sixth Circuit in that the court felt that the primary justification for the exclusionary rule[18] is to deter police misconduct and good faith errors cannot be deterred.[19]

Like the Sixth Circuit, the *Carmichael* court stated that in situations where the officer is reckless, if the misrepresentation is immaterial,[20] it does not affect the issuance of the warrant and thus there is no justification for suppressing the evidence. However, the Seventh Circuit gave no guidelines as to establishing recklessness on the part of the affiant, as did the Sixth Circuit. The Seventh Circuit did address itself to the question of negligent misrepresentations. While they felt that negligent misstatements are theoretically deterrable, the court felt that there was no workable test for determining whether an officer was negligent or completely innocent in not checking his facts further.[21] The Sixth Circuit made no refer-

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ant] had prior criminal arrests and criminal convictions, and that there was no basis for his [agent's] concluding or for this court to conclude that the allegedly reliable informant was a reliable informant.

United States v. Carmichael, 489 F.2d 983, 987 (7th Cir. 1973) (en banc). The state objected to this offer of proof, which resulted in a ruling in its favor.

[15]The court felt that the agent had adequately spelled out the informant's reliability in the affidavit. The court also felt that it was immaterial that the concluding portion of the affidavit contained hearsay,

> namely, the statement of the second informant, *i.e.*, the possessor of the checks, to the first informant that the checks would be given by defendant Carmichael to John Doe . . . and then to [informant]; that they were stolen from the mail; and that Carmichael and Doe would cash or cause them to be cashed. The statement by the second informant was an admission against penal interest, thus manifesting his reliability and constituting an exception to the hearsay rule.

Id. at 986.

Although the Carmichael case deals with an affidavit for an arrest warrant instead of a search warrant, the standards for the veracity of the affidavit should be similar, if not the same.

[16]*Id.* at 988. In United States v. Pearce, 275 F.2d 318, 321–22 (7th Cir. 1960) the Seventh Circuit expressed its opinion in dicta that the propriety of such a hearing is "hardly open to question." *See* United States v. Roth, 391 F.2d 507, 509 (7th Cir. 1967). In United States v. Edge, 444 F.2d 1372, 1375–76 n.8 (7th Cir. 1971) the court recognized "the difficulties inherent in deciding when and how far to permit attack upon the truthfulness of affidavits submitted to magistrates" and formerly to commissioners. In *Pearce* and *Roth,* the hearings were actually allowed in the trial courts, so that there was no need for the court to decide whether a defendant could insist on such a hearing; and in *Edge* the question before the court in *Carmichael* was left open.

In the *Carmichael* case, the court held that the defense counsel's offer of proof along with information about the informant's possible unreliability that was brought out by defense counsel at trial was enough to fulfill the threshold requirements for a hearing.

[17]The Seventh Circuit felt that the two-pronged test of Aguilar v. Texas, 378 U.S. 108, 114 (1964) sufficiently tests the credibility of confidential informers. Therefore, they held that defendant may not challenge the truth of hearsay evidence reported by an affiant. The court would allow defendant, however, to challenge, after a proper showing,

> any statements based on the affiant's personal knowledge, including his representations concerning the informer's reliability, his representation that the hearsay statements were actually made, and his implied representation that he believes the hearsay to be true.

United States v. Carmichael, 489 F.2d 983, 989 (7th Cir. 1973). They concluded that this decision would fill the gap not covered by the *Aguilar* tests.

[18]Although the Seventh Circuit asserted that its ruling was not based on constitutional grounds, its analysis was based on the prophylactic value of the fourth amendment exclusionary rule.

[19]The court went on and stated:

> Furthermore, such errors do not negate probable cause. If an agent reasonably believes facts which on their face indicate that a crime has probably been committed, then even if mistaken, he has probable cause to believe that a crime has been committed. Such errors are likelier and more tolerable during the early stages of the criminal process, for issuance of a warrant is not equivalent to conviction.

United States v. Carmichael, 489 F.2d 983, 988–89 (7th Cir. 1973) (en banc).

[20]The Sixth Circuit phrased it "essential to establishment of probable cause." United States v. Luna, 525 F.2d 4, 8 (6th Cir. 1975).

[21]Interestingly, the implication is that there is a workable test for determining recklessness, although the court never mentioned what this test might be.

As the Second Circuit pointed out in United States v. Gonzalez, 488 F.2d 833 (2d Cir. 1973), the *Carmichael* holding is very similar to a rule proposed by Professor Kip-

ence to negligent misstatements whatsoever, leaving this question open.

In the same year that the *Carmichael* case was decided, the Fifth Circuit looked at the identical issue and came up with a different approach. In *United States v. Thomas*[22] the affidavit stated that according to two reliable informants, a "James Finley" was a heroin trafficker and was supplying numerous southern cities. "Finley" currently had a supply of heroin in his possession and would supply one informant with as much of the narcotic as desired. In addition, the affidavit stated that "Finley" was driving a 1971 Lincoln bearing Alabama license number 2A15335. At the suppression hearing the affiant admitted that the informants did not designate the party discussed by the name of "James H. Finley." but consistently referred to him as "Tee" during each conversation with the agent. It was the agent's own testimony that it was he, not the informants as stated in the affidavit, who ascribed the name "Finley" to the party discussed by the informants. The agent stated that he based this conclusion on certain deductions made after additional investigation. The agent discovered through the Bureau of Narcotics and Dangerous Drugs Office in Alabama that the 1971 Lincoln had been associated with heroin traffic. He also discovered that the car was registered to "James H. Finley." Thus, the agent deduced that "Tee" was "Finley" and used this name in the affidavit. The agent did not learn that the man arrested was the defendant Thomas who was the person known as "Tee" until after the arrest.

The Fifth Circuit discarded the standard whereupon the affidavit would be valid if probable cause can still be established after the deletion of the misstatements.[23] They held instead that affidavits containing misrepresentations are invalid if the error (1) was committed with an intent to deceive the magistrate, whether or not the error is material to the showing of probable cause, or (2) made non-intentionally, but the erroneous statement is material to the establishment of probable cause for the search.[24] In the *Thomas* case the court held that the agent's erroneous theory of "Tee's" real identity was immaterial to the establishment of probable cause. They also found the error to be "blantantly misrepresentative."[25] However, due to the license plate registration and his knowledge that both "Tee" and "Finley" were from Alabama, this evidence was enough for affiant to validly assume that "Tee" was "Finley." The court admitted that the issue was difficult, but felt compelled to affirm the district court's finding that the agent's error was made in good faith and not with an intent to deceive the magistrate.

The Sixth Circuit and the Fifth Circuit will therefore invalidate affidavits containing intentional mispresentations intending to deceive the court or magistrate.[26] Unlike these circuits, the Seventh Circuit finds that any intentional misrepresentation by the affiant will invalidate the affidavit. Whereas it appears as if the standards are stricter in the Fifth and Sixth Circuits, these courts have not indicated how intentional deception of a court could be proven. Also, it seems inherent in an intentional misrepresentation that the affiant intends to misrepresent facts to the court wherein he hopes to obtain a warrant.[27]

perman. *See* note 3 *supra*. Unlike the Seventh Circuit, however, Kipperman would void a warrant based on an affidavit containing negligent material misstatements.

[22] 489 F.2d 664 (5th Cir. 1973).

[23] The court had previously determined that after deleting erroneous statements, if the affidavits then totally lacked facts tending to show the requisite probable cause, the search warrants pursuant thereto were invalid. United States v. Morris, 477 F.2d 657 (5th Cir. 1973); United States v. Jones, 475 F.2d 723 (5th Cir. 1973); United States v. Upshaw, 448 F.2d 1218 (5th Cir. 1971).

[24] United States v. Thomas, 489 F.2d 664, 669 (5th Cir. 1973).

[25] *Id.* at 671.

[26] *See* note 8 and accompanying text *supra*.

[27] Apparently the agent (affiant) in the Sixth Circuit case swore to a material fact which the informant never stated. *See* note 7 and accompanying text *supra*. In the *Thomas* case the agent (affiant) concluded that a nickname given by the informants was the same as a name he found through independent investigation. He then stated in his affidavit that the informants used this second name.

The court in the Sixth Circuit case found that the misrepresentation was knowing, but that it was not an intentional effort to deceive the court. The Fifth Circuit in *Thomas* found the error to be "blatantly misrepresentative." Considering the fact that an affiant's statements are under oath, how is it possible to have a knowing or "blatant" misrepresentation without specific intent to deceive the court? The Fifth Circuit seems to allude to this paradox, although it doesn't adequately deal with the issue, when it stated:

> For the purpose of this opinion we use the word "intentional" as meaning "with intent to deceive the magistrate." Of course, Phillips intended to use the name "Finley." In that sense, his incorrect statement was intentional.

United States v. Thomas, 489 F.2d 664, 665 n.1 (5th Cir. 1973).

Perhaps the misrepresentations in these cases are better termed negligence. The Sixth Circuit case as discussed by the court does not appear to have facts which would in any way distinguish between a knowing misrepresentation and

The Fifth Circuit, in the second situation noted, distinguished between nonintentional error that was material or immaterial to the establishment of probable cause. The Fifth Circuit stated that material errors in this nonintentional circumstance would invalidate the affidavit whereas an immaterial error would not. In apparent contradiction to this definite statement the *Thomas* court went on and determined that the "blatant" misrepresentation in the affidavit in its case was neither intentional nor material to the showing of probable cause, thereby not reaching the question of what degrees of non intentional misrepresentation, *i.e.,* reckless, negligent or innocent are necessary to invalidate an affidavit.[28] Thus, it is conceivable that the Fifth Circuit might in a later case decide that only reckless or negligent misrepresentations material to probable cause would invalidate the affidavit, but completely innocent falsifications, material or not, would never be sufficient. However, as the opinion reads now, this omission leaves the standards for invalidation of affidavits unclear in a wide variety of factual situations. The Seventh Circuit held that a completely innocent misrepresentation would never be sufficient to suppress evidence regardless of its materiality, agreeing with the Sixth Circuit that a good faith error would not require suppression of evidence even where the erroneous allegation was essential to the establishment of probable cause.

In *United States v. Marihart,*[29] the Eighth Circuit looked at the standards created by both the Seventh and Fifth Circuits, and adopted the Seventh Circuit's requirements.[30] However, that court specifically left undecided the issue as to what initial showing must be made to obtain a hearing.

The First Circuit has also faced this issue of veracity in affidavits in *United States v. Belcufine,*[31] but chose neither the Seventh nor the Fifth Circuit's standards. That case involved the possession and mailing of a pipe bomb which exploded in a Postal Annex. The package which carried the bomb was addressed to the Worcester Music Co., the defendant's former employer. From information given by officials of the music company[32] and a report from the Postal Service Crime Laboratory which identified defendant's thumb print on the inner wrapping of the parcel containing the bomb, the postal inspectors secured from a magistrate a warrant to search the premises of the music company which presently employed defendant. The affidavit in support of the search warrant stated that the premises of the latter music company consisted of a front office with one desk and file cabinets. It also stated that to the rear of this office through a door partially open, the inspectors observed a wooden bench and table. The defendant contended on appeal that the fruits of the search should have been suppressed, because the postal inspectors' allegation of observing a wooden bench and table in the music establishment was false, that evidence presented at the suppression hearing made it apparent that they could not have seen what they said they saw, and that they admitted as much in their testimony.

Although the *Belcufine* court found the misrepresentation non-material,[33] it remanded the case for a hearing to decide whether the postal inspectors *knowingly* misrepresented the facts. The court considered what initial showing must be made to obtain a hearing to suppress and decided it appropriate when a defendant makes a preliminary showing of knowing misstatements in the affidavit. However, the court did not address the question of a preliminary showing of non-intentional misstatements as being suitable for a hearing to suppress. In fact, the court

an intent to deceive the court. On the other hand, the Fifth Circuit's facts may be better termed a negligent misrepresentation rather than a knowing misrepresentation. *See* text accompanying notes 44–50 *infra.*

[28] *Id.* at 671 n.5.

[29] 492 F.2d 897 (8th Cir. 1974). The case involved the illegal possession of firearms by previously convicted felons. The defendants claimed, on appeal, certain inaccuracies in the government agent's affidavit and testimony allegedly established by other officers pursuant to defendant's renewed motion to suppress. The court held that the inaccuracies were immaterial and that no absence of good faith had been shown. Therefore, the affidavit and subsequent search warrant were valid.

[30] The court in *Marihart* stated:

> We agree with the Seventh Circuit that completely innocent misrepresentation should not support suppression even if material. The primary justification for the exclusionary rule is to deter police misconduct. Furthermore, if the officer reasonably believes facts which facially indicate a crime has been committed, then even if mistaken, he has probable cause for believing a crime has been committed.

Id. at 900 n.4.

[31] 508 F.2d 58 (1st Cir. 1974).

[32] Officials of Worcester Music Co. told postal inspectors that defendant had been employed by Worcester as a service manager; that he had knowledge of electrical circuitry and soldering; that defendant and another were the proprietors of Bell Music and Amusement Co., against which Worcester had obtained an $80,000 judgment for breach of a covenant not to compete; and that Bell Music would be apt to have a workshop equipped to do electrical soldering.

[33] "Excising that paragraph of the affidavit, however, we still find at least the minimal requirements for probable cause satisfied." United States v. Belcufine, 508 F.2d 58, 62 (1st Cir. 1974).

did not consider innocent misstatements at all and specifically refused to indicate any views on negligent but material misstatements.[34] What the court did consider was intentional but immaterial misstatements. The significance of this case lies in its definition of material, which differs somewhat from the other circuits in that material was defined as "but for essential of probable cause."[35] The court said that it adopted this phrasing from the Seventh Circuit.[36] However, the Seventh Circuit spoke of a "material fact."[37] The *Thomas* court used "material to the establishment of probable cause,"[38] while the Sixth Circuit most closely resembles the First Circuit's definition of materiality when it suggested "a statement essential to establishment for probable cause."[39]

Although the Seventh, Fifth, and Sixth Circuits all consider the probable cause factor in affidavits, the First Circuit seemed to recognize that marginally adequate affidavits are not always acceptable and that an immaterial statement not essential for probable cause might still have an impact on a marginally adequate affidavit. Thus, in the *Belcufine* case, although the court found the statement that the inspectors had observed a wooden bench and table in the rear of the music building to be false, the court also found it to be immaterial for probable cause. However, the court also asserted that the fact alleged in the affidavit that the agents had actually seen a workbench within the music premises may have carried great weight with the magistrate, for it both provided an independent fact supporting a finding of probable cause, and verified by observation the educated guess given by the Worcester Music officials, thus strengthening the credibility of all they said. Therefore, the statement changed a marginally adequate affidavit into a solidly persuasive one.[40] Although the statement was nonmaterial, but still relevant and nontrivial, the court remanded the case for a hearing on the question whether the postal inspectors knowingly misrepresented the facts. Although the First Circuit specifically rejected the equation of "material" to "relevant to an element of probable cause,"[41] its ruling requires it to make the analysis such a definition would necessitate.

The First Circuit considered the question of immaterial but intentional false statements in affidavits. All of the other circuits considered agree that suppression is necessary, even if the statement is immaterial.[42] Although never specifically stating its position on this issue, the First Circuit did hold that suppression of evidence must be allowed when the warrant was based on an affidavit containing an intentional, relevant, and nontrivial misstatement, even though immaterial for probable cause. The *Belcufine* court also disputed the necessity for specific intent to deceive the court and would allow suppression of the evidence if the intentional, relevant and nontrivial misstatement merely intended to "round out the picture."[43] The implication from this holding is that immaterial, albeit intentional misstatements, which are irrelevant or trivial would not invalidate the affidavit. This is a clear departure from the other circuits who have unanimously held that intentional misstatements, material or not, regardless of impact, must be suppressed on the basis of policy.

The Second Circuit did not set any standards useful to the determination of the veracity of affidavits. *United States v. Gonzalez*[44] distinguished between two different tests governing the standards

[34] We find perplexing the question of the prophylactic value of the exclusion of evidence secured with a warrant issued in reliance on negligent and material, but not intentional misstatements. At this stage of development of legal doctrine, we would hesitate to adopt a position for this circuit on a hypothetical basis. Suffice it to say that, as we view the record, the question is not before us, and we imply no views as to the answer.
Id. at 61-62.

Interestingly, the *Belcufine* court distinguished the Fifth and Seventh Circuit's consequences for negligent misstatements.

[35] United States v. Belcufine, 508 F.2d 58, 62 (1st Cir. 1974).

[36] *Id.* at 61 n.3.

[37] United States v. Carmichael, 489 F.2d 983, 988 (7th Cir. 1973).

[38] United States v. Thomas, 489 F.2d 664, 669 (5th Cir. 1973).

[39] United States v. Luna, 525 F.2d 4, 8 6th Cir. (1975).

[40] The court felt that a "knowing misstatement of so significant a fact would exhibit exactly that quality of unscrupled zeal which impelled the adoption of the exclusionary rule." United States v. Belcufine, 508 F.2d 58, 62 (1st Cir. 1974).

[41] *Id.* at 61 n.3.

[42] The definition of intentional misrepresentation for the various circuit courts is subject to the caveats raised in notes 26-28 and accompanying text *supra*.

[43] *Id.* at 62. Unfortunately the court did not specifically explain the term "round out the picture" nor give guidelines as to its meaning. Since the court was contrasting this phrase to intentionally deceiving the court, it might be assumed that "round out the picture" is equivalent to intentional misstatements used by the Seventh Circuit. *See* notes 26-28 and accompanying text *supra*.

[44] 488 F.2d 833 (2d Cir. 1973). The Second Circuit stated that since a hearing was held on the existence of factual inaccuracies in the warrant, it was not facing the question of when an evidentiary hearing must be had where the affidavit and warrant are valid on its face. *Id.* at 837 n.4.

to be applied in a situation of this nature. One test was called the "material misstatement" test and the court cited several cases which stood for the proposition that

> when the truthfulness of the facts underlying a warrant has become suspect, the warrant will be set aside and the evidence derived from it suppressed where there is a showing that the affiant has made a material and knowing misstatement in the affidavit.[45]

The other test was taken from the often cited Kipperman analysis[46] which said among other things that misstatements in affidavits must be set aside if negligent and material. Since the court found that misstatement immaterial and at most negligent, the affidavit survived both tests. Thus, while the court recognized the validity of the two standards, it refused to choose between them in this given case.[47] However, an interesting point about the *Gonzalez* case is that it is the only case wherein any circuit has stated the possible existence of negligence in its fact situation. Although the court states that immaterial negligence will not invalidate an affidavit, it leaves open the question of material negligence and implicity states that negligence is an issue which it will distinguish from nonintentional falsifications.

It is important to look at what the Second Circuit considers negligence. In the *Gonzalez* case, the affiant alleged that Gonzalez was arrested[48] while in possession of a safe deposit box key. At the hearing to suppress, the affiant stated that when he took this key from defendant, he was not certain that it was a safe deposit box key, but upon determing that Gonzalez had a safe deposit box, affiant applied for the search warrant after Gonzalez's arrest without first checking whether the key he obtained from Gonzalez actually did fit that particular safe deposit box. Thus, when the affiant applied for the warrant, he did not actually know that the key did fit the box. As it turned out, the key did not fit the box which was searched.[49]

As stated previously, the Sixth Circuit designated that one of the circumstances where the affidavit should be held invalid is if the statement is false and reckless. Their standard for reckless included that the statement sought to be attacked was false when made and that when made the affiant did not have reasonable grounds for believing it. In the *Gonzalez* case, the statement was false when made. The critical question would be, however, if the affiant had reasonable grounds for believing it. If there were no reasonable grounds, then the Sixth Circuit would label the action recklessness, while the Second Circuit has stated that it was at most a negligent misrepresentation.[50] The key point to be made, therefore, is that different standards set up by these various circuits could conceivably provide different outcomes for the identical fact situation. The difficulty, however, is that these different standards are not founded upon legal interpretation, but rather upon different ways of analyzing the facts.

Although the recent trend in the federal appellate courts is to allow challenges in the veracity of affidavits used for obtaining warrants, the guidelines are still loose and problematic. The Seventh and Eighth Circuits will allow suppression of the evidence if the affidavits contained intentional misstatements regardless of materiality, or if the misstatement was material and recklessly made. The Fifth Circuit will invalidate the affidavit if the falsification was meant to deceive the court, or if it was unintentionally made but material to the establishment of probable cause. It declined in the *Thomas* case, however, to distinguish unintentional from innocent,

[45] *Id.* at 835. The court relies on United States v. Morris, 477 F.2d 657 (5th Cir. 1973); United States v. Jones, 475 F.2d 723 (5th Cir. 1973); United States v. Upshaw, 448 F.2d 1218 (5th Cir. 1971), *cert. denied,* 505 U.S. 934 (1972); United States v. Harwood, 470 F.2d 322 (10th Cir. 1972); and United States v. Roth, 391 F.2d 507 (7th Cir. 1967).

[46] Kipperman, *supra* note 3.

[47] However, the *Gonzalez* court did note that prior case law in the Second Circuit did speak on this issue, even if only in passing.

> In United States v. Bozza, 365 F.2d 206, 223–224 (2d Cir. 1966), the court appeared to say that a negligent misstatement would upset a warrant only if that misstatement was material. In United States v. Perry, 380 F.2d 356, 358 (2d Cir.), *cert. denied,* 389 U.S. 943 . . . (1967), the court stated that it is sufficient support for a warrant that " . . . the facts alleged by the informant, if true, establish illegality and the affiant-agent has reasonable grounds for believing in the truth of the allegations." In United States v. Suarez, 380 F.2d 713, 716 (2d Cir. 1967), the court stated in dicta that "[i]t may be that testimony at trial could so clearly demolish statements in an affidavit supporting a warrant that a prior denial of a motion to suppress would be overruled." In United States v. Sultan, 463 F.2d 1066, 1070 (2d Cir. 1972), the court suggested that a material and knowing misstatement would upset a warrant.

United States v. Gonzalez, 488 F.2d 833, 837–38 (2d Cir. 1973).

[48] Gonzalez was convicted on one count of conspiracy and one count of smuggling cocaine into the United States, in violation of 21 U.S.C. § 952 (a) (1970) and 18 U.S.C. § 2 (1970).

[49] 488 F.2d at 837–38. The court felt that Gonzalez's use of the safe deposit box was determined by investigation and that, therefore, there was probable cause to search the box whether or not the key fit.

[50] *Id.* at 838.

negligent and reckless, although it did recognize that different standards might be set for these various conditions in later cases. Thus, the court left unsettled any useful rules for these difficult situations and set forth a truly limited opinion.

The First Circuit emphasized the necessity to invalidate affidavits which are immaterial and intentional, but which still have an impact upon the establishment of probable cause. The Second Circuit felt that its case did not address the various questions and refused to set up standards until a case presented itself with the appropriate issues. Most recently the Sixth Circuit has joined the five other circuits which have faced this controversial subject and added yet another interpretation of the requirements needed to invalidate affidavits. It decided that deception of the court and reckless but material misrepresentations must invalidate the affidavits. It left open for future decision whether reckless but immaterial and any sort of negligence must suppress the evidence. Although it might be coincidental, it is interesting that none of the above six circuits interpreted its particular fact situation as one where the affidavit was clearly invalid. The circuits either remanded for more evidence or affirmed the validity of the affidavit.

As it stands, a myriad of interpretations govern when affidavits should be invalidated. Since the standards are so unclear, the circuits could conceivably fit their facts to any standard suitable to a holding of their choice. Thus, if the Seventh Circuit did not want to invalidate an affidavit, it could hold that a material misstatement was negligent instead of reckless. Or the Fifth Circuit might hold a falsification intentional, but not meant to deceive the court, and therefore, allow the affidavit to stand. This is not to say that the circuits would deliberately choose categories appropriate for their holdings. It merely points out the importance of generating clear and uniform requirements for establishing the different degrees of culpability. The Sixth Circuit begins to define its own standards when it gives the criteria necessary for recklessness, but falls short in not completely addressing the other degrees of culpability. It is important to distinguish between negligence and recklessness and also between negligence and innocence. A consideration should be whether negligence is, in fact, an unworkable factor as the Seventh Circuit asserted.

The question of good faith is yet another issue; how does it affect culpability and how can it be proved? Another major conflict arises in the definition and importance of materiality. Does a material statement have to be essential to probable cause or merely a material statement? When should immaterial misstatements invalidate affidavits? More importantly, when should material misstatements not invalidate affidavits? It seems apparent that the time is ripe for the Supreme Court to carefully examine these questions and give some concrete guidelines to the confused but important issue of veracity in affidavits.

Prison Reform

The constant struggle to upgrade the general conditions of confinement existing within many penal institutions may have been mitigated as a result of a recent decision in a United States District Court for Alabama. The court in *James v. Wallace*[51] held that present conditions of confinement within the Alabama penal system violate any current judicial definition of cruel and unusual punishment[52] and henceforth ordered sweeping improvements within the prison to bring it up to constitutional standards. The court enumerated eleven minimum requirements to be met,[53] including reduction of overcrowding, im-

[51] James v. Wallace, 406 F. Supp. 318 (M.D. Ala. 1976), *decided with* Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976). The *Pugh* case was a consolidated class action with *James*.

[52] The definition of the cruel and unusual punishment clause of the eighth amendment has been subject to constant restructuring by the courts. *See* Trop v. Dulles, 356 U.S. 86, 101 (1958) (Warren, C.J., joined by Black, Douglas & Whittaker, JJ.); Lambert v. California, 355 U.S. 225, 231 (1957) (Frankfurter, J., dissenting); Weems v. United States, 217 U.S. 349, 353 (1910).

[53] The minimal standards set forth in the Minimum Constitutional Standards For Inmates of Alabama Penal System can be briefly summarized as follows:

I. *Overcrowding:* The number of inmates in each institution in the Alabama penal system shall not exceed the design capacity for that institution. No new prisoners, except escapees who have had their paroles revoked, may be accepted until the inmate population is no greater than the design capacity for each facility.

II. *Segregation and Isolation:* standards set out in Wolff v. McDonnell, 418 U.S. 539 (1974) must be followed. No prisoner may be isolated or segregated without due cause which is left to the discretion of the prison officials.

III. *Classification:* The defendants must file a classification plan by April 15, 1976, for all incarcerated inmates. Such plan should include methods for pre-release and work-release or other community based programs.

IV. *Mental Health Care:* The defendants shall identify inmates who require mental health care and make provision for such care, including the hiring of mental health professionals.

provement of general living conditions, food services, education, recreation and rehabilitation programs. The court in its final order rejected the prison officials' defense that the lack of adequate state funding prevents them from instituting the required changes, and stated that any failure to comply with the minimum standards will require the court to close specific prison facilities found to be unfit for human habilitation.

The legal import of the decision can be readily appreciated by focusing upon the two major issues discussed in the opinion. First, the court, in analyzing the adequacy of the prison environment, held that the physical facilities violate any current judicial interpretation of cruel and unusual punishment. The court, however, did not limit its holding to that declaration but expanded its holding and concluded that confinement absent an environment which allows for positive rehabilitation is an unreasonable restriction of prisoners' rights under the eighth amendment.

In the second issue addressed, the court expanded the scope of judicial involvement in the administration of prison affairs. It placed the defendant state officials on notice to upgrade specific prison facilities, and included a warning that failure to comply with the minimum standards set forth in the court order would necessitate the closing of those several facilities found unfit for human confinement. The prescription from the court to meet the minimum standards was not solely hortatory. Rather, the court was willing to take affirmative action in response to noncompliance by the prison officials—thus directly involving the court in the internal affairs of prison administration.[54]

In the instant case, the plaintiffs in two consolidated class actions[55] sought declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 (1970) for deprivation of their eighth and fourteenth amendment rights. The plaintiffs set forth two allegations within the complaint: (1) that the defendants have failed to protect the plaintiff class from violence on the part of other inmates; and (2) that the defendants have failed to provide adequate rehabilitation facilities and have maintained conditions that make rehabilitation impossible.[56] The court focused its opinion on the second allegation and held that the

V. *Protection from Violence:* (a) defendants must make reasonable efforts to segregate known violent and aggressive inmates; (b) guards shall be present at all times; (c) only minimum custody inmates may be placed in dormitories.

VI. *Living Conditions:* articles for personal hygiene must be supplied; minimum living space of 60 square feet per prisoner is required; lighting, electricity, and heating must be adequate.

VII. *Food Service:* must employ food supervision and nutrition consultants.

VIII. *Correspondence and Visitation:* no limitation on length or number of letters received; comfortable space for visitation must be provided.

IX. *Educational, Vocational, Work and Recreational Opportunities:* (1) each inmate shall be assigned a meaningful job on the basis of the inmate's abilities and interests, and according to institutional needs. Inmates shall not be required or allowed to perform household or personal tasks for any person; (2) each inmate shall have the opportunity to participate in basic educational programs; (3) each inmate shall have the opportunity to participate in a vocational training program designed to teach a marketable skill; (4) no inmate shall be denied educational, vocational and work opportunities unless there is a clear threat to institutional security; (5) each inmate shall be afforded the opportunity to participate in some transitional program designed to aid in his or her re-entry into society; (6) each institution shall have physical educational or recreational facilities.

X. *Physical Facilities:* must meet minimum standards of the U.S. Public Health Service.

XI. *Staff:* minimum staffing levels for each institution must be reached to reduce racial and cultural disparity between staff and inmate population.

These standards were enacted by the Alabama legislature with the intent to maintain a suitable environment for state prisoners. Assessing whether these standards are either less than adequate or, in fact, more stringent than most, will largely determine the import of this case due to the court's strict reliance upon these standards in the instant case. James v. Wallace, 406 F. Supp. 318, 332–35 (M.D. Ala. 1976).

[54]Comment, *Judicial Intervention in Prison Administration,* 9 WM. & MARY L. REV. 178, 179 (1967). This article discusses the equilibrium between prison administrative affairs and the scope of judicial involvement in prison affairs. *See* Startti v. Beto, 405 F.2d 858 (5th Cir. 1969), *cert. denied,* 395 U.S. 929 (1968); Commonwealth v. Banmiller, 194 Pa. Super. 566, 168 A.2d 793 (1961).

[55]In these consolidated class actions, the plaintiffs sought declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 (1970) for deprivation of eighth and fourteenth amendment rights. The actions were maintainable as class actions under FED. R. CIV. P. 23(a),(b)(2). The first class action, *Pugh,* was consolidated with the claims in *James.*

[56]The four principal institutions for male inmates are overcrowded. At the time of trial the institutions contained over 3,550 men, although they were designed to house 2,300 inmates. The effects of the overcrowding made the dormitory living arrangements unhealthy and unsanitary. There was often no walking space between bunks, and sanitation and security were impossible to maintain.

unsanitary living conditions in each prison cell block, the inadequate heating and lighting throughout the prison and the hygienic problems relating to filth and vermin in eating areas of the prison constitute an inhumane living environment, making it impossible for inmates to rehabilitate themselves. The court, declaring these conditions a violation of the eighth and fourteenth amendments, enunciated that the institutional work assignments and the vocational and educational activities being performed in such inhumane facilities make prospects for successful inmate rehabilitation and future integration into society remote.

The court then addressed the need for rehabilitation within the context of cruel and unusual punishment, concluding that the concept of rehabilitation was incorporated within the ambit of the eighth amendment.[57] The court relied upon the flexibility of the definition of cruel and unusual punishment to reach this end result, citing *Weems v. United States*[58] for the proposition that the notion of cruel and unusual punishment is set within the context of time; new conditions and purposes bring new meaning to the term.[59] The term accordingly moves with the mood of society's concept of decency.[60]

The concept of cruel and unusual punishment within the context of prison reform has maintained its illusive status, yet a close scrutiny of the cases shows a common thread in the definition.[61] Declaring a violation of the eighth amendment, the courts have looked to a deprivation of the basic elements of hygiene and unsafe living conditions. In *Jordan v. Fitzharris*[62] and *Wright v. McMann*[63] the courts held that where cells were not cleaned regularly and where the accumulation of human waste presented an immediate health hazard such confinement constituted a violation of the eighth amendment. Similarly, in *Hancock v. Avery,*[64] the court upheld a violation of the eighth amendment where a prisoner was denuded, deprived of soap and toilet paper and was forced to live in an unsanitary cell.

In the 1960's an additional aspect to the definition of cruel and unusual punishment began to emerge.[65] Rehabilitation, treatment and care became important variables in safeguarding basic prisoners' rights. In *Jones v. Willingham,*[66] the court stated that the federal penal system has an affirmative duty and responsibility not only to confine those charged to its keeping, but also to "provide for their proper government, discipline, treatment, care, rehabilitation, and reformation."[67] 18 U.S.C. § 4001 (1970). Citing *Jones* as dispositive, the court in *Long v. Harris*[68] held that prison officials have a duty to provide for the proper care, treatment and rehabilitation not only for the petitioners involved in the action, but also for all other inmates charged to confinement.

Moreover, in a landmark case in the area of prison reform, *Holt v. Sarver,*[69] the constitutionality of an entire penal system became the subject of attack.[70] Eight class actions were brought by inmates of the Arkansas Penitentiary against the State Commis-

[57] *See* note 2 *supra.*

[58] 217 U.S. 349 (1910).

[59] *Id.* at 373.

[60] The courts, however, have identified three general approaches to the definition of cruel and unusual punishment. Rudolph v. Alabama, 375 U.S. 889, 890-91 (1963). The first approach is to determine whether the punishment is of such a nature as to shock the general conscience or to be intolerable to fundamental fairness. Secondly, a punishment may be cruel and unusual if it is greatly disproportionate to the offense for which it is imposed. Robinson v. State of California, 370 U.S. 660 (1962). Thirdly, a punishment may be cruel and unusual when, although applied in pursuit of a legitimate penal aim, it goes beyond what is necessary to achieve that aim. Weems v. United States, 217 U.S. 349, 370 (1910); Robinson v. California, *supra* at 677. Illustrative of the changing conceptual distinctions in the definition are: Rudolph v. Alabama, 375 U.S. 889 (1963); Trop v. Dulles. 356 U.S. 86 (1958); Weems v. United States, 217 U.S. 349 (1910); Holt v. Sarver, 442 F.2d 304 (8th Cir. 1971); Lee v. Tahash, 352 F.2d 970 (8th Cir. 1965); Hancock v. Avery, 301 F. Supp. 786 (M.D. Tenn. 1969); Austin v. Harris, 226 F. Supp. 304 (W.D. Mo. 1964).

[61] In Novak v. Beto, 453 F.2d 661 (5th Cir. 1971) the common thread in cruel and unusual punishment cases was depicted as a deprivation of basic elements of hygiene. Further, the court stressed that caution must be exercised so as not to jeopardize good health. *Id.* at 670. *See also* Haines v. Kerner, 404 U.S. 519 (1972); Woolsey v. Beto, 450 F.2d 321 (5th Cir. 1971); Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968).

[62] 257 F. Supp. 674 (N.D. Cal. 1966).

[63] 387 F.2d 519 (2d Cir. 1967).

[64] 301 F. Supp. 786 (M.D. Tenn. 1969).

[65] In the 1960's the courts began to consider the aspect of rehabilitation when looking to safeguard basic prisoner's rights. *See* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT (1967).

[66] 248 F. Supp. 791 (D. Kan. 1965).

[67] *Id.* at 793.

[68] 332 F. Supp. 262 (D. Kan. 1971), *aff'd*, 473 F.2d 1387 (10th Cir. 1973).

[69] 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

[70] Subsequent decisions have also challenged the constitutionality of facilities within penal systems, yet none of the holdings go beyond the *Holt* court's decision and rationale. *See* Pell v. Procunier, 417 U.S. 817 (1975); Finney v. Arkansas Bd. of Corrections, 505 F.2d 194 (8th Cir. 1974); Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974).

sioner of Corrections and against the Board of Corrections.[71] The petitioners alleged that the conditions and practices within the prison amounted to a violation of the eighth and fourteenth amendments. The petitioners prayed for declaratory judgment and for permanent injunctive relief. In the Arkansas prison the facilities were dilapidated, contributing to deplorable sanitary conditions. Living quarters were inadequately heated and ventilated, and electrical and lighting facilities were improperly functioning. All prisoners were housed in 100-man dormitories, affording no opportunity for privacy. Alcohol and drugs were readily obtainable and prisoners were often victims of overdoses. Medical and dental facilities were practically unavailable to inmates except in emergency situations.[72]

The court in *Holt* did not grant specific individual relief; rather, it ordered the Commissioner to take appropriate measures in a prompt and reasonable fashion so that the violations of the prisoners' constitutional rights would be remedied. When looking at the physical facilities, the court declared them unconstitutional under the eighth amendment since they deprived inmates of a hygienically clean and safe environment. When addressing the need for reform in the prison, however, the court looked beyond the violation of hygienic standards and discussed the primary objectives of a penal institution.

Holt stressed that most penologists believe that the primary purpose of prison confinement is to rehabilitate the prisoner so that he may again become a productive individual and return to society.[73] Yet in so stating, the court in *Holt* was reluctant to declare the lack of rehabilitative efforts unconstitutional per se under the eighth amendment. The court stopped short of this in its holding and stated that, "a sociological theory or idea may ripen into constitutional law. . . . But this Court is not prepared to say that such a ripening has occurred as yet, as far as rehabilitation of convicts is concerned."[74] Nevertheless, the court did indicate that the absence of an affirmative program of training and rehabilitation may have constitutional significance where physical conditions and practices exist which actually militate against reform and rehabilitation.[75] More specifically, if the physical conditions of a penal institution deny the possibility for rehabilitation despite positive programs for reform and rehabilitation, such conditions are constitutionally suspect under the eighth amendment.

The decision in *James* addresses the same issue of defining constitutionally adequate conditions and declares unconstitutional the conditions of the Alabama prison which are similar factually to the conditions described in *Holt.* The *James* court, as did the court in *Holt,* interrelated the physical environment with rehabilitative efforts. "Not only is it cruel and unusual punishment to confine a person in an institution under circumstances which increase the likelihood of future confinement, but these same conditions defeat the goal of rehabilitation which prison officials have set for their institutions."[76] The court in *James* concluded that a violation of the cruel and unusual punishment clause of the eighth amendment will arise if the conditions of the institution negate rehabilitative efforts, holding that the Alabama prison environment had a less than neutral effect upon an inmate even if affirmative rehabilitation programs are present. This environment denies the inmate the right to rehabilitation.

Though the court in *James* may not have intended to meet the standards set forth in *Holt,* it has fulfilled the criteria of the *Holt* court's qualified position on rehabilitation. According to the *Holt* decision, physical conditions and practices that militate against reform and rehabilitation have constitutional significance and the *James* court has, in analyzing the Alabama prison facilities, described those conditions as constituting an environment which in fact militates against all efforts for rehabilitation.

The potential impact is great. The *James* decision declares that prisoners have a right to rehabilitation; further, the court has fulfilled the criteria enunciated in a keystone decision in the area of prison reform.[77] The force, then, is felt on two fronts and has the potential impact of altering the definition of cruel and unusual punishment in the area of prison reform to include a right to rehabilitation for inmates.

A second point of significance in *James* is the scope of involvement the court was willing to assume when

[71] 42 U.S.C. § 1983 (1970) provides a civil remedy for deprivation of civil rights by a person acting under the color of law, and 28 U.S.C. § 1343(3) (1970) vests original jurisdiction in the federal district courts.

[72] Holt v. Sarver, 309 F. Supp. 362, 376–79 (E.D. Ark. 1970), *aff'd,* 442 F.2d 304 (8th Cir. 1971).

[73] *Id.*

[74] *Id.* at 379.

[75] *Id.* Though the court in *Holt* did not declare the lack of rehabilitation in the Arkansas prison unconstitutional per se, the court did conclude that the absence of rehabilitation services and facilities of which the petitioners complained remained a factor in the overall constitutional equation before the court.

[76] James v. Wallace, 406 F. Supp. 318, 330, (M.D. Ala. 1976).

[77] *Id.*

providing a remedy for the abuses within the prison facilities. To insure the proper remedial action the court not only issued injunctive relief but threatened court action which would close down specific facilities unless minimum standards were met. In previous decisions the courts have issued declaratory judgments or injunctive relief and merely stated that prison officials must upgrade prison facilities in due course or with deliberate speed.[78] Generally, the policy of the courts has been to avoid direct interference with the actual administrative duties of the prison. This posture has been called the "hands off" policy in the area of prison reform.[79] In *Startti v. Beto*[80] the court denied an inmate's petition for relief by a writ of mandamus which asked the respondent prison authorities to cease and desist from subjecting the inmate to cruel and unusual punishment. The inmate was confined in an unsanitary solitary cell for nine days and given only bread and water to eat. The court dismissed the petition on the grounds that it dealt with matters of prison discipline that are the sole concern of the state save in exceptional circumstances.[81] In *Reyeo v. Hauch*[82] an inmate brought a civil rights action alleging cruel and unusual punishment due to a jail guard's refusal to place his name on a doctor's medical list. The court dismissed the cause stating that federal courts will not interfere with the conduct, management and disciplinary control of jails except in extreme cases. Furthermore, in *Woods v. Burton*[83] the court concluded that despite twenty-five sanitary and hygienic violations of the recommended minimum standards set forth for the operation of jails, the petitioner's confinement in the jail did not amount to cruel and unusual punishment. The court defined the problem as legislative and not judicial in nature.[84]

Recently, however, the trend for increased court involvement to superintend treatment or discipline of prisoners has begun to emerge.[85] In *Gates v. Collier*,[86] the court issued an injunctive order where the conditions of the Mississippi State penitentiary deprived inmates of basic elements of hygiene and adequate medical treatment and where adequate protection against physical assaults and abuses by other inmates were absent. The injunctive order called for a federal monitor to check all phases of prison administration and management until the violations were remedied. Concommitantly, in *Finney v. Arkansas Bd. of Correction*,[87] the court of appeals upheld the federal district court's jurisdiction over state penitentiary facilities where the facilities were held to violate the cruel and unusual punishment clause of the eighth amendment. In so holding, the appeals court decided that the district court could continue to appoint court monitors to supervise the institution's administrators until the needed changes were met.

[78] *Cf.* Finney v. Arkansas Bd. of Corrections, 505 F.2d 194 (8th Cir. 1974).

[79] Eisenhardt v. Britton, 478 F.2d 855 (5th Cir. 1973) (unless judicial intervention is necessary to secure constitutional rights, courts will not interfere with matters of pure internal prison management); Black v. Warden, 467 F.2d 202 (10th Cir. 1972) (basic responsibility for control and management of penal institutions, including the discipline, treatment and care of those confined, lies with the Attorney General and is not subject to judicial review unless exercised in such a manner as to constitute clear arbitrariness or caprice on the part of prison officials); Young v. Wainwright, 449 F.2d 338 (5th Cir. 1971) (classification of inmates is a matter of prison administration and management with which federal courts are reluctant to interfere except in extreme circumstances); Sheffey v. Greer, 391 F. Supp. 1094 (E.D. Ill. 1975) (only in exceptional circumstances will a federal court interfere with matters that involve internal management of a state prison); Luparer v. Stoneman, 382 F. Supp. 495 (D. Vt. 1974) (internal management of prisons or correctional institutions is vested in and rests with the heads of those institutions operating under statutory authority, and such persons' acts in the administration of prison discipline and overall operation of the institution are not subject to court supervision or control; but in a case of highly unusual circumstances or a violation of constitutional rights, the courts have power and a duty to intervene in internal affairs of a prison); Hillery v. Procunier, 364 F. Supp. 196 (N.D. Cal. 1973) (prison officials are given a great degree of discretion in the administration of penal institutions); Reyes v. Hauck, 339 F. Supp. 195 (W.D. Tex. 1972) (federal courts will not interfere with the conduct, management and disciplinary control of jails except in extreme cases); Seale v. Manson, 326 F. Supp. 1375 (D. Conn. 1971) (absent extreme circumstances, a federal district court must not interfere with internal prison management or interpose its judgment with respect to rules and regulations on discipline and security, but the court must not be reluctant to strike down prison regulations if they are unreasonable, arbitrary, or not reasonably related to the needs of penal administration).

[80] 405 F.2d 858 (5th Cir. 1969).

[81] *Id.* at 859.

[82] 339 F. Supp. 195 (W.D. Tex. 1972).

[83] 9 Wash. App. 13, 503 P.2d 1079 (1972).

[84] *Id.* at 1082.

[85] Before the court began to increase its involvement in the administration of internal prison management the courts did intervene where traditional constitutional rights of an inmate were jeopardized. Johnson v. Avery, 393 U.S. 483 (1969); Sewell v. Pegelow, 291 F.2d 196 (4th Cir. 1961); Coffin v. Reichard, 143 F.2d 443 (6th Cir. 1944); Rakes v. Coleman, 318 F. Supp. 181 (E.D. Va. 1970); Wilson v. Kelley, 294 F. Supp. 1005 (N.D. Ga. 1968), *aff'd*, 393 U.S. 266 (1968).

[86] 501 F.2d 1291 (5th Cir. 1974).

[87] 505 F.2d 194 (8th Cir. 1974).

At the present time, then, the courts have begun to move away from their hands off posture and will intervene to a limited extent in prison administrative policies through the appointment of monitors in a supervisory capacity. The *James* court, however, goes one step further and states that when supervisory actions cannot insure the needed changes the court will take affirmative action and close down facilities not meeting constitutional standards.

The *James* court has taken a major step in defining the interdependency between adequate physical facilities and the right to rehabilitation. The court utilizes a list of minimum standards as general guidelines to declare specific facilities unconstitutional. Though the court creates a right to rehabilitation by employing these standards, the question remains as to what specific violations in the prison will violate the right to rehabilitation; the court merely uses broad language to declare the *environment* unconstitutional. The *James* court, while attempting to elevate rehabilitation to a constitutional right, does not state what violations will or will not result in denial of an inmate's right to rehabilitation.[88]

Furthermore, the *James* court in increasing the scope of court involvement by its threat to close down specific facilities, fails to consider the question as to where the displaced prisoners will go once the facilities are shut down. Is it within the proper jurisdiction of a court to dictate a specific plan to be enacted by prison administrators or should such a plan be legislative in nature?

In conclusion, the *James* decision has focused upon a fundamental problem within our penal institutions and has redirected our attention to one of the original purposes of detention: prisoner rehabilitation. In the future, courts must be cognizant of the delicate issues involved in prison reform so that the goal of rehabilitation can be realized.

[88]The court in *James* uses broad language to determine the constitutional violations in the penal system. No specific findings of fact are alleged which would serve as guidelines to other courts when determining violations.