

10-2563
Bailey v. Pataki

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2011

(Argued: October 31, 2011

Decided: February 14, 2013)

Docket No. 10-2563

Kenneth Bailey,

Plaintiff - Appellee,

Robert Trocchio, Jorge Burgos, Jr., Louis Massei, Robert Warren,
Charles Brooks,

Consolidated Plaintiffs - Appellees,

v.

George Pataki, former Governor of New York State, Eileen
Consilvio, former Executive Director, Manhattan Psychiatric
Center and Kirby Forensic Psychiatric Center, John Doe, # 1,
Commissioner of the New York State Department of Corrections,
John Doe, # 2, Commissioner of the New York State Office of
Mental Health, John Doe, # 3, Superintendent of Wyoming
Correctional Facility, John Doe, # 4, Superintendent of Attica
Correctional Facility, John Doe, # 5, Superintendent of the
Downstate Correctional Facility, John Doe, # 6 through 20,
medical personnel who examined and evaluated plaintiff pursuant
to New York State Mental Hygiene Law Article 9, Glenn S. Goord,
Sharon Carpinello, Michael Giambruno, James Conway, Paul Annetts,
Emilia Rutigliano, Prabhakar Gumbula, Allan Wells,

Defendants - Appellants,

Jonathan Kaplan, Olusegun Bello, Mary Ann Ross, Ayodeji Somefun,
Michal Kunz, William Powers, Lee E. Payant, Lawrence Farago, Luis
Hernandez, Samuel Langer, Robert Dennison, Former Chairman of the
New York State Board of Parole and Chief Executive Officer of the
New York State Division of Parole, Jeffrey Tedford, Former Deputy
Superintendent of Security at Clinton Correctional Facility,
William J. Sackett, Facility Senior Parole Officer, Clinton
Correctional Facility, Jean Liu, psychiatrist who evaluated
plaintiff for possible civil commitment, Abadul Qayyum, Charles

1 Chung, Dale Artus, Former Superintendent of Clinton Correctional
2 Facility,

3 Consolidated Defendants - Appellants.

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5 Before: McLAUGHLIN, SACK, and HALL, Circuit Judges.

6 This is an appeal from an order of the United States
7 District Court for the Southern District of New York (Jed S.
8 Rakoff, Judge) denying the defendants' motion for summary
9 judgment. The defendants argue that they are entitled to
10 qualified immunity on the plaintiffs' 42 U.S.C. § 1983 procedural
11 due process claims because the procedures employed in the course
12 of civil commitment proceedings against the plaintiffs complied
13 with due process requirements, and because, even if they did not,
14 a reasonable person in the defendants' position would not have
15 known that he was violating the plaintiffs' constitutional
16 rights. We conclude that the district court properly denied the
17 defendants' motion for summary judgment. There is sufficient
18 evidence which, when viewed in the light most favorable to the
19 plaintiffs, supports their claim that they were denied their
20 right to procedural due process before being civilly committed.
21 We also agree with the district court that a reasonable official
22 in the defendants' position would have known that the process by
23 which the plaintiffs were committed did not satisfy basic
24 constitutional requirements and that the defendants are therefore
25 not entitled to qualified immunity.

26 Affirmed.

1 AMEER BENNO, Benno & Associates, New
2 York, NY, (Richard Sullivan, Jeffrey
3 Rothman, on the brief), for Plaintiffs-
4 Appellees.

5
6 CECELIA C. CHANG, Assistant Solicitor
7 General, (Barbara D. Underwood,
8 Solicitor General, Benjamin N. Gutman,
9 Deputy Solicitor General, on the brief),
10 for Andrew M. Cuomo, Attorney General of
11 the State of New York, New York, NY, for
12 Defendants-Appellants.

13 SACK, Circuit Judge:

14 This appeal requires us to decide whether the civil
15 commitment of the plaintiffs following the expiration of their
16 sentences for sexually based criminal offenses constituted
17 violations of their procedural due process rights redressable
18 under 42 U.S.C. § 1983, and, if so, whether the defendants are
19 nonetheless entitled on the record before the district court to
20 summary judgment dismissing the procedural due process claims on
21 the grounds of qualified immunity.

22 The plaintiffs' commitments were effected not through
23 the state's normal civil commitment procedures, but by means of
24 an executive-branch effort aimed at preventing the release of
25 some "sexually violent predators" ("SVPs"). The Governor of New
26 York State at the time, Governor George E. Pataki, directed the
27 State's Office of Mental Health ("OMH") and Department of
28 Correctional Services ("DOCS") to develop a plan whereby he could
29 take executive action to implement an initiative (the "SVP

1 Initiative" or the "Initiative") that would result in the
2 involuntary commitment of selected SVPs to state psychiatric
3 facilities after the expiration of their criminal sentences. The
4 plaintiffs, who were committed pursuant to this initiative,
5 assert a variety of claims against Governor Pataki and officials
6 of OMH and DOCS.

7 In this appeal, the defendants assert that the district
8 court erred when it denied their motion for summary judgment on
9 the plaintiffs' procedural due process claims, concluding that
10 the defendants are not entitled to qualified immunity. The
11 plaintiffs' claims for denial of procedural due process are
12 premised on the allegation that they were committed pursuant to
13 the SVP Initiative without the benefit of notice or an
14 opportunity for a hearing prior to their commitment.

15 We agree with the district court that there is
16 sufficient evidence in the record to support the plaintiffs'
17 procedural due process claims and therefore defeat the motion for
18 summary judgment. We also conclude that at the time of the
19 Initiative, the constitutional principle that, absent some
20 emergency or other exigent circumstance, an individual cannot be
21 involuntarily committed to a psychiatric institution without
22 notice and a predeprivation hearing was firmly established.
23 Because the law pertaining to the involuntary civil commitment of
24 prisoners was firmly established, the district court properly
25 determined that the defendants should not enjoy qualified
26 immunity.

1 **BACKGROUND**

2 The SVP Initiative

3 In June 2005, a recently-paroled sex offender murdered
4 a woman in the parking lot of the Galleria Mall in White Plains,
5 New York. Governor Pataki had previously attempted to enact
6 legislation providing additional avenues for the commitment of
7 dangerous sex offenders,¹ but after the murder, "momentum to do
8 something around [sic.] dangerous sex offenders increased,"
9 according to associate director of OMH's Forensic Services
10 Division, Richard Miraglia, who participated in the creation and
11 implementation of the SVP Initiative. Dep. of Richard Miraglia,
12 Nov. 24, 2009 ("Miraglia Dep."), at 62; Joint App'x at 147. In
13 an October 2005 press release, Governor Pataki's office explained
14 that during this time period he "directed that every sexually
15 violent predator (SVP) in State custody be evaluated for
16 involuntary civil commitment before being released from prison.
17 He directed [OMH] and [DOCS] to push the envelope of the State's
18 existing involuntary commitment law because he couldn't wait any
19 longer for the Assembly Leadership to bring his legislation to

¹ Beginning in 1998, shortly before the end of his first term in office, Governor Pataki tried to convince the New York State legislature to pass sex offender civil commitment legislation, but, he said in a televised interview, the state Assembly leadership would not permit a floor vote. Tr. of Interview of George E. Pataki by Bill O'Reilly, FOXNews.com, Nov. 18, 2005; Joint App'x at 274. Those opposing the measure, the Governor said, were making "the same old argument. There are those who would rather have 50 sexual predators out on the street than one who they believe might have been wrongfully confined." Tr. of Interview of George E. Pataki by Glenn Beck, July 16, 2007; Joint App'x at 590.

1 the floor for a vote." Press Release, N.Y. State Executive
2 Chamber, Governor: U.S. Dep't of Justice Adds N.Y. to Nat'l Sex
3 Offender Public Registry Web Site (Oct. 24, 2005); Joint App'x at
4 215.

5 In order to put the governor's policy into effect, OMH
6 officials began engaging in daily discussions about how to
7 implement a civil commitment initiative. Miraglia testified that
8 the "general tenor" of these meetings reflected "concern about
9 dangerous repeat sex offenders being released to the community"
10 and "some frustration about legislative inaction." Miraglia Dep.
11 at 48; Joint App'x at 136. Discussions eventually centered on
12 using either Correction Law § 402 or Mental Hygiene Law § 9.27
13 for this purpose. The two statutes are substantially different.

14 Section 9.27 of the Mental Hygiene Law ("MHL"),
15 codified in Article 9 of the MHL and entitled "Involuntary
16 admission on medical certification," allows the director of a
17 hospital to accept any patient "alleged to be mentally ill and in
18 need of involuntary care and treatment upon the certificates of
19 two examining physicians." MHL § 9.27(a). The director must
20 also receive a sworn application explaining why the patient needs
21 mental health treatment. Id. After the patient arrives at the
22 hospital, a member of the hospital's psychiatric staff is
23 required to examine him and confirm that he should be admitted.
24 MHL § 9.27(e). The law requires that the nearest relative of the
25 patient, or any other person the patient has designated, be given
26 notice of the involuntary admission within five days of

1 admission. MHL § 9.29(b). Within sixty days of admission, the
2 patient or a friend or relative can request a hearing on the
3 involuntary admission, which is required to be held within five
4 days of receipt by the hospital director of notice of the
5 request. MHL § 9.31(a). If no hearing has been held or court
6 order issued, or if the patient does not consent to the
7 admission, the hospital director is required to seek a court
8 order within sixty days of the patient's involuntary admission if
9 the director wishes to pursue the matter. MHL § 9.33(a).

10 Correction Law § 402 is entitled "Commitment of
11 mentally ill inmates." Under that law, if a staff physician at a
12 prison informs the prison superintendent that an inmate is
13 mentally ill, the superintendent asks a "judge of the county
14 court or justice of the supreme court in the county" to appoint
15 two physicians to examine the inmate. Correction Law § 402(1).
16 If both physicians conclude that hospitalization is appropriate,
17 they must produce certificates to that effect. Id. The
18 superintendent is then required to apply to the court for a
19 commitment order, and personally serve notice on the inmate and
20 his or her closest relative or, if relatives are unknown or not
21 within the state, "any known friend," five days prior to the
22 commitment. Correction Law § 402(3). The Mental Hygiene Legal
23 Services must then inform the inmate (or, in appropriate cases,
24 others concerned with the inmate's welfare) of "the procedures
25 for placement in a hospital and of the inmate's right to have a
26 hearing, to have judicial review with a right to a jury trial, to

1 be represented by counsel and to seek an independent medical
2 opinion." Id. The inmate is entitled to request a hearing
3 before a judge prior to any transfer to a psychiatric hospital.
4 Correction Law § 402(5). The procedural protections in section
5 402 may only be bypassed where admission to a hospital is sought
6 on an emergency basis. Correction Law § 402(9).

7 The state officials dealing with the matter ultimately
8 decided that MHL § 9.27 would be the appropriate law through
9 which to implement the SVP Initiative. The parties disagree as
10 to whether MHL § 9.27 had previously been utilized for the civil
11 commitment of inmates. Scott Clair, who worked for OMH at Attica
12 Correctional Facility between 1976 and 2005, testified that use
13 of Correction Law § 402 was standard procedure for the civil
14 commitment of prisoners, and that he was unfamiliar with MHL §
15 9.27. Dep. of Scott Clair, January 14, 2010 ("Clair Dep."), at
16 43-44; Joint App'x at 1200-01. Hal Smith, who served as
17 executive director of the Central New York Psychiatric Center, an
18 OMH facility, similarly testified that prior to the SVP
19 Initiative, inmates were transferred from DOCS to OMH facilities
20 pursuant to the Correction Law, not the Mental Hygiene Law. Dep.
21 of Hal E. Smith, November 11, 2009 ("Smith Dep."), at 162-63,
22 166, 169; Joint App'x at 1256-59. In a related state court
23 proceeding, the state Attorney General represented that MHL
24 § 9.27 had been used five times between 2003 and 2005 to civilly
25 commit prisoners. State ex rel. Harkavy v. Consilvio, 10 Misc.
26 3d. 851, 856, 809 N.Y.S.2d 836, 839-40 (Sup. Ct. 2005), rev'd, 29

1 A.D.3d 221, 812 N.Y.S.2d 496 (1st Dep't), rev'd, 7 N.Y.3d 607,
2 859 N.E.2d 508, 825 N.Y.S.2d 702 (2006).

3 Sharon Carpinello, Commissioner of the OMH, presented
4 the proposed SVP Initiative, utilizing MHL § 9.27, to Governor
5 Pataki. The proposal called for a pool of SVPs to be identified
6 based on upcoming release dates. The pool of inmates was drawn
7 from those who had committed a violent offense as defined by New
8 York Penal Law § 70.02, and a sex offense as defined by Penal Law
9 § 130, as well as from another list of inmates who had committed
10 felonies involving some sexual motivation. According to Dawne
11 Amsler, Associate Director of OMH's Bureau of Forensic Research,
12 this constituted a departure from prior practice. Previously,
13 MHL § 9.27 applied to "individuals who have a mental illness that
14 makes them dangerous to themselves or others," and inmates who
15 did not fit that criteria were evaluated prior to their release
16 pursuant only to Correction Law § 402. Dep. of Dawne Amsler,
17 Nov. 10, 2009 ("Amsler Dep."), at 21, 27; Joint App'x at 502-03.
18 Amsler testified that "individuals who were already on the mental
19 health caseload at OMH and receiving fairly intensive services
20 were evaluated at the end of their [sentences] regardless of the
21 crime they committed and perhaps committed if deemed necessary.
22 This changed [after implementation of the Initiative] in that all
23 sex offenders regardless of whether or not they were on caseloads
24 were evaluated." Id. at 36; Joint App'x at 506.

25 Under the Initiative, the identified inmates would be
26 subject to a review of their criminal histories, and then to an

1 examination by two physicians, who would determine whether they
2 posed a risk to the public, or suffered from a mental illness,
3 and therefore needed inpatient care and treatment. If the
4 physicians recommended civil commitment, the inmate would be
5 transferred to a psychiatric center and examined by a
6 psychiatrist to confirm the diagnosis. Once admitted to the
7 facility, the inmate would begin undergoing a specialized course
8 of treatment.

9 Implementation of the Initiative began almost
10 immediately. Under Defendant Glenn Goord's direction, DOCS
11 identified SVPs scheduled for release and made the presentence
12 reports for those inmates available to OMH. OMH then compiled
13 relevant information on the inmates, including their "OMH level,"
14 which did not include a specific diagnosis, and a description of
15 the offense of conviction. Between September 2005 and January
16 2006, Amsler personally compiled the information about the
17 identified inmates and provided that information to OMH
18 personnel. She completed two documents for each inmate, a
19 "FPMS/DMHIS" overview and a "Static 99" evaluation. Pls.'
20 Statement of Uncontested Material Facts Pursuant to Local Rule
21 56.1, at ¶ 85; Joint App'x 87, citing Amsler Dep.²

22 Every inmate identified by DOCS as a potential SVP was
23 evaluated for civil commitment by OMH. Any inmate who refused to
24 submit to the evaluation was subject to disciplinary action and

² Amsler did not know what the initials "FPMS" stood for.
Amsler Dep. at 122; Joint App'x at 546.

1 refusal could have constituted a parole violation. The DOCS
2 Superintendent then applied for the civil commitment of SVP
3 inmates who had been deemed to meet the criteria for civil
4 commitment and had been examined by two physicians who had so
5 certified. The inmates received no advance notice that they
6 would be transferred or subject to a civil commitment evaluation.

7 While the procedures for commitment used in the SVP
8 Initiative tracked MHL § 9.27, the standard for commitment was
9 different from that ordinarily used under the provision, which
10 caused concern among those charged with implementing the
11 Initiative.³ Miraglia testified that officials had only days to
12 develop the techniques for assessing whether SVPs qualified for
13 commitment under the Initiative. "[T]he sex offender assessment
14 is a specialty . . . that heretofore [had] not been within the
15 OMH menu of services. . . . So we needed to develop that
16 capacity to understand what . . . assessment techniques would be
17 required to identify those at highest risk for sexual
18 recidivism." Miraglia Dep. at 69; Joint App'x at 154.

19 One person involved with the Initiative wrote in an e-
20 mail under a heading "Operational Concerns and Challenges," that

³ The standard itself is not at issue in this appeal. The plaintiffs' substantive due process claim challenging whether the standard for commitment utilized was appropriate is not before us. See Bailey v. Pataki, No. 08 Civ. 8563, 2010 WL 4237071, at *4, 2010 U.S. Dist. LEXIS 113766, at *13 (S.D.N.Y. Oct. 26, 2010)(denying defendants' motion for summary judgment on the substantive due process claims). The uncertainty regarding the standard used is nevertheless relevant to the procedural due process analysis because it compounds the risk of an erroneous deprivation of a liberty interest.

1 "[e]xpertise in the treatment of sexual offenders is not widely
2 available among current OMH staff, and the majority of clinicians
3 have not had any experience with this population. Training
4 clinicians who are unfamiliar with the sexual offender population
5 to apply civil commitment criteria to these individuals may be
6 difficult." Email from Robyn Katz to Carpinello, Miraglia et al.
7 (July 29, 2005, 6:25 p.m.); Joint App'x at 593. Scott Clair, a
8 Forensic Unit Chief of the mental health unit at Attica,
9 explained that the "criteria" utilized to evaluate the inmates
10 identified as SVPs was "dangerousness to self or others." Clair
11 Dep. at 46; Joint App'x at 1203. Correction Law § 402 used the
12 same criteria, but, Clair testified, "[i]nmates that went on 402
13 were clinically decompensated to the point where they were
14 dangerous to self or others at that exact time," while those
15 under the SVP Initiative were evaluated "based on dangerousness
16 to the community based on the risk assessment and their
17 diagnosis." Id. at 47; Joint App'x 1204.

18 Another OMH physician explained that she was "asked to
19 make a prediction of the risk of possible recidivism to keep the
20 community safe," whereas the Article 9 standard, by contrast, "is
21 based on if the individual is harmful to himself and others and
22 that if this is deemed the case then the certification is good
23 for a period of 72 hours." Dep. of Mary Ann Ross, Sept. 24,
24 2009, at 437-39; Joint App'x at 1671-73.

25 The SVP Initiative's evaluation was based in part on
26 the Static 99 form, which estimated an inmate's risk of future

1 recidivism in five, ten, and fifteen years, and which had not
2 previously been used in the State's civil commitment process.
3 When the Initiative began, most of the OMH physicians did not
4 have any experience using the Static 99 form, and some were "not
5 comfortable" using it. Smith Dep. at 157; Joint App'x at 1255.

6 The Plaintiffs' Commitment

7 Plaintiff Kenneth Bailey was among the first to be
8 evaluated pursuant to the new Initiative. He and the other
9 plaintiffs contend that had it not been for its implementation,
10 they would not have been evaluated for civil commitment at all.
11 Bailey had been convicted multiple times for sexual abuse of
12 children and has admitted to molesting twenty-three girls. His
13 most recent conviction stemmed from the repeated sexual abuse of
14 his daughter for which, in 1994, he was convicted and sentenced
15 to six to twelve years imprisonment. Some eleven years later, on
16 September 28, 2005 -- less than two weeks before he was scheduled
17 for release -- Bailey was transferred from Wyoming Correctional
18 Facility to Attica Correctional Facility. Three days before his
19 scheduled release, two OMH physicians evaluated Bailey for
20 involuntary civil commitment pursuant to the Initiative. Both
21 physicians produced written certificates stating that Bailey
22 qualified for civil commitment.

23 When Bailey's sentence expired, the Superintendent of
24 Attica applied for Bailey's involuntary commitment and DOCS
25 transported Bailey to the Manhattan Psychiatric Center ("MPC")
26 the same day. Bailey did not request a hearing following his

1 commitment because he apparently thought he would be at MPC for
2 only a few weeks or months. He contends that he was not aware
3 that he was a psychiatric patient there. The commitment
4 proceedings for the other plaintiffs in this action followed
5 similar patterns. See Bailey v. Pataki, 722 F. Supp. 2d 443,
6 448-49 (S.D.N.Y. 2010).

7 The plaintiffs petitioned for habeas corpus relief in
8 state court, arguing that the use of MHL § 9.27, rather than
9 Correction Law § 402, to civilly commit them was illegal. State
10 ex rel. Harkavy v. Consilvio, 7 N.Y.3d 607, 859 N.E.2d 508, 825
11 N.Y.S.2d 702 (2006). In Harkavy, the New York Court of Appeals
12 commented: "[W]e understand how in an attempt to protect the
13 community from violent sexual predators, the State proceeded
14 under the Mental Hygiene Law." The court concluded, however,
15 that "because inmates who are incarcerated do not pose an
16 immediate threat to the community, there should be ample time to
17 proceed under the Correction Law." Id. at 614. The court
18 ordered that each civilly committed individual be provided "an
19 immediate retention hearing pursuant to article 9," and directed
20 that future proceedings against inmates proceed under Correction
21 Law § 402 "with all its attendant procedural requirements
22 including court supervision, pretransfer notice and an
23 opportunity to be heard within a reasonable period of time prior
24 to the inmate's proposed release date." Id. The court did not
25 decide on the constitutionality of applying Article 9 to
26 prisoners. In a concurrence by Judge Robert S. Smith, however,

1 he cautioned that it "would raise serious constitutional
2 problems" because "Petitioners had all been in prison for years
3 before the State sought to commit them civilly. No sudden,
4 unforeseen emergency required their confinement in a mental
5 hospital." Id. at 615.

6 The District Court Opinion

7 In October 2008, the plaintiffs filed this action
8 alleging claims under 42 U.S.C. § 1983 for violations of their
9 Fourteenth Amendment rights to procedural and substantive due
10 process and to equal protection, and their Fourth Amendment right
11 against unreasonable seizure, under 42 U.S.C. § 1985(3) for
12 conspiracy, and under various provisions of New York State law.
13 On March 31, 2010, both sides moved for summary judgment. The
14 district court (Jed S. Rakoff, Judge) denied the plaintiffs'
15 motion for summary judgment in full, and granted in part and
16 denied in part the defendants' motion for summary judgment.⁴
17 Relevant to this appeal, the district court rejected the
18 defendants' argument that they are entitled to qualified immunity
19 on the plaintiffs' procedural due process claim.

20 In its opinion, the district court first addressed
21 whether the plaintiffs had made out a procedural due process
22 claim for their "involuntar[y] commit[ment] to civil confinement
23 without advance written notice, an evaluation by court-appointed

⁴ The district court entered a separate opinion detailing its decision on all issues other than qualified immunity. See Bailey, 2010 WL 4237071, at *1, 2010 U.S. Dist. LEXIS 113766, at *3-*4 (explaining the different opinions and orders issued).

1 physicians, and . . . a predeprivation judicial hearing."
2 Bailey, 722 F. Supp. 2d at 447. The court explained that a
3 confined prisoner "presents no immediate danger to the community,
4 [therefore] full due process must be accorded before he can be
5 transferred, upon completion of his sentence, to involuntary
6 civil commitment." Id. at 447-48. Relying on Vitek v. Jones,
7 445 U.S. 480 (1980), the court determined that such process must
8 include notice and "a predeprivation adversary hearing . . . at
9 which the prisoner can see the evidence for the commitment and be
10 given an opportunity to be heard in person, as well as present
11 testimony and engage in cross-examination of the state's
12 witnesses." Bailey, 722 F. Supp. 2d at 448.

13 The district court then examined whether the process it
14 had determined was constitutionally required had been afforded to
15 the plaintiffs in this case. It concluded that the "plaintiffs'
16 civil confinement did not remotely comport with constitutional
17 requirements." Id. at 449.

18 Having thus decided that, viewed in the light most
19 favorable to the plaintiffs, the evidence supported the due
20 process claims, the district court then considered whether the
21 defendants were entitled to qualified immunity because the right
22 at issue was not "clearly established" when the Initiative was
23 implemented. The court determined that it was clearly
24 established at the relevant time that in the absence of any
25 "immediate danger to society," a predeprivation hearing was
26 required before civilly committing an individual and that this

1 requirement was "so obvious that no reasonable defendant official
2 could have failed to miss it." Id. at 450-51.

3 The district court emphasized that Correction Law
4 § 402, which specifically dealt with commitment of inmates,
5 required a predeprivation hearing. Id. at 451. The court noted,
6 finally, that:

7 [I]t is not irrelevant that the plaintiffs
8 here have advanced competent evidence from
9 which a jury could conclude that the decision
10 to deprive SVP detainees of a predeprivation
11 hearing by replacing the procedures of
12 directly applicable Correction Law § 402 with
13 those of seemingly inapplicable MHL § 9.27
14 was a deliberate decision taken for political
15 reasons. To deprive plaintiffs of their
16 constitutional rights for political gain can
17 never be reasonable.

18 Id. at 451-52.

19 The defendants appeal.

20 **DISCUSSION**

21 We review de novo a district court's denial of summary
22 judgment on qualified immunity grounds, and construe all evidence
23 and draw all reasonable inferences in the non-moving party's
24 favor. Amore v. Novarro, 624 F.3d 522, 529 (2d Cir. 2010).
25 Summary judgment is appropriate where "there is no genuine
26 dispute as to any material fact and the movant is entitled to
27 judgment as a matter of law." FED. R. CIV. P. 56(a).

28 **I. Procedural Due Process Claim**

29 The plaintiffs allege that they were denied their
30 Fourteenth Amendment right to procedural due process when they
31 were committed to a psychiatric institution without the benefit

1 of notice, psychiatric examination by court-appointed physicians,
2 or a judicial hearing prior to their commitment. In order to
3 state a claim under 42 U.S.C. § 1983 for denial of procedural due
4 process in the context of this litigation, the plaintiffs are
5 required to demonstrate that they have a protected liberty
6 interest in not being involuntarily committed to a psychiatric
7 institution and that they were deprived of that interest without
8 due process of law. See Tellier v. Fields, 280 F.3d 69, 79-80
9 (2d Cir. 2000).

10 On appeal, the defendants urge that the district court
11 erred in reading Vitek v. Jones, 445 U.S. 480 (1980), as
12 mandating especially stringent due process procedures for
13 prisoners, arguing that while notice and a hearing are generally
14 required, nothing in Vitek prohibits brief periods of prehearing
15 commitment if a timely hearing is later offered. The defendants
16 insist that courts have upheld identical prehearing commitments
17 of prisoners that the district court concluded did not satisfy
18 due process here, and that in any event the procedures employed
19 did indeed comply with due process requirements. The district
20 court looked to the Supreme Court's decision in Vitek in
21 determining what procedural protections are required before an
22 inmate can be civilly committed without his consent consistent
23 with due process standards. Bailey, 722 F. Supp. 2d at 447-48.
24 The court read Vitek to require notice, a predeprivation
25 adversarial hearing, and a written statement by the decision

1 maker disclosing the reasons for the inmate's commitment. Id. at
2 448.

3 Vitek addressed an as-applied challenge to the
4 constitutionality of a Nebraska statute that provided for the
5 transfer of an inmate to a psychiatric facility at the direction
6 of the State's Director of Correctional Services if a
7 psychologist or psychiatrist concluded that the prisoner
8 "'suffers from a mental disease or defect'" that the prisoner's
9 current facility could not properly treat. Vitek, 445 U.S. at
10 483. Such a transfer remained valid until the expiration of the
11 prisoner's sentence, at which point civil commitment proceedings
12 were required prior to continued confinement. Id. at 483-84.

13 The plaintiff in Vitek was an inmate who had been
14 transferred to a psychiatric facility after setting his mattress
15 on fire while in solitary confinement. Id. at 484. The Vitek
16 Court considered whether the transfer of a prisoner to a state
17 mental hospital implicated a liberty interest triggering due
18 process protection, and concluded that the plaintiff's "objective
19 expectation" based on state law and practice that he would not be
20 transferred to a mental hospital if his condition could be
21 treated in prison did create a liberty interest requiring
22 "appropriate procedures" prior to its deprivation. Id. at 489-
23 90. The Court emphasized the "stigmatizing consequences of a
24 transfer to a mental hospital" and the "mandatory behavior
25 modification" treatment the prisoner would undergo once at that
26 hospital. Id. at 494.

1 The district court in Vitek identified seven safeguards
2 it concluded were required to protect the plaintiff's liberty
3 interest. Among them were pretransfer notice to the prisoner, a
4 pretransfer hearing at which the prisoner could present and
5 cross-examine witnesses, and the right to counsel. See id. at
6 494-95.

7 In considering these requirements, the Supreme Court
8 explained that while the State has a substantial interest in
9 "segregating and treating mentally ill patients," "[t]he interest
10 of the prisoner in not being arbitrarily classified as mentally
11 ill and subjected to unwelcome treatment is also powerful," and
12 the "risk of error . . . is substantial enough to warrant
13 appropriate procedural safeguards against error." Id. at 495.
14 The Court acknowledged that the inquiry into whether a prisoner
15 should be placed in a psychiatric facility is "essentially
16 medical," but concluded that "[t]he medical nature of the
17 inquiry . . . does not justify dispensing with due process
18 requirements. It is precisely the subtleties and nuances of
19 psychiatric diagnoses that justify the requirement of adversary
20 hearings." Id. (quotation marks and citation omitted). The
21 Court concluded that the procedures prescribed by the district
22 court were "appropriate in the circumstances present"
23 Id. at 496.⁵

⁵ The requirement of legal counsel was endorsed by only a plurality of the court. Justice Powell wrote in a concurrence that although "qualified and independent assistance" must be provided, it need not take the form of a "licensed attorney." Vitek, 445 U.S. at 497 (Powell, J., concurring).

1 Vitek is plainly relevant to this case. It confirms
2 the plaintiffs' contention that a prisoner has a liberty interest
3 in the essential nature of his confinement, and that this
4 interest must be safeguarded with appropriate procedures. But it
5 does not automatically follow from the Vitek Court's endorsement
6 of the procedures mandated by the district court in that case
7 that the same process is required in every case. See id.
8 (concluding that the procedures set forth by the district court
9 were "appropriate in the circumstances present here." (emphasis
10 added)). The Court's acknowledgment that it is "precisely the
11 subtleties and nuances of psychiatric diagnoses that justify the
12 requirement of adversary hearings," id. at 495, similarly stops
13 short of identifying the circumstances in which an adversary
14 hearing must be held or what that hearing should entail.

15 Indeed, the facts and legal posture of Vitek differ
16 significantly from those before us. The plaintiff in Vitek faced
17 confinement in a psychiatric institution for the duration of his
18 prison sentence based on the opinion of a single doctor, with no
19 opportunity for an additional hearing. The procedures at issue
20 in Vitek, therefore, provided fewer safeguards than were offered
21 to the plaintiffs here. And because the Vitek Court never
22 discussed whether the availability of a postdeprivation hearing
23 negates the need for a predeprivation hearing, its applicability
24 to this case is limited.

25 The Supreme Court's decision in Zinermon v. Burch, 494
26 U.S. 113 (1990), however, does offer guidance as to when a

1 postdeprivation hearing would survive constitutional scrutiny.
2 There, the Court considered the case of a patient admitted to a
3 state mental health hospital after completing voluntary admission
4 forms. The patient later alleged that he was a paranoid
5 schizophrenic and had been unable to give informed consent to his
6 admission. The defendants, he asserted, should have afforded him
7 the procedural safeguards required for involuntary commitment,
8 including a hearing. Id. at 123-24.

9 Quoting Mathews v. Eldridge, 424 U.S. 319, 335 (1976),
10 the Court described the factors to be considered in determining
11 what procedural protections are necessary in a particular case:

12 "First, the private interest that will be
13 affected by the official action; second, the
14 risk of an erroneous deprivation of such
15 interest through the procedures used, and the
16 probable value, if any, of additional or
17 substitute procedural safeguards; and
18 finally, the Government's interest, including
19 the function involved and the fiscal and
20 administrative burdens that the additional or
21 substitute procedural requirement would
22 entail."

23 Zinermon, 494 U.S. at 127.

24 The Zinermon Court observed that, applying the Mathews
25 test, it "usually has held that the Constitution requires some
26 kind of hearing before the State deprives a person of liberty or
27 property." Id. (emphasis in original). But, the Court
28 continued, a postdeprivation hearing might satisfy due process
29 where a predeprivation hearing is "unduly burdensome in
30 proportion to the liberty interest at stake" or "where the State
31 is truly unable to anticipate and prevent a random deprivation of

1 a liberty interest." Id. at 132. "[W]here the State feasibly
2 can provide a predeprivation hearing," however, "it generally
3 must do so regardless of the adequacy of a postdeprivation . . .
4 remedy." Id.

5 The Court concluded that the defendants could be liable
6 to the plaintiff under his section 1983 claim for deprivation of
7 his procedural due process rights because it was foreseeable that
8 a mentally ill patient incompetent to give informed consent would
9 nonetheless sign a voluntary admission form and because the Court
10 could not "say that predeprivation process was impossible" under
11 the circumstances. Id. at 136-37.

12 The deprivation here seems to us to have been as
13 foreseeable as it was in Zinermon. As in that case, the
14 deprivation here occurred at a "predictable point," see id. at
15 136 -- the expiration of the inmate's sentence. Nothing that
16 occurred here was random or unanticipated so as to prevent the
17 State from planning for and then providing predeprivation
18 process. Nor, as we discuss below, can it reasonably be argued
19 that predeprivation procedural protections were "unduly
20 burdensome" in comparison with the substantial liberty interest
21 at stake.

22 Application of the Mathews balancing test supports the
23 conclusion that predeprivation process was required here and that
24 postdeprivation remedies were constitutionally insufficient. See
25 Mathews, 424 U.S. at 334-35. With respect to the "private
26 interest" aspect of the standard, the defendants acknowledge that

1 "involuntary commitment is a significant curtailment of liberty,"
2 but argue that because of the "extremely brief" period of
3 potential prehearing commitment, the safeguards required are not
4 as significant as they would otherwise be. Appellants' Br. 30.
5 We think there can be no serious doubt that the liberty interests
6 implicated here are of a high order. Not only were the
7 plaintiffs' physical freedoms curtailed, but they were also
8 subject to specialized mental health treatment. This treatment
9 included the use of a "penile plethysmograph," which the First
10 Circuit has explained is a "strain gauge strapped to an
11 individual's genitals while sexually explicit pictures are
12 displayed in an effort to determine his sexual arousal patterns."
13 Harrington v. Almy, 977 F.2d 37, 44 (1st Cir. 1992). One can
14 imagine that to be something less than a dignity inspiring
15 experience.

16 Classification as an SVP also constitutes a fundamental
17 change in an inmate's status and privileges. An SVP committed to
18 a psychiatric hospital cannot gain release until he has secured
19 either employment or vocational training, despite the fact that
20 any potential employer must be notified of his SVP status. An
21 SVP also suffers the stigma of the label itself, which connotes a
22 likelihood of recidivist sexually violent behavior, and of a
23 diagnosis of mental illness. And although it may be true that
24 SVPs have already been convicted of sex offenses carrying
25 significant stigma, that the additional stigma is only
26 incremental does not render it illusory.

1 As Vitek confirmed, a prisoner -- even one convicted of
2 an atrocious crime -- maintains a liberty interest in the
3 conditions relating to the essential nature of his confinement.
4 Here, not only did those committed pursuant to the SVP Initiative
5 face a material change in the nature of their confinement, but
6 their confinement was also prolonged.

7 With regard to the second factor in the Mathews test --
8 "risk of an erroneous deprivation of such interest through the
9 procedures used," Zinermon, 494 U.S. at 127 -- the defendants
10 insist that the risk of such an erroneous deprivation during the
11 five-day period before a committed SVP is entitled to a hearing
12 is "slight" because of the safeguards provided in Article 9.
13 Appellants' Br. 30. The defendants' argument is not without
14 force. There were, on paper, procedures intended to mitigate the
15 risk of an erroneous deprivation. For example, three separate
16 medical professionals were required to sign off on every
17 commitment. And, as the defendants point out, fewer than 20
18 percent of those evaluated under the SVP Initiative were
19 ultimately committed.

20 Despite these safeguards, several factors increased the
21 risk that an inmate would be erroneously committed under the
22 Initiative. The OMH physicians charged with examining the
23 prisoners were unfamiliar with the standards for assessing sex
24 offenders and the likelihood of recidivism, and were evaluating
25 them using a novel standard and new tools, such as the Static 99
26 form, with which they had no experience.

1 Although it may be dangerous to overstate the
2 importance of the fact that the Initiative was quickly put into
3 place in a politically charged environment, it is difficult to
4 ignore (as the district court did not). Because of the infancy
5 of the Initiative and the lack of training or formal procedures,
6 coupled with significant political pressure, the risk of error
7 seems to us to have been enhanced. See Rodriguez v. City of New
8 York, 72 F.3d 1051, 1062 (2d Cir. 1995) ("Though we agree with
9 the district court that due process does not require a guarantee
10 that a physician's assessment of the likelihood of serious harm
11 be correct, . . . due process does demand that the decision to
12 order an involuntary emergency commitment be made in accordance
13 with a standard that promises some reasonable degree of
14 accuracy."). Additional safeguards would unquestionably have
15 lessened this risk. If the plaintiffs were afforded notice and a
16 hearing prior to their commitments, the decision as to whether to
17 commit would have been undertaken by a neutral decisionmaker with
18 the benefit of an adversarial hearing.

19 The defendants argue that the availability of a
20 postdeprivation hearing mitigated the risk of erroneous
21 deprivation. They point out that none of the plaintiffs
22 requested a hearing following his commitment. Although this is
23 true, the plaintiffs' filing of a habeas corpus petition in New
24 York State court and Bailey's allegation that he did not know
25 that he could request such a hearing, suggest that the

1 availability and contours of the process likely were not clear to
2 the plaintiffs.⁶

3 With respect to the third part of the Mathews test --
4 the Government's interest, including the function involved and
5 the fiscal and administrative burdens that the additional or
6 substitute procedural requirement would entail, Zinermon, 494
7 U.S. at 127 -- the defendants urge that predeprivation hearings
8 would have imposed a substantial burden on the State. They note
9 that during the first month of the Initiative, eighty prisoners
10 were examined, twenty-one of whom were eventually committed, and
11 that many of these prisoners were on the verge of being released.
12 Because the SVP Initiative had begun only weeks before some of
13 the plaintiffs were scheduled for release, the defendants
14 contend, predeprivation hearings, in addition to conducting
15 psychiatric evaluations, would have diverted scarce resources
16 from the treatment of mentally ill inmates.

17 We disagree. Under the provisions of Article 9, the
18 defendants should have been prepared to present their case for
19 civil commitment at a hearing on five-days notice at any point
20 after a civil commitment was effected. It does not follow that
21 they could not have prepared for such a hearing in advance of
22 commitment without incurring substantial additional expense or
23 effort. The sole reason that holding predeprivation hearings

⁶ The record otherwise contains little detail about what the plaintiffs understood regarding the availability of postdeprivation hearings.

1 would have unduly burdened the State is that a decision was made
2 to create and implement the Initiative on a compressed timeline;
3 any exceptional burden that the State faced was of its own
4 making. We do not think this fact should work in the defendants'
5 favor -- if it did, due process requirements could be curtailed
6 by delaying the establishment of proper procedures until they
7 became "too burdensome."

8 Construing the evidence in the light most favorable to
9 the plaintiffs, the facts alleged, if proven, would establish
10 that the defendants violated the plaintiffs' rights to procedural
11 due process. Even if it may be said that the district court
12 mischaracterized Vitek's dicta as holding, we find no support for
13 the defendants' contention that a predeprivation hearing was not
14 required in the absence of emergent circumstances. The Mathews
15 test brings the defendants' violation into sharp relief: the
16 private interest at stake was significant; the risk of erroneous
17 deprivation was pronounced due to the lack of notice or an
18 adversary proceeding, the politically charged environment, and
19 the novel aspects of this initiative, and that risk would have
20 been reduced by additional procedures; and the burden to the
21 State would have been no greater predeprivation than
22 postdeprivation were it not for the State's own actions in
23 scrambling to implement the Initiative.

II. Qualified Immunity

The defendants are entitled to qualified immunity if they can establish either that (1) "a constitutional right was [not] violated" or (2) "the right was [not] clearly established." Saucier v. Katz, 533 U.S. 194, 201 (2001), overruled in part on other grounds by Pearson v. Callahan, 555 U.S. 223 (2009).⁷ As a part of this inquiry, the Court considers whether "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."⁸ Id. at 202.

⁷ This was the test applied by the district court: The "defendants are entitled to qualified immunity if they show either that plaintiffs have failed to make out a violation of constitutional right or if the right at issue was not clearly established at the time of the alleged violation." Bailey, 722 F. Supp. 2d at 449.

⁸ There is some tension in our Circuit's cases as to whether the qualified immunity standard is of two or three parts, and whether the "reasonable officer" inquiry is part of step two -- the "clearly established" prong -- or whether it is a separate, third step in the analysis. Compare, e.g., Okin v. Vill. of Cornwall-On-Hudson Police Dep't, 577 F.3d 415, 433 (2d Cir. 2009)(reciting two-part test and stating that "[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted" (quoting Saucier, 533 U.S. at 202)), with X-Men Sec., Inc. v. Pataki, 196 F.3d 56, 65-66 (2d Cir. 1999)(a governmental official is entitled to qualified immunity "in any of three circumstances": (1) if the charged conduct does not violate a constitutional right; (2) if the constitutional right "was not clearly established at the time of the conduct"; or (3) "if the defendant's action was objectively legally reasonable in light of the legal rules that were clearly established at the time it was taken" (quotation marks, brackets, and ellipses omitted)); Taravella v. Town of Wolcott, 599 F.3d 129, 133-34 (2d Cir. 2010)(describing qualified immunity analysis as "a two-part inquiry" but adding that "the qualified immunity defense also protects an official if it was 'objectively reasonable' for him at the time of the challenged action to believe his acts were lawful").

1 Qualified immunity is an affirmative defense and the
2 burden is on the defendant-official to establish it on a motion
3 for summary judgment. See In re State Police Litig., 88 F.3d
4 111, 123 (2d Cir. 1996). We have already determined that there
5 is sufficient evidence in the record to support, as a matter of
6 law, the plaintiffs' procedural due process claims. We therefore
7 turn to the question of whether the right at issue was clearly
8 established. In answering that question, we look to whether (1)
9 the right was defined with reasonable clarity, (2) the Supreme
10 Court or the Second Circuit has confirmed the existence of the
11 right, and (3) a reasonable defendant would have understood from
12 the existing law that his conduct was unlawful. Luna v. Pico,
13 356 F.3d 481, 490 (2d Cir. 2004). We have further held that
14 where the law was established in three other circuits and the
15 decisions of our own Court foreshadowed the right, the law was
16 sufficiently "well established" that its violation stripped the
17 defendant of his immunity. Varrone v. Bilotti, 123 F.3d 75, 78-
18 79 (2d Cir. 1997).

19 For a right to be clearly established, it is not
20 necessary that courts have agreed "upon the precise formulation
21 of the standard." Saucier, 533 U.S. at 202. "Assuming, for
22 instance, that various courts have agreed that certain conduct is
23 a constitutional violation under facts not distinguishable in a

 This is not a debate we need enter inasmuch as we conclude
that qualified immunity is not available to the defendants
irrespective of which way the test is articulated.

1 fair way from the facts presented in the case at hand, the
2 [defendants] would not be entitled to qualified immunity based
3 simply on the argument that courts had not agreed on one verbal
4 formulation of the controlling standard." Id. at 202-03.

5 The Supreme Court stated more than twenty years ago in
6 Zinermon that "where the State feasibly can provide a
7 predeprivation hearing . . . it generally must do so regardless
8 of the adequacy of a postdeprivation . . . remedy"
9 Zinermon, 494 U.S. at 132. Unless a predeprivation hearing is
10 "unduly burdensome in proportion to the liberty interest at
11 stake" or "the State is truly unable to anticipate and prevent a
12 random deprivation of a liberty interest," predeprivation notice
13 and a hearing are required before an individual may be deprived
14 of a significant liberty interest. Id.

15 The defendants raise several arguments in support of
16 their position that the right at issue here -- notice and an
17 adversarial hearing prior to civil commitment -- was not so
18 clearly established that a reasonable person in the defendants'
19 position would know that his conduct was unlawful. The
20 defendants contend that the Second Circuit upheld the procedures
21 laid out in Article 9 in Project Release v. Prevost, 722 F.2d 960
22 (2d Cir. 1983), which examined the constitutionality of Article
23 9's provision allowing hospitalization for up to sixty days
24 without a hearing unless one is requested. Project Release
25 dealt, however, with the facial validity of Article 9, and
26 explicitly left open the possibility of an as-applied challenge.

1 Id. at 971. The plaintiffs do not contend that Article 9 is
2 unconstitutional when utilized to take an acutely dangerous and
3 mentally ill person off the streets -- the basis upon which we
4 upheld the statute in Project Release.

5 In that decision, we concluded that involuntary
6 commitment without an automatic hearing within 48 hours was
7 constitutional when dealing with "persons with a mental illness
8 'for which care and treatment in a hospital is essential to such
9 persons' welfare and whose judgment is so impaired that [they
10 are] unable to understand the need for such treatment.'" Id. at
11 972 (quoting MHL §§ 9.27, 9.01). That is not the population at
12 issue here, nor the standard that was applied.

13 The defendants also point out that the New York
14 Appellate Division "found no constitutional violation in
15 plaintiffs' own cases when plaintiffs raised the identical due
16 process claim on state habeas review." Appellants' Br. 37.
17 (emphasis omitted). The defendants refer to State ex rel.
18 Harkavy v. Consilvio, 29 A.D.3d 221, 812 N.Y.S.2d 496 (1st Dep't
19 2006), but that decision was reversed by the New York Court of
20 Appeals, see State ex rel. Harkavy v. Consilvio, 7 N.Y.3d 607,
21 859 N.E.2d 508, 825 N.Y.S.2d 702 (2006). And although the Court
22 of Appeals in Harkavy did not decide the constitutionality of
23 applying Article 9 to prisoners, in a concurrence, as we have
24 seen, Judge Smith noted that it "would raise serious
25 constitutional problems," because the plaintiffs had all been in
26 prison for several years before civil commitment procedures were

1 initiated and there was no "sudden, unforeseen emergency" that
2 would require their immediate commitment without prior notice or
3 a hearing. Id. at 615 (Smith, J., concurring).

4 The defendants cite several cases in which they contend
5 that prehearing transfer and commitment of prisoners and sex
6 offenders has been held to be constitutional. In Gay v. Turner,
7 994 F.2d 425 (8th Cir. 1993) (per curiam), for example, the
8 Eighth Circuit affirmed a grant of summary judgment for a
9 defendant on the plaintiff's due process claim where the
10 plaintiff, an inmate, had been transferred to a state mental
11 hospital without a hearing. Id. at 426. That decision, however,
12 was based on the plaintiff having signed transfer forms, and her
13 failure to adduce any evidence that her consent was not
14 voluntary. Id. at 427.

15 The defendants also rely on Aruanno v. Hayman, 384 F.
16 App'x 144 (3d Cir.), cert. denied, 131 S.Ct. 835 (2010), in which
17 the Third Circuit -- in a non-precedential opinion -- upheld a
18 state-law provision allowing a court to order temporary
19 commitment based on an ex parte submission from the State
20 Attorney General. Id. at 150. Any individual committed under
21 the statute was entitled to a hearing within twenty days of the
22 commitment order. Id.

23 The factual circumstances in Aruanno differ
24 significantly from those here. New Jersey had initiated civil
25 commitment proceedings nearly a year before the plaintiff's
26 release date, but was unable to hold a hearing due in part to the

1 plaintiff's "repeated insistence that he be appointed new
2 counsel." Id. at 145. In addition, Aruanno was temporarily
3 committed pursuant to a judicial order, albeit one based on an ex
4 parte submission. Id. at 148 n.8. Aruanno suffered from
5 schizophrenia and refused to take his medication, which a doctor
6 later testified presented a "very high" risk of future violence.
7 Id. at 146. The non-precedential opinion was issued, moreover,
8 over Judge McKee's dissent, which argued that "absent exigent
9 circumstances, no justification exists for denying [the
10 plaintiff] his due process right to notice prior to his
11 involuntary commitment under the [act]." Id. at 152-53. He
12 continued, "[i]t is clear that post-deprivation hearings are
13 appropriate and constitutionally permissible in emergency
14 situations where there is no realistic opportunity to afford
15 prior notice to one whom the state wants to involuntarily commit.
16 That is simply not the situation here" Id. at 153. We
17 agree.

18 The defendants also point to the procedures in the
19 federal sex-offender commitment statute, 18 U.S.C. § 4248. Under
20 that statute, the Department of Justice must certify to a federal
21 district court that a prisoner is "sexually dangerous," at which
22 point the statute "stays the individual's release from
23 prison . . . giving the Government an opportunity to prove its
24 claims at a hearing." United States v. Comstock, 130 S.Ct. 1949,
25 1954 (2010). The prisoner is then afforded counsel and an
26 adversarial hearing prior to his civil commitment. Id.

1 According to the defendants, the procedures set forth
2 in Article 9 are more protective than are those in the federal
3 statute because the latter permits the individual's release to be
4 stayed for up to seventy-five days or more before his commitment
5 hearing. See 18 U.S.C. § 4247(b); see also United States v.
6 Shields, 522 F. Supp. 2d 317, 334 (D. Mass. 2007).⁹ What the
7 defendants fail to acknowledge, however, is that the federal
8 statute permits a temporary stay of release prior to a commitment
9 hearing; it does not permit, as was the case here, civil
10 commitment followed by the opportunity for a hearing. Here, the
11 question is whether an individual must be afforded the
12 opportunity for a hearing before he is civilly committed to a
13 psychiatric facility. Vitek's emphasis on the "stigmatizing
14 consequences of transfer to a mental hospital" and the "mandatory
15 behavior modification" treatment that prisoners undergo once at
16 the hospital, Vitek, 445 U.S. at 494, suggests there is an
17 important difference between holding an inmate for a brief period
18 beyond his release date for the purpose of providing process
19 before civil commitment and subjecting him to commitment in a
20 psychiatric facility in advance of any hearing.

⁹ In Shields, the district court declined to invalidate the federal sex-offender statute on a facial due process challenge. The court did, however, find that the lack of a probable cause hearing after certification "raises serious constitutional questions." Shields, 522 F. Supp. 2d at 333. The court concluded that, in order to avoid interpreting the act itself as unconstitutional, it would construe it to require a hearing "within forty-eight hours after a certified individual is detained beyond his scheduled release date," unless there were "exigent or extraordinary circumstances." Id. at 337.

1 We ultimately agree with the district court that "the
2 basic proposition that due process requires a predeprivation
3 hearing unless there is an immediate danger to society" was well
4 established prior to 2005. Bailey, 722 F. Supp. 2d at 451.
5 Despite the litany of cases cited by the defendants to suggest
6 that due process tolerates civil commitment of inmates without
7 either notice or a hearing, each of those cases involved critical
8 factors not present here. In none of the cases was a civil
9 commitment effected without notice or a predeprivation hearing
10 where the inmate was safely confined, and, indeed, where the
11 standard the inmate met was not one of immediate and acute
12 dangerousness but rather potential recidivism five, ten, or
13 fifteen years after his release. See, e.g. Glass v. Mayas, 984
14 F.2d 55, 57 (2d Cir. 1993) (upholding involuntary commitment
15 without a predeprivation hearing where the committed individual
16 "was hospitalized following two reports he was threatening an
17 individual with a gun," had displayed behavior described by those
18 who examined him as "hostile, guarded, angry, suspicious,
19 uncooperative, and paranoid," and "had an extensive psychiatric
20 history, which included a history of violent behavior"). The
21 defendants offer no Supreme Court or Second Circuit precedent for
22 the proposition that due process is satisfied if an individual in
23 the plaintiffs' position has the opportunity to request a hearing
24 after he has been labeled an SVP and civilly committed.

25 Except for emergent or otherwise unusual circumstances,
26 such as where an emergency makes it necessary for the State to

1 act immediately to avoid imminent harm to the person being
2 restrained or to the public, or where predeprivation process is
3 highly impracticable, the Supreme Court has long held that "the
4 Constitution requires some kind of a hearing before the State
5 deprives a person of liberty." Zinermon, 494 U.S. at 127
6 (emphasis in original). See also United States v. James Daniel
7 Good Real Prop., 510 U.S. 43, 62 (1993) ("Unless exigent
8 circumstances are present, the Due Process Clause requires the
9 Government to afford notice and a meaningful opportunity to be
10 heard before seizing real property"); Cleveland Bd. of
11 Educ. v. Loudermill, 470 U.S. 532, 542 (1985) ("An essential
12 principle of due process is that a deprivation of life, liberty,
13 or property be preceded by notice and opportunity for hearing
14 appropriate to the nature of the case." (quotation marks and
15 citation omitted)); Vitek, 445 U.S. at 496 ("[N]otice is
16 essential to afford the prisoner an opportunity to challenge the
17 contemplated action and to understand the nature of what is
18 happening to him."); Burtneiks v. City of New York, 716 F.2d 982,
19 988 (2d Cir. 1983) (observing that "the existence vel non of an
20 emergency . . . is a material fact" in determining whether a
21 predeprivation hearing is constitutionally required).

22 Furthermore, the decision to apply the procedures of
23 Article 9 to the plaintiffs was made despite the fact that there
24 was a law in place, Correction Law § 402, which outlined civil
25 commitment procedures for those already incarcerated and which
26 clearly provided for a predeprivation hearing. We think

1 reasonable persons in the defendants' positions would have
2 understood that, absent exigent circumstances not present here,
3 it was unconstitutional to civilly commit inmates to a
4 psychiatric facility prior to any notice or adversarial hearing.
5 Using the words of the district court, in the absence of any
6 "immediate danger to society," a predeprivation hearing was
7 required before civilly committing an inmate and this requirement
8 was "so obvious that no reasonable defendant official could have
9 failed to miss it." Bailey, 722 F. Supp. 2d at 450. The
10 defendants are therefore not entitled to the benefit of qualified
11 immunity.

12 **III. Plaintiffs' Additional Claims**

13 The defendants, citing Sadallah v. City of Utica, 383
14 F.3d 34 (2d Cir. 2004), argue that because they are entitled to
15 qualified immunity on the plaintiffs' procedural due process
16 claims, the defendants are also entitled to summary judgment on
17 the plaintiffs' remaining federal and state claims. The court in
18 Sadallah explained that "[n]ormally, we would not have
19 jurisdiction to consider plaintiffs' [additional] claims . . .
20 because only the issue of . . . entitlement to qualified immunity
21 was immediately appealable. When, however, an appellate court
22 'has taken jurisdiction over one issue in a case, it may, in its
23 discretion, exercise jurisdiction over an independent but related
24 question that is inextricably intertwined with the [appealable
25 issue] or is necessary to ensure meaningful review of that
26 issue.'" Id. at 39 (quoting Ierardi v. Sisco, 119 F.3d 183, 189

1 (2d Cir. 1997)). Specifically, the defendants urge that because
2 the gist of the plaintiffs' other claims is the existence of a
3 deliberate conspiracy to violate the plaintiffs' rights, those
4 claims must fail because the right at issue was not clearly
5 established.

6 We decline to exercise jurisdiction over the
7 plaintiffs' other claims. Reaching these additional claims is
8 not necessary to ensure meaningful review of the qualified
9 immunity question, nor are the claims "inextricably intertwined"
10 with that issue. Furthermore, as a practical matter, because we
11 conclude that qualified immunity does not attach to the
12 procedural due process claims, there would be no basis for
13 dismissing the other claims against the defendants.

14 **IV. Plaintiffs' Summary Judgment Motion**

15 Finally, the plaintiffs assert that the district court
16 erred in not granting summary judgment in their favor on their
17 procedural due process claims after determining that the
18 defendants were not entitled to qualified immunity, and, in a
19 later opinion, that each defendant participated in the
20 constitutional deprivation.

21 The plaintiffs mischaracterize the district court's
22 opinion. The court concluded that the plaintiffs had adduced
23 enough evidence of personal involvement to survive summary
24 judgment -- not that "the defendants did not dispute their
25 'participat[ion] in the creation and implementation' of the SVP
26 initiative." Appellees' Br. at 60. The district court noted

1 that the defendants "dispute the extent and materiality of such
2 involvement" and determined that the question must go to the
3 jury. Bailey, 2010 WL 4237071, at *4, 2010 U.S. Dist. LEXIS
4 113766, at *12. The factual disputes that the district court
5 identified as precluding summary judgment have not been resolved,
6 and we think it impossible for us to do so on the current record.
7 Neither is this a question "inextricably intertwined" with the
8 resolution of the qualified immunity issue.

9 **CONCLUSION**

10 We have considered all of the parties' arguments, and
11 for the reasons set forth above, we affirm the decision of the
12 district court.