IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOHN DOE and JAMES ROE,

Plaintiffs,

v.

DAVID C. EVANS,
JOE FRANK HARRIS,
J. PAUL FORD,
CHARLES E. BURDEN, and
WAYNE SNOW, JR.

(and their respective successors in office),

Defendants.

CIVIL ACTION FILE
NO. 1:88-cv-1752-MHS

SECOND AMENDED COMPLAINT

COME NOW the Plaintiffs, John Doe and James Roe, and make their claim for relief against the Defendants David C. Evans, Joe Frank Harris, J. Paul Ford, Charles E. Burden, and Wayne Snow, Jr.

PARTIES AND JURISDICTION

1.

Plaintiff John Doe ("Doe") is the fictitious name of an inmate presently incarcerated in the Georgia state prison system. Doe originally entered the Georgia state prison system on his present charge at the Georgia Diagnostic and Classification Center ("GDCC") in Jackson, Georgia, after which he was transferred to the Augusta Correctional/Medical Institute ("ACMI") in Augusta, Georgia, and to the Jack T. Rutledge Correctional Institute

("Rutledge") in Columbus, Georgia, before being transferred to Lee Correctional Institute ("Lee") in Leesburg, Georgia.

2.

Plaintiff James Roe ("Roe") is the fictitious name of an inmate presently incarcerated in the Georgia state prison system. Roe also entered the Georgia state prison system at GDCC, after which he was transferred to ACMI, to Rutledge, and to Lee before being re-transferred to ACMI.

3.

Defendant David C. Evans ("Evans") is the Commissioner of the Department of Corrections of the State of Georgia and as such, he is responsible for the direction, supervision and control of the Department, including the promulgation and enforcement of rules, regulations, policies and practices related to the management and control of Georgia's penal institutions. Commissioner Evans is responsible for the testing and segregation programs that are challenged in this action.

4.

Defendant Joe Frank Harris ("Harris") is the Governor of the State of Georgia, and in that capacity, he is responsible for the oversight of the Department of Corrections and its policies and practices related to the management and control of Georgia's penal institutions.

5.

Defendant J. Paul Ford ("Ford") is the Superintendent of Rutledge. As such, he exercises powers and duties relating to the control, governance and supervision of that facility.

Superintendent Ford administers the segregation program at Rutledge that is challenged in this action.

6.

Defendant Charles E. Burden ("Burden") is the Superintendent of ACMI. As such, he exercises powers and duties relating to the control, governance and supervision of that facility. Superintendent Burden administers the segregation program at ACMI that is challenged in this action.

6A.

Defendant Wayne Snow, Jr. ("Snow") is Chairman of the Georgia State Board of Pardons and Paroles, and as such, he is responsible for the direction, supervision and control of the Board's paorle policies, including the promulgation and enforcement of rules, regulations, policies and practices related to paroles of inmates in Georgia's penal institutions. Chairman Snow is responsible for the parole procedures challenged in this action.

7.

Each defendant is sued both individually and in his official capacity. At all times mentioned in the Complaint, each defendant has acted under color of state law.

8.

This action seeks to redress injuries suffered by plaintiffs for deprivations under color of state law of rights secured by the United States Constitution and federal law. The claims for relief are filed pursuant to 42 U.S.C. § 1983, and pursuant to § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq., as amended by the Civil Rights Restoration Act of 1987. Accordingly,

this Court has jurisdiction over the claims pursuant to 28 U.S.C. § 1343(3) and (4).

BACKGROUND

9.

While incarcerated in the Georgia prison system, blood samples of plaintiffs Doe and Roe were taken for testing for antibodies to the Human Immunodeficiency Virus ("HIV" or "HTLV-3 virus"), a retrovirus believed to cause the Acquired Immune Deficiency Syndrome ("AIDS"). Neither Doe nor Roe were notified that their blood would be used for such testing, and neither Doe nor Roe would have consented to such testing if they had been so notified.

10.

There is no test for AIDS itself, or for AIDS contagiousness. The ELISA and Western Blot tests which were administered under defendants' direction merely determine the presence of "antibodies" the body has formed to fight "exposure" to the HTLV-3 virus. Neither of these tests is 100% accurate, nor have the laboratories administering the tests maintained a 100% testing procedure accuracy. It has been estimated that over one million Americans would test "seropositive"; of all seropositives, only about 5-30% ever develop AIDS.

11.

Both plaintiffs Doe and Roe were notified that they had tested positive for antibodies to the HIV virus. Despite this classification as "seropositive" (or "HIV-positive"), plaintiffs Doe and Roe have never exhibited any physical signs of AIDS in the

more than two years since their classification, and plaintiffs Doe and Roe deny that they have AIDS.

12.

Despite the lack of any medical basis for believing that seroposivitity equates to AIDS or contagiousness, despite plaintiffs' failure to exhibit any physical symptoms of AIDS for more than two years, and despite plaintiffs' failure to exhibit any likelihood of spreading the disease even if they were contagious, plaintiffs have been kept administratively segregated at each of the correctional institutions since their initial classification as seropositive. This change in housing and custody status was imposed without a hearing, and without regard to appropriate classification factors, such as a prisoner's propensity for violence. Unlike other dorms, the security levels of prisoners in the seropositives' housing areas range from minimum to maximum, creating a potentially dangerous situation.

13.

At ACMI, defendant Burden, by his own admission, and upon information and belief with the knowledge and consent of defendants Evans and Harris, made the decision to relegate all alleged seropositives to administrative detention. At Rutledge, alleged seropositives have been similarly kept in administrative segregation (later labelled "special handling"), with the knowledge and consent of defendant Ford and defendant Evans. This segregation is unnecessary, and contrary to the medical advice of

Dr. William A. Hopkins, the Medical Director of the Georgia Department of Corrections' Health Services.

14.

As a result of this segregation, confidentiality of prisoners' test results is impossible to maintain. Prisoners such as plaintiffs who tested positive for the HIV virus were inevitably branded as "AIDS victims" or "AIDS carriers" to the entire prison community, including other inmates, correctional officers and prison staff, and those who visited the prison.

15.

The segregation at ACMI and Rutledge has been maintained in a highly visible and public manner. Housing has been separate and public at both ACMI and Rutledge; at ACMI, in fact, seropositives have been housed in perhaps the most highly visible location possible--adjacent to the dorms of the many transient inmates travelling to ACMI for non-hospitalized medical care. Visitation has been separate and public; visitors at ACMI and Rutledge have been required to meet seropositives in separate rooms, referred to as the AIDS "cages", which are easily visible to other inmates and visitors who meet in the main visitation area. Daily routine has been separate and public; seropositves at ACMI and Rutledge have been regularly escorted by guards, who tell non-seropositives not to associate with the seropositive inmates.

16.

These separated activities--in housing, visitation, and daily routine--have caused the identities of alleged seropositives such as plaintiffs to become public, and have caused them to be branded

and ostracized as "AIDS carriers". Once so identified, seropositives are labelled for life, incorrectly, as persons with AIDS, and are stigmatized and ostracized--compounding the anguish not only of the inmates, but of their families as well, and creating the possibility of discrimination in employment, education, housing, credit, insurance, and even social contact.

17.

At ACMI and Rutledge, this ostracism of seropositives such as plaintiffs has been fostered and engendered by prison officials. Some (including defendant Burden) have referred to these alleged seropositives (including plaintiffs) as "the girls", while other prison officials, with the knowledge and consent of defendants, have unnecessarily and cruelly told seropositives they have "six months to live", causing extreme emotional anguish. Officials at various times have also unnecessarily treated seropositives with rubber gloves and masks.

18.

Seropositives at ACMI have been served food with paper plates, styrofoam cups, and plastic utensils, unlike the other inmates, who have been given reusable plates, cups and flatware. At Rutledge, styrofoam cups and plastic utensils also have been given only to seropositives. While meals to all inmates are served on reusable trays at Rutledge, certain trays have been specially "marked" for exclusive use and reuse by seropositive inmates. At ACMI and Rutledge, seropositives until recently also have been required to eat separately from the general prison population, and have been served last. Trash cans in the mess

halls at ACMI and Rutledge have been labelled "HIV Only", containing special red trash bags.

19.

Special and unjustified parole procedures exist for seropositives. Unlike other inmates, seropositives have not been eligible at all for the 90-day early release or any other early release program. In addition, seropositives have been required to sign a form agreeing to "Special Conditions" before they can be paroled. These "Special Conditions" require notification of the person(s) with whom the seropositive lives, which often delays release for those seeking sponsors, and proof of a medical checkup every thirty days, with consent to dissemination of these medical records, which has allowed employers, insurance companies, and others outside prison to learn about the inmates' seropositive status. In addition, at least one parole "advocate", assigned to argue inmates' cases before the parole board, has openly indicated a belief that seropositives should never be paroled, casting into doubt inmates' chances of effective and vigorous representation in the parole hearing.

20.

Seropositives have not been given an equal opportunity to receive reduced security classifications. There are five such classifications--trusty, minimum, medium, close, and maximum--with attendant privileges afforded to those in lower classifications. Inmates are traditionally reviewed approximately every six months to determine if their good behavior warrants a reduced security classification; plaintiffs and other seropositives, however, have

not been reviewed on an equal basis, despite repeated requests. Because of this fact, or for other discriminatory reasons, seropositives have not been sent to halfway houses (for which a reduced security classification is necessary) in a manner similar to other inmates, who may qualify for halfway house release.

21.

Educational and vocational opportunities have been different for seropositives at ACMI and Rutledge. At Rutledge, seropositives have received only one hour per day of classroom work toward a GED high school equivalency degree. Because of the length of time such a degree would take to earn at this rate, many seropositives have dropped the classes. Non-seropositive inmates at Rutledge, by contrast, may spend 3 hours per day in class either in the morning or afternoon. They also have many other benefits which have not been offered to seropositives: college, Alcoholics Anonymous and Narcotics Anonymous, Jaycees, and technical education and training. The disparity at ACMI is even greater: classes have been provided to the seropositives only at their dorm for one hour per day (and not every day), and classes have been taught only through the fourth grade level.

22.

Religious services at Rutledge have been separate and shorter for seropositives (½ hour) than the regular services (1 hour) held for the general population, which also is given access to special guests and outside fellowship denied to seropositives.

23.

Recreational opportunities, until recently, have been different for seropositives. At ACMI, seropositive recreational activities have been separate and shorter (one hour of gym per day) than seropositives (longer sessions twice per day). Seropositives have had shorter and less frequent "yard calls" as well, and have been able to use only the yard beside their dorm, unlike non-seropositives. At Rutledge, seropositives have received 1½ hours of yard call in a fenced yard six days per week and 1½ hour of gym once per week, versus 2 hours of open yard call every morning and 2 hours of gym every evening for non-seropositive inmates.

24.

At one time at Rutledge and ACMI, memoranda with asterisks beside the "HIV+" patients were posted on the prison bulletin boards for all to see. James Roe's name specifically appeared on one such memorandum in February or March of 1988.

25.

Several films have been made of seropositives in prison without adequate privacy protections. The first was a Department of Corrections' film made at ACMI in August or September 1987, which is shown to all inmates entering the Georgia prison system. The film shows inmate's faces and names, and says they are dying of AIDS. Later, the film was broadcast nationwide by the Public Broadcasting System. Inmates appearing in the film were incorrectly assured that their names would be kept confidential. Another film was later taken at Rutledge in connection with a

lawsuit filed there. Seropositives (including Doe) were forced to march before the camera, and were threatened with disciplinary action if they did not. No privacy waivers were obtained for this film.

26.

Discriminatory exceptions to the segregation policies have been made whenever the exceptions are deemed convenient to prison officials. Plaintiffs have on several occasions been placed on integrated buses along with other passengers when being transferred between segregated prisons. Upon information and belief, an inmate with "AIDS Related Complex" (a seropositive with some, but not all, of the physical symptoms of AIDS) was once reclassified down to "seropositive" so that he could be transferred out of ACMI. Moreover, segregated seropositives at Rutledge (including plaintiff Doe while he was incarcerated there), have been forced to participate in manual labor, unlike others in administrative detention and contrary to the Department of Corrections' regulations.

27.

The testing system utilized by the state is inaccurate and flawed. "False positives" can occur depending on the sophistication of the test and the laboratories' skill and care, while "false negatives" can occur if a person exposed to the HTLV-3 virus has simply not yet developed antibodies, which may take the body up to 18 months to produce. On information and belief, defendant Evans is aware of one former Georgia inmate who was erroneously kept segregated for an extended period of time because

of a false positive testing, an error which was only discovered after the inmate's release. Despite that event and the obvious need for some type of regular retesting and review process, inadequate retesting and review procedures exist. Plaintiff Roe in fact has been told that the test results which identify him as seropositive are "missing from his file", yet he has been kept in seropositive segregation without explanation. Other tests, such as the "T-cell" test given to plaintiff Roe, were discriminatorily given and have been used to segregate plaintiff Roe despite facility doctors' conclusions that the test is not a valid predictor of AIDS.

28.

Medical care for seropositives has been inadequate. The drug azidothymidine ("AZT", or Zidovudine), which can prolong the life of persons with AIDS and also delay the development of AIDS, as well as other similar drugs, has not been made available to Georgia prisoners. Mental health and counseling to distinguish between a positive test result and an AIDS diagnosis, and to provide emotional support to seropositives and AIDS patients also has been lacking or inadequate. Upon information and belief, the Georgia Department of Corrections, ACMI and Rutledge all receive federal financial assistance especially for each seropositive, AIDS-related complex, or AIDS patient, yet such patients have been told inadequate funds are available for further testing or medical care.

CLAIMS FOR RELIEF

1. Violation of Constitutional Right to Privacy

29.

Plaintiffs incorporate the allegations of paragraphs 1-28 above as if set forth fully herein.

30.

Plaintiffs' status as "HIV-positive", even if correct, represents a medical diagnosis properly afforded confidentiality protection by plaintiffs' privacy rights under the United States Constitution.

31.

By failing to provide for the confidentiality of patients' test results, and by visibly and publicly displaying plaintiffs as "seropositives", or causing them to be so displayed, defendants have violated plaintiffs' constitutional rights to privacy.

32.

Plaintiffs have been injured by this denial of their constitutional rights to privacy.

2. Violation of Due Process

33.

Plaintiffs incorporate the allegations of paragraphs 1-28 and 30-31 above as if set forth fully herein.

34.

Plaintiffs were unlawfully segregated at ACMI and Rutledge without just cause, and without a hearing to determine the justification for their initial administrative detention.

35.

Plaintiffs were kept segregated at ACMI and Rutledge without notice of any valid basis for their segregation, and without any regular review being conducted at which their detention would be reconsidered or opportunity to review their files.

36.

Plaintiffs have been segregated together with other seropositives without regard to appropriate classification factors, such as a prisoner's propensity for violence.

37.

Plaintiffs have been denied access to their medical records and to further and more accurate tests, either of which could rebut defendants' contentions that plaintiffs are seropositive. Plaintiff Roe has been kept segregated despite being told that his seropositive test results are "missing from his file".

38.

Plaintiffs have been denied their constitutional rights of due process under the Fourteenth Amendment of the United States Constitution as a result of the actions of defendants taken under color of state law, and have been injured thereby.

3. Violation of Equal Protection

39.

Plaintiffs incorporate the allegations of paragraphs 1-28, 30-31, and 34-38 above as if set forth fully herein.

40.

The separate and discriminatory treatment of seropositives at ACMI and Rutledge is neither rationally related to an important

governmental interest nor strictly tailored to a compelling state interest. AIDS is not transmitted by any form of casual contact with a seropositive person--such as breathing the same air, sharing facilities, using common eating utensils, touching the same objects, shaking hands, or any other ordinary contact--and the discriminatory treatment of seropositives lacks a legitimate foundation.

41.

Plaintiffs have been denied their constitutional rights of equal protection under the Fourteenth Amendment of the United States Constitution as a result of the actions of defendants taken under color of state law, and have been injured thereby.

4. Unlawful Search and Seizure

42.

Plaintiffs incorporate the allegations of paragraphs 1-28, 30-31, 34-38, and 40-41 above as if set forth fully herein.

43.

Plaintiffs' blood was used for testing for antibodies to the HTLV-3 virus without any notification, and without their consent, which they would not have given if they had been so notified. Other inmates were not so tested, and the tests have been given in a sporadic and discriminatory manner.

44.

Plaintiff Roe's blood was tested for "T-cell" counts without his consent, and against his wishes. Plaintiff Roe is a diabetic, and blood drawn in connection with his other medical treatment was

used for T-cell testing, without notification or consent, which he would not have given if he had been so notified.

45.

Defendants' actions in taking plaintiffs' blood samples and using them for testing without notification to or consent from plaintiffs constitutes an unlawful search and seizure, in violation of plaintiff's rights under the Fourth and Fourteenth Amendments of the United States Constitution.

5. Cruel and Unusual Punishment

46.

Plaintiffs incorporate the allegations of paragraphs 1-28, 30-31, 34-38, 40-41, and 43-45 above as if set forth fully herein.

47.

Plaintiffs have been segregated with other seropositives without regard to appropriate classification factors such as propensity for violence, constituting cruel and unusual punishment in relation to the crimes for which plaintiffs were convicted.

48.

Defendants' failure to provide plaintiffs with adequate medical care, and to provide them with access to AZT and other medications which may prolong their lives similarly constitutes cruel and unusual punishment.

49.

The totality of circumstances at ACMI and Rutledge, including the lack of confidentiality, the ostracism, the inadequate care, and the emotional distress caused by equating seroposivity with an incurable and fatal disease, all have served to sap plaintiffs of

hope and create an aura of doom, constituting cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.

50.

Plaintiffs have been injured by this cruel and unusual punishment in violation of their constitutional rights.

6. Violation of § 504 of the Rehabilitation Act

51.

Plaintiffs incorporate the allegations of paragraphs 1-28, 30-31, 34-38, 40-41, 43-45 and 47-49 above as if set forth fully herein.

52.

Plaintiffs' status as "HIV-positive" has been recognized as a handicapping condition pursuant to §§ 503 and 504 of the Rehabilitation Act of 1973, 29 U.S.C. §§ 793 and 794.

53.

The Georgia Department of Corrections, ACMI and Rutledge all receive federal financial assistance. These funds are administered by defendants in their official capacities and acting under color of state law.

54.

Plaintiffs have been unlawfully discriminated against on the basis of their handicap by defendants, in violation of § 504 of the Rehabilitation Act.

55.

Plaintiffs have been injured by this discrimination on the basis of their handicap by defendants.

7. Pendent State Claim: Slander Per Se

56.

Plaintiffs incorporate the allegations of paragraphs 1-28, 30-31, 34-38, 40-41, 43-45, 47-49, and 52-54 above as if set forth fully herein.

57.

Defendants have published, or caused to be published, statements that plaintiffs are carriers of the AIDS virus, a dread and socially unacceptable communicable disease which is fatal and incurable. Such publication constitutes slander per se under the pendent law of the State of Georgia.

NO ADEQUATE REMEDY AT LAW

58.

As a result of defendants' policies and acts, plaintiffs have suffered, and will continue to suffer immediate and irreparable injury, including physical, psychological and emotional harm. Plaintiffs have no plain, adequate and complete remedy at law to redress the wrongs described herein, and will continue to be irreparably injured by defendants' policies and acts unless this Court grants the injunctive relief plaintiffs seek. The balancing of hardships favors injunctive relief, and injunctive relief will not disserve the public interest.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray as follows:

1. That the Court issue a Declaratory Judgment and Order holding that defendants' policies and conduct toward plaintiffs violate plaintiffs' rights under the First, Fourth,

Eighth and Fourteenth Amendments of the United States Constitution, as well as § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, as amended by the Civil Rights Restoration Act of 1987;

2. That the Court preliminarily and permanently enjoin defendants, their officers, agents, employees and successors in office, as well as those acting in concert and participating with them, from subjecting the plaintiffs to the illegal and unconstitutional conditions and practices described in this Complaint at ACMI, Rutledge, or any other Georgia state correctional institution to which plaintiffs might be sent, and further enjoin said persons from directly or indirectly retaliating in any way against plaintiffs for filing this lawsuit;

3. That the Court order that all instances of mention of plaintiffs' names in medical or any other records regarding HIV seropositivity or status, in any form whatsoever, in storage at any location whatsoever, be sought out and obliterated, with proof positive of such obliteration assembled and provided to the Court, or to a Monitor appointed by the Court, and to plaintiffs;

4. That the Court award plaintiffs monetary damages in an amount to be determined at trial;

5. That the Court award plaintiffs reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 1988; and

6. That the Court retain jurisdiction over this matter until said Orders have been fully implemented; and that the Court award plaintiffs such other and further relief as it may deem appropriate.

This 18th day of August, 1989.

KING & SPALDING

Frank C. Jones
Georgia State Bar No. 400300

Gregory S. Smith
Georgia State Bar No. 658375

2500 Trust Company Tower
Atlanta, Georgia 30303
(404) 572-4600

Attorneys for Plaintiffs
John Doe and James Roe

CERTIFICATE OF SERVICE

I hereby certify that the within and foregoing **Amended Complaint was** today served upon all parties by causing a copy of same to be sent, via United States mail, postage prepaid, to counsel of record for defendants, addressed as follows:

Michael E. Hobbs, No. 358200
Senior Assistant Attorney General
Attorney General's Office
132 State Judicial Building
Atlanta, Georgia 30334

This 18th day of August, 1989.

Gregory S. Smith