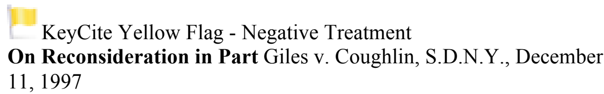
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On Reconsideration in Part Giles v. Coughlin, S.D.N.Y., December 11, 1997

1997 WL 433437
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United States District Court, S.D. New York.

James GILES, Plaintiff,
v.
Thomas COUGHLIN 3D, Commissioner of New York State Correctional Services; Robert GREIFINGER, M.D., Commissioner and Chief Medical Officer; John P. KEANE, Superintendent, Sing Sing Correctional Facility; Charles GREINER, Deputy Superintendent of Security, Sing Sing Correctional Facility; Satish KAPOOR, Head Medical Doctor, Sing Sing Correctional Facility, Defendants.

No. 95 Civ. 3033(JFK). | Aug. 1, 1997.

Attorneys and Law Firms

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Opinion

OPINION AND ORDER

KEENAN, District Judg.

***1** Before the Court is Defendants' motion, pursuant to Fed.R.Civ.Pro. 60(b)(5) and 18 U.S.C. § 3626(b)(2), for modification of a March 1, 1996 consent decree. For the reasons discussed below, the Court denies the motion under Rule 60(b)(5), but grants the motion under 18 U.S.C. § 3626(b)(2).

Background

The Court assumes the readers' familiarity with the history of this case, and therefore declines to discuss the background of this case in any great detail. To give some context to this motion, the Court provides the following brief summation of this case's history.

Plaintiff James Giles is an inmate at the Great Meadow Correctional Facility in Comstock, New York. For a number of years, Plaintiff has refused to take a screening test for latent tuberculosis ("TB") infection known as a purified protein derivative test ("PPD test"). Latent TB is a noncontagious form of tuberculosis. An individual with latent TB is infected with the bacterium that causes TB, but has no obvious symptoms. The PPD test does not indicate if an individual has active TB, which is the contagious form of TB. An individual with active TB exhibits symptoms such as fever, lethargy, coughing, and sweating. TB may be transmitted by "any expulsion of infectious fluids into the air," and therefore a person with active TB could spread the disease through sneezing, coughing, clearing the throat, or even laborious breathing. Wright Aff. ¶ 12 (June 2, 1997); *see also* Pl.'s Ex. 2 at 88 (Reichman Dep.). A chest x-ray, physical examination or sputum test are used to determine if an individual has active TB. Those who test positive for latent TB have about an 8% chance of developing active TB within a year after contracting latent TB. Tr. I at 32.[1] That risk decreases to less than 1% after that first year, but the risk may again increase as an individual ages. Wright Aff. ¶ 11 (May 9, 1997). Over a lifetime, an individual with latent TB has up to a 20% chance of developing active TB. Tr. I at 32. Thus, the first year after contracting latent TB is the statistical time period where an individual is at the greatest risk of developing active TB. Wright Aff. ¶ 17 (June 2, 1997). Plaintiff has no objection to chest x-rays, physical examinations or sputum tests, which are the means to test for active TB; he objects only to the PPD test, which is the only method to test for latent TB.

In 1991, as a response to the rise of TB in state prisons, the New York State Department of Correctional Services ("DOCS") instituted a mandatory PPD testing policy. Inmates were tested for latent TB, by a PPD test, upon arrival at the DOCS facility, and on an annual basis thereafter. Inmates who refused to take a PPD test were placed in a form of confinement known as "medical keeplock." Inmates in medical keeplock were not permitted to leave their cells, except for one ten-minute shower a week. Inmates were afforded no out-of-cell exercise, and were not permitted to have any visitors with the exception of their attorneys. Yet, medical keeplock did not provide many safeguards against TB contagion: the air was not filtered or sectioned off to prevent that air from circulating to other parts of the prison, prison personnel did not wear masks when interacting with the prisoners, and the inmates in that confinement did not wear masks when showering or when they met with their attorneys in the prison's regular visiting room.[2] The Second Circuit observed that these medical keeplock conditions under the 1991 policy "were more stringent than those imposed on prisoners in solitary confinement, who were permitted an hour of exercise daily." *Williams*

v. Greifinger, 97 F.2d 699, 701 (2d Cir.1996).

***2** Due to his refusal to take a PPD test, on December 12, 1991 Defendants placed Plaintiff James Giles in medical keeplock. On April 12, 1995, Plaintiff filed the instant lawsuit alleging, among other things, violations of his 8th Amendment rights resulting from the conditions of his medical keeplock confinement. Subsequent to Plaintiff's filing the action, two southern district cases addressed the issue of the placement of PPD test refusers in medical keeplock and found that the conditions of medical keeplock confinement under the 1991 DOCS policy constituted Eighth Amendment violations. *See Williams v. Greifinger,* 918 F.Supp. 91 (S.D.N.Y. Jan.30, 1996), *rev'd,* 97 F.3d 699 (2d Cir. Oct.15, 1996) (appeal addressed only the district court's findings on qualified immunity), and *Jolly v. Coughlin,* 894 F.Supp. 734 (S.D.N.Y. August 14, 1995), *aff'd,* 76 F.3d 468 (2d Cir. Feb.7, 1996). On March 1, 1996, the parties entered into a consent decree, approved by this Court, in which the parties agree that "Plaintiff will not be placed in medical keeplock or have his status otherwise changed for the remainder of his sentence due to his refusal to take a PPD (purified protein derivative test)." As a result of that stipulation, Defendants released Plaintiff from medical keeplock and placed him in the general population.

On April 24, 1997, Defendants made an emergency application to this Court for a modification of the March 1, 1996 consent decree, to allow Plaintiff to be placed in a form of confinement known as tuberculin hold ("TB hold"), in light of the fact that Plaintiff had been exposed to a prisoner with active TB and would likely refuse a PPD test. The Court heard testimony from Dr. Lester Wright, associate commissioner and chief medical officer of DOCS, concerning the need to place Plaintiff in TB hold and the conditions of confinement in TB hold. Upon consideration of that testimony, the Court modified orally the March 1, 1996 consent decree to allow Plaintiff to be placed in TB hold, if he refused to take the PPD test, until further order of the Court. Thereafter the parties conducted discovery and submitted papers on Defendants' application for modification of the March 1, 1996 consent decree. From July 21 to July 23, 1997, the Court continued the April 24, 1997 hearing and five witnesses testified with regard to the Defendants' application. The parties produced an extensive record on the instant application, which brought out the following facts.

On March 24, 1997 Esteban Perez, an inmate at the Great Meadow facility, who was suffering from AIDS, died of active TB in the prison infirmary. Tr. I at 21–22; Tr. II at 108–113; Defs.' Ex. E. In order to determine the extent of the TB exposure from Perez, DOCS identified 38 people believed to have had the greatest exposure to Perez and sought to conduct PPD tests on those individuals. This is known as a "contact trace" and its serves to determine "how infectious the index case [Perez] was and to determine whether [the TB] has spread from that index case ... to those who breathe the same air with that person.' Tr. II at 219; *see also* Tr. II at 104. If all of those tests come back negative, there is no need to identify a second circle of those with lesser exposure to Perez for PPD testing. Dr. Wright testified that "missing [testing on] even one" of the individuals identified in the first circle, or inner circle, "means that we may miss the fact in which you may need to go to a second group" for further PPD testing to determine the extent of TB exposure. Tr. I at 33. Plaintiff was a porter assigned to the infirmary and had been in regular direct contact with Mr. Perez in his capacity as a porter. Tr. I at 24–25; Tr. II at 125–26, 129–134. As an infirmary worker in regular direct contact with Perez during the period that Perez had active TB and was housed in the infirmary, Plaintiff was among those identified in the first circle of 38 for the contact trace PPD testing. Under DOCS's May 20, 1996 TB policy, a PPD test is mandatory for inmates identified in a contact trace. Wright Aff. (May 9, 1997), Ex. F. at V.A.2.h. Plaintiff Giles refused to take a PPD test, and the May 20, 1996 policy calls for his placement in TB hold for such a refusal. Pursuant to this Court's April 24, 1997 ruling, on April 25, 1997 Defendants placed Plaintiff in TB hold for his refusal to take the PPD test as part of the contact trace.

***3** Under DOCS's May 20, 1996 TB policy, an inmate in TB hold is confined to his cell, but receives one hour of daily out-of-cell exercise and three showers a week. Tr. I at 41; Tr. II at 253; Wright Aff. ¶ 14 (May 9, 1997), Ex. F at IV.A.1.b–f. These inmates are evaluated more frequently for active TB symptoms and if after a year the inmate shows no signs of active TB, the inmate is released into the general population. Tr. I at 39; Wright Aff. (May 9, 1997), Ex. F at IV.A.1.b.i. Tuberculin hold is not respiratory isolation, and prison personnel do not wear masks when in contact with TB hold inmates. Tr. I at 39; Wright Aff. (May 9, 1997), Ex. F at IV.A.1.d. TB hold inmates may receive telephone calls, but legal visits are the only visits permitted to TB hold inmates. Wright Aff. ¶ 14 (May 9, 1997), Ex. F. at IV.A.1.f. Dr. Wright stated that the purpose of TB hold "is that should [an inmate] develop disease within that year [after exposure and refusal to take a PPD test], that we would have a much smaller group of people that he had the opportunity to spread it to." Tr. I at 40; *see* Wright Aff. ¶ 13 (May 9, 1997); Wright Aff. ¶ 17 (June 2, 1997). Thus, Plaintiff's confinement in TB hold is meant to limit the number of individuals in which he comes into contact "during the statistical period identified as posing the greatest risk for developing the disease." Wright Aff. ¶ 17 (June 2, 1997). Plaintiff has been confined to TB hold since April 25, 1997.

Of the 38 individuals identified in the first circle of the contact trace, 31 took PPD tests and all of their PPD results were negative for latent TB. Six of the 38 were not tested because prior to their exposure to Perez they had

tested positive for latent TB under the PPD test, and once an individual tests positive for latent TB they remain positive for life. Tr. II at 281–83. Mr. Giles was the only member of the inner circle not accounted for. Plaintiff received a chest x-ray in April of 1997 and he did not have active TB at that time. Tr. II at 215. At the time of hearing, Mr. Giles exhibited no signs of active TB and was present in court throughout the hearing.

Discussion

Defendants move under Fed.R.Civ.Pro. 60(b)(5) and 18 U.S.C. § 3626(b)(2) of the Prison Litigation Reform Act ("PLRA") for a modification of the March 1, 1996 consent decree, such that Defendants may place Plaintiff in TB hold, pursuant to the May 20, 1996 TB policy, due to his exposure to active TB and refusal to take a PPD test.

A. Rule 60(b)(5)

Pursuant to Rule 60(b)(5), "the court may relieve a party ... from a final judgment, order, or proceeding" where "it is no longer equitable that the judgment should have prospective application." Defendants seek to modify the March 1, 1996 consent decree on the grounds that changed circumstances make it inequitable to allow prospective application of the consent order. Specifically, Defendants claims that "[a]t the time of the entry of the original order, DOCS did not anticipate that plaintiff would be exposed to an infectious case of TB." Defs.' Mem. at 10. In light of these purported changed and unanticipated circumstances, Defendants seek modification of the March 1, 1996 consent decree.

***4** A court may modify a consent decree providing prospective relief, pursuant to Rule 60(b)(5), upon a showing that "a significant change in facts or law warrants revision of the decree and that the proposed modification is suitably tailored to the changed circumstance." *Rufo v. Inmates of the Suffolk County Jail,* 502 U.S. 367, 393, 112 S.Ct. 748, 116 L.Ed.2d 867 (1992). As the Supreme Court stated in *Rufo,* modification of a consent decree under Rule 60(b)(5) may be appropriate

> when changed factual conditions make compliance with the decree substantially more onerous ... Modification is also appropriate when a decree proves to be unworkable because of unforeseen obstacles ... or when enforcement of the decree without modification would be detrimental to the public interest.

Id. at 384. The Supreme Court cautioned that "[o]rdinarily ... modification should not be granted where a party relies upon events that actually were anticipated at the time it entered into a decree." *Id.* at 384. In a case where a party anticipated changing conditions that would make performance of the consent decree more difficult, but nevertheless agree to the order,

> that party would have to satisfy a heavy burden to convince a court that it agreed to the decree in good faith, made a reasonable effort to comply with the decree, and should be relieved of the undertaking under Rule 60(b).

Id. at 384.

The Court concludes that the alleged change in circumstances, i.e ., Giles' exposure to active TB, was clearly anticipated at the time the parties entered into the March 1, 1996 decree. Both Dr. Lee Braslow and Dr. Lester Wright testified that about 25% of the approximately 70,000 inmates in the DOCS system have latent TB. Tr. II at 70; Tr. II at 223. According to Dr. Wright's testimony, 8% of those in the general population with latent TB will develop active TB within the year. Tr. I at 32. Dr. Wright also testified that those with latent TB in the general population may and do develop active TB unbeknownst to prison authorities, Tr. II at 223–24, thereby exposing other inmates to TB. In his February 2, 1996 affidavit, Dr. Wright highlighted the TB problem in New York prisons. He stated:

> 2. The TB rate in New York state has doubled since 1978; and has increased by 31%, from 3,202 to 5,186 cases, from 1989–90. TB poses a potentially serious threat within prisons because it is spread by close and prolonged contact with a person who has active disease. Transmission is enhanced in congregate settings.
>
> 3. An additional risk factor for the spread of TB is the presence of susceptible hosts, *i.e.,* persons with [sic] are malnourished, chronically ill, or suffering from immune deficiencies. Without preventive therapy, about 8% of the persons infected with TB without disease ("latent TB") will eventually develop the active disease and may become contagious. Of those persons with latent TB who are also infected with the HIV virus, if not treated, about 10% *annually* will develop TB....
>
> ***5** 4. The high prevalence of HIV infection among inmates, many of whom are coinfected with TB, creates

> a public health risk because of the congregate setting. Among adult males entering DOCS facilities in 1994, 10% were HIV infected. Overall, there are an estimated 8000 HIV infected inmates in DOCS' custody, of whom about 2000 are coinfected with TB.

Pl.'s Ex. 10. There is no doubt that TB is a pervasive problem in the New York prison system. The risk of exposure to active TB is a part of prison life, and the parties were aware of those risks when they entered into the March 1, 1996 consent decree. What Defendants assert to be changed circumstances are no more than a well-known risk at the time of the stipulation coming to pass. At the time they agreed to the consent decree, the fact that Plaintiff might be exposed to active TB during the remaining term of his confinement was foreseeable and anticipated.

Insofar as the parties anticipated that Plaintiff may be exposed to TB at some point, the Court must therefore determine whether Defendants have satisfied their "heavy burden" in demonstrating that they "agreed to the decree in good faith, made a reasonable effort to comply with the decree, and should be relieved of the undertaking under Rule 60(b)." *Rufo,* 502 U.S. at 384. The Court concludes that Defendants have not satisfied this "heavy burden." The decree states without equivocation that Plaintiff would not be placed in medical keeplock "*or have his status otherwise changed* " due to his refusal to take a PPD test. The decree contemplates that Plaintiff would not be placed in isolation for his PPD test refusal even if he was exposed to active TB. The stipulation covers this scenario and allows for regular x-rays, physical examinations, and monitoring of the Plaintiff for signs of active TB. Additionally, about five months after entering into the March 1, 1996 consent decree, DOCS assigned Plaintiff, a known PPD test refuser, to work in the Great Meadow prison infirmary despite the fact that this would increase Plaintiff's risk of TB exposure. Tr. II at 216, 232–33. Dr. Wright testified that inmates with active TB are treated and housed in the infirmary. Tr II at 207–08. Dr. Wright also testified that inmates with AIDS are treated and housed in the infirmary, and that "TB is an infection that AIDS patients frequently have." Tr. II at 206. Nurse Paul Bundrick, nurse administrator at Great Meadow, testified that "anybody assigned to the infirmary run[s] the risk of developing or [being] exposed to TB." Tr. II at 132. Defendants placed Plaintiff in a situation where he was much more likely to be exposed to TB, and in fact was exposed to TB.

Defendants are not entitled to a modification of the consent order under Rule 60(b)(5). As the Supreme Court has stated, "Rule 60(b)(5) provides that a party may obtain relief from a court order when 'it is no longer equitable that the judgment should have prospective application,' not when it is no longer convenient to live with the terms of the consent decree." *Rufo,* 502 U.S. at 383.

B. 18 U.S.C. § 3626, The Prison Litigation Reform Act

***6** While Defendants are clearly not entitled to a modification of the March 1, 1996 consent decree under Rule 60(b)(5), Defendants have also moved for relief under § 3626(b)(2) of the PLRA. Through § 3626(b)(2), "Congress has provided an alternative mechanism [to Rule 60(b)] that parties may utilize to modify a final judgment," *Benjamin v. Jacobson,* 935 F.Supp. 332, 344 (S.D.N.Y.1996). These two provisions "coexist." *Id.*

Congress enacted the PLRA on April 26, 1996, approximately two months after the parties entered into the consent order. PLRA § 3626(b)(2)–(3) provides,

> **(2) Immediate termination of prospective relief.—**In any civil action with respect to prison conditions, a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right and is the least intrusive means necessary to correct the violation of the Federal right.
>
> **(3) Limitation.—**Prospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current or ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.

These provisions apply retroactively to consent decrees entered prior to the PLRA's enactment, which provide for prospective relief. *See Salahuddin v. Mead,* No. 95–8581(MBM), 1997 WL 357980, at * 3 (S.D.N.Y. June 26, 1997); *Benjamin,* 935 F.Supp. at 357–58 (applying § 3626(b) retroactively and vacating 1978–79 consent decrees that addressed conditions in New York City jails such as overcrowding, fire safety, insect control, sanitation, food services, and handling of detainees' mail and property).

As a preliminary matter the Court must determine whether the March 1, 1996 consent decree, which requires prospective relief, concerns a civil action relating to prison conditions and is thereby subject to termination under § 3626(b)(2). PLRA § 3626(g)(2) defines "civil action with respect to prison conditions" as,

> any civil proceeding arising under Federal law with respect to the

> conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison....

Plaintiff Giles brought this civil action alleging Eighth Amendment violations that resulted from the conditions of his confinement in medical keeplock for his refusal to take a PPD test. Plaintiff's Amended Complaint details how the conditions of his medical keeplock confinement constituted cruel and unusual punishment. *See* Second Am.Compl. ¶¶ 28, 31–33, 39–41. Plaintiff spent four years in medical keeplock, which as noted above, the Second Circuit characterized as having more stringent conditions of confinement than solitary confinement. Insofar as Plaintiff's civil action centered on (1) his placement in medical keeplock by prison officials due to his refusal to take a PPD test and (2) the cruel and unusual punishment he suffered for four years under the conditions mandated by the 1991 medical keeplock policy promulgated by Defendants, this civil action falls within § 3626(g)(2)'s definition of a civil action with respect to prison conditions. Therefore the consent decree, which provides Plaintiff prospective relief by preventing Defendants from changing the conditions of his confinement for his refusal to take a PPD test, is subject to § 3626(b). While Plaintiff argues that a limited prospective remedy applicable to only one inmate falls beyond the scope of § 3626(b), the Court concludes that the plain language of the statute indicates otherwise and makes no such exclusion. The Court must apply the law as written.

***7** The Court must next determine if, under § 3626(b)(2), the prospective relief granted under March 1, 1996 consent decree was approved in the absence of a finding by the Court that the prospective relief is narrowly drawn, extends no further than necessary to correct the violation of the federal right, and is the least intrusive means necessary to correction the violation of the federal right. The Court made no such findings with regard to the prospective relief granted under the March 1, 1996 consent decree. Thus, termination of the prospective relief is mandated under § 3626(b)(2). This, however, does not end the analysis. Section 3626(b)(3) provides that a court shall not terminate the prospective relief, due to absence of the findings required under § 3626(b)(2), if the court makes a present finding based on the record that the relief remains necessary to correct current violations and imposes only narrowly tailored relief. Thus, the Court now turns to the question of whether the prospective relief granted under March 1, 1996 consent decree (1) remains necessary to correct a current or ongoing violation of a federal right, (2) extends no further than necessary to correct the violation of the federal right, and (3) is narrowly drawn and the least intrusive means to correct the violation. *See* 18 U.S.C. § 3626(b)(3). The parties have established an extensive record, on the current motion and as far back as Plaintiff's original preliminary injunction motion in January of 1996, for the Court to make these determinations.

1. Whether the prospective relief granted in the March 1, 1996 consent decree remains necessary to prevent a current or ongoing violation of a federal right

The conditions of confinement imposed under the 1991 medical keeplock policy for PPD test refusers, which the courts in *Williams v. Greifinger,* 918 F.Supp. 91, *rev'd,* 97 F.3d 699 (2d Cir. Oct.15, 1996) (appeal addressed only the district court's findings on qualified immunity), and *Jolly v. Coughlin,* 894 F.Supp. 734 (S.D.N.Y.1995), *aff'd,* 76 F.3d 468 (2d Cir. Feb.7, 1996), denounced as Eighth Amendment violations, are no longer required for PPD test refusers because that 1991 policy no longer exists. Consequently, the prospective relief granted under March 1, 1996 consent decree does not remain necessary to correct the Eighth Amendment violations Plaintiff suffered during his four-year confinement under 1991 medical keeplock policy. However, while the 1991 medical keeplock policy is no longer in effect, in the absence of the March 1, 1996 consent decree, Defendants would place Plaintiff in TB hold under the May 20, 1996 TB policy due to his refusal to take a PPD test as part of a contact trace. Plaintiff argues that his confinement in TB hold is an Eighth Amendment violation and the prospective relief granted under the March 1, 1996 consent decree protects against such a violation. Therefore, Plaintiff argues that the prospective relief remains necessary to prevent a current or continuing Eighth Amendment violation. The Court must therefore examine the conditions of TB hold and make a finding as to whether confining James Giles to TB hold under the May 20, 1996 policy amounts to an Eighth Amendment violation such that the prospective relief remains necessary.

***8** The Eighth Amendment prohibits the infliction of "cruel and unusual punishment" on those convicted of crimes. U.S. Const. amend. VIII. A plaintiff seeking to establish that the conditions of confinement constitute cruel and unusual punishment must prove both (1) a "serious deprivation of basic human needs," *Anderson v. Coughlin,* 757 F.2d 33, 35 (2d Cir.1985), and (2) that the defendants imposed these conditions with "deliberate indifference." *Wilson v. Seiter,* 501 U.S. 294, 297, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991).

With regard to the first prong, the Court notes initially that the Eighth Amendment "does not mandate comfortable prisons," *Rhodes v. Chapman,* 452 U.S. 337, 349, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981), and conditions that are "restrictive and even harsh," are "part of the penalty that criminal offenders pay for their

offenses against society." *Id.* at 347. Yet, the Eighth Amendment does prohibit conditions of confinement that result in either "unquestioned and serious deprivations of basic human needs" or "deprive inmates of the minimal civilized measure of life's necessities." *Id.* The Second Circuit has stated that the Eighth Amendment "stands as a barrier against fundamental and shocking indecency to those whom the state has chosen to confine for their crimes." *Anderson,* 757 F.3d at 36. TB hold prisoners are confined to their cells, may only receive legal visitors, and have library privileges. Unlike the previous conditions mandated by the 1991 medical keeplock policy, inmates in TB hold are entitled to one hour of out-of-cell exercise daily and three showers per week. Additionally, TB hold has a definite term of confinement—one year. If the inmate does not develop signs of active TB in that first year, the inmate will be released into the general population. The Court concludes that these conditions of confinement do not result in a serious deprivation of basic human needs, and therefore TB hold meets Eighth Amendment standards. *See Dorsey v. McQuillian,* No. 94–3578(HB), slip op. at 2 (July 17, 1997) (holding that the conditions of confinement in TB hold are not violative of the Eighth Amendment); *see also Anderson,* 757 F.2d at 34–35.

Plaintiff offers the argument that even with an improvement in the conditions of medical keeplock, and the Court agrees that in many ways TB hold is an improved form of medical keeplock, subjecting Plaintiff to such confinement still violates his Eighth Amendment rights in light of the four years he was confined under the previous medical keeplock policy. Plaintiff points to the Second Circuit's *Jolly* decision in which the Circuit acknowledged that DOCS had amended the medical keeplock conditions to allow for daily exercise and additional showers, but still found that even subjecting the plaintiff to the improved conditions did not meet Eighth Amendment standards due to the amount of time the plaintiff had been deprived of basic human needs under the old policy. On the issue of improved conditions, the Circuit stated,

> ***9** Had the plaintiff all along been afforded meaningful daily exercise, or been deprived of all meaningful exercise for only a short period of time, we might face a more interesting constitutional question. As it happens, however, the plaintiff was for more than three-and-a-half years confined to his cell except for ten minutes per week—eight hours and forty minutes per year. We have no difficulty concluding that, on the heels of such extreme and prolonged confinement, to continue to confine the plaintiff to medical keeplock under somewhat improved conditions would run afoul of the Eighth Amendment.

Jolly, 76 F.2d at 480,

> We also conclude that the change in DOCS's policy [allowing for one hour of daily out of cell exercise and three showers per week] does not make the plaintiff any less likely to succeed in demonstrating a serious deprivation after the implementation of the change. As the Supreme Court has noted, it is "plain" that "the length of confinement cannot be ignored in deciding whether the confinement meets [Eighth Amendment] standards." ... Thus, a change in the plaintiff's conditions of confinement—even the imposition of conditions that might not initially have amounted to a serious deprivation—does not eliminate the plaintiff's Eighth Amendment claim, given the previous prolonged deprivation and the indefinite nature of the plaintiff's continued confinement to medical keeplock.

Jolly, 76 F.3d at 481 (citations omitted). While the Court has considered quite carefully these conclusions by the Circuit in the *Jolly* case, the Court concludes that Plaintiff's confinement to TB hold, despite his lengthy confinement under the old policy, does not amount to a serious deprivation of basic human needs. First, Plaintiff was released from keeplock into the general population upon execution of the March 1, 1996 consent decree. He remained in the general population for more than a year, despite his status as a PPD refuser. Therefore, confinement under the TB hold conditions does not come "on the heels of such extreme and prolonged confinement." Second, under the present TB hold policy, Plaintiff must remain in TB hold for one year due to his refusal to take a PPD test as part of a contact trace. If he does not develop symptoms of active TB in that year, Plaintiff will be released into the general population. The Court finds these two distinctions significant because in *Jolly,* the Circuit's chief concern about the continued confinement of the plaintiff under more improved conditions was the "previous prolonged deprivation" and "indefinite nature" of the continued confinement to medical keeplock. Here, Plaintiff has not been subject to the offensive conditions of the previous medical keeplock policy for over a year, the conditions of TB hold do not amount to a serious deprivation, and the confinement to TB hold has a definite duration.

To the extent that Plaintiff is no longer subject to the previous medical keeplock policy, and the conditions of confinement under the May 20, 1996 TB hold policy do not constitute an Eighth Amendment violation, the prospective relief granted by the March 1, 1996 consent decree does not remain necessary to correct a current or

continuing violation of a federal right. In light of this finding, the Court need not reach the questions of whether the prospective relief extends no further than necessary to correct the violation of the federal right, and is narrowly drawn and the least intrusive means to correct the violation. Accordingly, pursuant to § 3626(b)(2)–(3) of the PLRA, this Court must terminate the prospective relief granted under the March 1, 1996 consent decree.

Conclusion

***10** For the reasons discussed above, the Court denies Defendants' motion pursuant to Fed.R.Civ.Pro. 60(b), and grants Defendants' motion pursuant to 18 U.S.C. § 3626(b)(2)–(3). This Court finds that the prospective relief granted under the March 1, 1996 consent decree is no longer necessary to correct a current or continuing violation of a federal right, and upon such a finding the PLRA § 3626(b)(3) mandates that the prospective relief be terminated. Therefore, Defendants may confine Plaintiff to TB hold pursuant to the May 20, 1996 TB policy.

The parties are to complete all discovery in the underlying civil action with respect to the remaining issues on damages and qualified immunity by September 5, 1997, and the Court sets a ready for trial date of October 24, 1997.

Footnotes

1 "Tr. I" refers to the transcripts from the April 24, 1997 hearing, and "Tr. II" refers to the transcripts from the continuation of that hearing from July 21–23, 1997.

2 For a more complete discussion of the forms of TB, the DOCS's TB testing and medical keeplock policy of 1991, and the conditions of medical keeplock for PPD refusers, *see Williams v. Greifinger,* 918 F.Supp. 91 (S.D.N.Y. Jan.30, 1996), *rev'd,* 97 F.3d 699 (2d Cir. Oct.15, 1996), and *Jolly v. Coughlin,* 894 F.Supp. 734 (S.D.N.Y. Aug.14, 1995); *aff'd,* 76 F.3d 468 (2d Cir. Feb.7, 1996).