

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2014

(Argued: June 5, 2015 Decided: May 17, 2016)

Docket No. 13-3412

ROBERT WARREN, CHARLES BROOKS,
Consolidated Plaintiffs-Appellants,

ROBERT TROCCHIO, SYLVIA TORRES, AS ADMINISTRATRIX OF THE
ESTATE OF JORGE BURGOS, JR., LOUIS MASSEI,
Consolidated Plaintiffs,

KENNETH BAILEY,
Plaintiff,

v.

GEORGE PATAKI, FORMER GOVERNOR OF NEW YORK STATE, SHARON
CARPINELLO, GLENN S. GOORD, EILEEN CONSILVIO, FORMER
EXECUTIVE DIRECTOR, MANHATTAN PSYCHIATRIC CENTER AND KIRBY
FORENSIC PSYCHIATRIC CENTER, ROBERT DENNISON, FORMER
CHAIRMAN OF THE NEW YORK STATE BOARD OF PAROLE AND CHIEF
EXECUTIVE OFFICER OF THE NEW YORK STATE DIVISION OF PAROLE,
DALE ARTUS, FORMER SUPERINTENDENT OF CLINTON CORRECTIONAL
FACILITY,
Defendants-Appellees,

JOHN DOE(S), # 3, SUPERINTENDENT OF WYOMING CORRECTIONAL
FACILITY, JOHN DOE(S), # 4, SUPERINTENDENT OF ATTICA
CORRECTIONAL FACILITY, JOHN DOE(S), # 5, SUPERINTENDENT OF THE

1 DOWNSSTATE CORRECTIONAL FACILITY, JOHN DOES, # 6 THROUGH 20,
2 MEDICAL PERSONNEL WHO EXAMINED AND EVALUATED PLAINTIFF
3 PURSUANT TO NEW YORK STATE MENTAL HYGIENE LAW ARTICLE 9,
4 MICHAEL GIAMBRUNO, JAMES CONWAY, PAUL ANNETTS, EMILIA
5 RUTIGLIANO, PRABHAKAR GUMBULA, OLUSEGUN BELLO, ALLAN
6 WELLS, JONATHAN KAPLAN, MARY ANN ROSS, AYODEJI SOMEFUN,
7 MICHAL KUNZ, WILLIAM POWERS, LEO E. PAYANT, LAWRENCE
8 FARAGO, LUIS HERNANDEZ, SAMUEL LANGER, JEFFREY TEDFORD,
9 FORMER DEPUTY SUPERINTENDENT OF SECURITY, CLINTON
10 CORRECTIONAL FACILITY, WILLIAM J. SACKETT, FACILITY SENIOR
11 PAROLE OFFICER, CLINTON CORRECTIONAL FACILITY, JEAN LIU,
12 PSYCHIATRIST WHO EVALUATED PLAINTIFF FOR POSSIBLE CIVIL
13 COMMITMENT, ABADUL QAYYUM, CHARLES CHUNG,
14 Defendants.*
15

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17
18 Before: SACK, HALL, and CARNEY, *Circuit Judges*.

19 The plaintiffs were civilly committed to state psychiatric facilities pursuant
20 to the New York State Sexually Violent Predator Initiative promulgated by the
21 executive branch of the New York State government in 2005. Challenging their
22 commitments by bringing suit in the United States District Court for the
23 Southern District of New York, the plaintiffs asserted that the defendants, who
24 were allegedly involved in the creation and execution of the Initiative, violated
25 the plaintiffs' rights under the Fourth and Fourteenth Amendments of the U.S.

* We accept the parties' representations, made in response to our inquiry of counsel, that all named defendants were duly served with process in this litigation and thus are properly identified as defendants. The Clerk of Court is therefore respectfully directed to amend the official caption as shown above.

1 Constitution, and state law. The district court (Jed S. Rakoff, *Judge*) concluded,
2 on defendants' motion for summary judgment, that the defendants were not
3 entitled to qualified immunity as a matter of law, a conclusion that we affirmed
4 on interlocutory appeal. Many of the claims were thereafter dismissed by the
5 district court on judgments as a matter of law, while the remainder were tried to
6 a jury. The jury found one defendant liable for procedural due-process
7 violations, and awarded each plaintiff one dollar in nominal damages against
8 that defendant. The appellants now challenge the district court's (1) jury
9 instruction on personal involvement; (2) denial of judgment as a matter of law on
10 procedural due-process liability; (3) denial of judgment as a matter of law on the
11 plaintiffs' entitlement to actual, compensatory damages; (4) entry of judgment for
12 the defendants on the plaintiffs' false-imprisonment claims on the grounds that
13 these claims were duplicative; and (5) limitations on depositions, and several
14 other evidentiary decisions. We affirm the judgment of the district court.

15 AFFIRMED.

16 KAREN R. KING (Jesse S. Crew, Jayme J.
17 Herschkopf, and Ekta R. Dharia, *on the*
18 *brief*), Paul, Weiss, Rifkind, Wharton &
19 Garrison LLP, New York, New York, *for*
20 *Consolidated Plaintiffs-Appellants*.

1 Ameer Benno, Benno & Associates P.C.,
2 New York, New York, *(on the brief)*, for
3 Consolidated Plaintiffs-Appellants.

4
5 CLAUDE S. PLATTON (Barbara D.
6 Underwood, Cecelia C. Chang, *on the brief*),
7 for Eric T. Schneiderman, Attorney General
8 of the State of New York, New York, New
9 York, for Defendants-Appellees Except George
10 Pataki.

11 ABBE DAVID LOWELL (Christopher D.
12 Man, *on the brief*), Chadbourne & Parke,
13 LLP, Washington, District of Columbia, for
14 Defendant-Appellee George Pataki.

15
16 SACK, Circuit Judge:

17 In 2005, then-New York State Governor George Pataki launched the
18 Sexually Violent Predator Initiative (the "SVP Initiative" or the "Initiative"),
19 which provided for the involuntary civil commitment at state psychiatric
20 facilities of some "sexually violent predators" ("SVPs") nearing the date of their
21 release from incarceration or supervision. The six plaintiffs in this case were
22 civilly committed to a psychiatric hospital in late 2005, during the first weeks the
23 Initiative was in effect. In 2008, they filed this action against several individuals
24 who allegedly designed or implemented the Initiative, asserting claims under the
25 Fourth Amendment, the substantive and procedural components of the

1 Fourteenth Amendment's Due Process Clause, the Fourteenth Amendment's
2 Equal Protection Clause, and several provisions of New York state law.

3 In *Bailey v. Pataki*, 708 F.3d 391 (2d Cir. 2013), we affirmed on interlocutory
4 appeal the decision of the district court (Jed S. Rakoff, *Judge*) in *Bailey v. Pataki*,
5 722 F. Supp. 2d 443 (S.D.N.Y. 2010). There, the district court had concluded that
6 the defendants could not establish as a matter of law at the summary judgment
7 stage that they were entitled to qualified immunity on the plaintiffs' procedural
8 due-process claims. In affirming, we concluded that if the material facts alleged
9 were proven, the Initiative would have violated the plaintiffs' clearly established
10 rights to procedural due process. *Bailey*, 708 F.3d at 403-04.

11 Following our decision, the district court held a jury trial on the plaintiffs'
12 false-imprisonment, procedural due-process, substantive due-process, and state
13 law claims against six defendants: former Governor George Pataki; former Office
14 of Mental Health Commissioner Sharon Carpinello; former Department of
15 Correctional Services Commissioner Glenn S. Goord; former Executive Director
16 of Manhattan Psychiatric Center Eileen Consilvio; former Superintendent of
17 Clinton Correctional Facility Dale Artus; and former Division of Parole head
18 Robert Dennison. During the trial, the district court entered judgments as a

1 matter of law pursuant to Federal Rule of Civil Procedure 50 in the defendants'
2 favor on the false-imprisonment claims, among others, deeming them
3 impermissibly duplicative of the procedural due-process claims. The court also
4 denied the plaintiffs' motions for judgment as a matter of law on their procedural
5 due-process claims and their entitlement to actual, compensatory damages for
6 the alleged due-process violations. The jury ultimately rejected the plaintiffs'
7 remaining substantive due-process claims, found defendant Carpinello liable for
8 procedural due-process violations, and awarded each plaintiff one dollar in
9 nominal damages against her.

10 Plaintiffs Robert Warren and Charles Brooks appeal, challenging the
11 district court's (1) jury instruction on personal involvement; (2) denial of
12 judgment as a matter of law on procedural due-process liability; (3) denial of
13 judgment as a matter of law on the plaintiffs' entitlement to actual, compensatory
14 damages; (4) entry of judgment for the defendants on the plaintiffs' false-
15 imprisonment claims on the grounds that these claims were duplicative; and (5)
16 limitations on depositions, and several other evidentiary decisions. The plaintiffs
17 dispute neither the judgment against them on their substantive due-process
18 claims nor the denial of their requests for punitive damages.

1 For the reasons set forth below, we conclude that the plaintiffs' arguments
2 lack merit. We therefore affirm the judgment of the district court.

3 BACKGROUND

4 *Factual Background*

5 We set forth the factual background underlying this appeal in some detail
6 in our opinion affirming on interlocutory appeal the district court's denial of
7 summary judgment for the defendants on the grounds of qualified immunity.
8 *See Bailey*, 708 F.3d at 393-99. We rehearse it here only insofar as we think it
9 necessary to an understanding of our resolution of this appeal.

10 *The SVP Initiative*

11 In October 2005, then-New York State Governor George Pataki faced a
12 challenge: He had tried and failed several times to persuade the State Assembly
13 to establish a program that would permit the civil commitment and confinement
14 of designated sex offenders in New York State. Political pressure on the issue
15 was mounting in the wake of a widely publicized murder committed by a then-
16 recently paroled sex offender. Unwilling to wait any longer, as we described in
17 *Bailey*, *id.* at 394, the Governor directed New York's Office of Mental Health

1 ("OMH") and Department of Correctional Services ("DOCS")¹ to "push the
2 envelope of the State's existing involuntary commitment law," *id.* The result was
3 the SVP Initiative. Its principal theme was that every "sexually violent predator"
4 in state prison should and would be evaluated for involuntary civil commitment
5 before being released from incarceration.

6 Sharon Carpinello, the Commissioner of the New York State Office of
7 Mental Health, with several others, developed an implementation plan for the
8 SVP Initiative. She presented it to Governor Pataki's representatives in mid-
9 September 2005. The Initiative provided for a commitment process based on the
10 procedures set forth in New York Mental Hygiene Law ("MHL") § 9.27 *et seq.*
11 ("Article 9"), instead of the more stringent criteria for commitment set forth in
12 Correction Law § 402,² which the SVP Initiative's designers had also considered.

¹ DOCS is now known as the Department of Corrections and Community Supervision, and commonly referred to by the nearly identical acronym, "DOCCS."

² As we explained in *Bailey*:

Section 9.27 of the Mental Hygiene Law ("MHL"), codified in Article 9 of the MHL and entitled "Involuntary admission on medical certification," allows the director of a hospital to accept any patient "alleged to be mentally ill and in need of involuntary care and treatment upon the certificates of two examining physicians." MHL § 9.27(a). The director must also receive a sworn application explaining why the patient needs mental health treatment. *Id.* After the patient arrives

at the hospital, a member of the hospital's psychiatric staff is required to examine him and confirm that he should be admitted. MHL § 9.27(e). The law requires that the nearest relative of the patient, or any other person the patient has designated, be given notice of the involuntary admission within five days of admission. MHL § 9.29(b). Within sixty days of admission, the patient or a friend or relative can request a hearing on the involuntary admission, which is required to be held within five days of receipt by the hospital director of notice of the request. MHL § 9.31(a). If no hearing has been held or court order issued, or if the patient does not consent to the admission, the hospital director is required to seek a court order within sixty days of the patient's involuntary admission if the director wishes to pursue the matter. MHL § 9.33(a).

Correction Law § 402 is entitled "Commitment of mentally ill inmates." Under that law, if a staff physician at a prison informs the prison superintendent that an inmate is mentally ill, the superintendent asks a "judge of the county court or justice of the supreme court in the county" to appoint two physicians to examine the inmate. Correction Law § 402(1). If both physicians conclude that hospitalization is appropriate, they must produce certificates to that effect. *Id.* The superintendent is then required to apply to the court for a commitment order, and personally serve notice on the inmate and his or her closest relative or, if relatives are unknown or not within the state, "any known friend," five days prior to the commitment. Correction Law § 402(3). The Mental Hygiene Legal Services must then inform the inmate (or, in appropriate cases, others concerned with the inmate's welfare) of "the procedures for placement in a hospital and of the inmate's right to have a hearing, to have judicial review with a right to a jury trial, to be represented by counsel and to seek an independent medical opinion." *Id.* The inmate is entitled to request a hearing before a judge prior to any transfer to a psychiatric hospital. Correction Law § 402(5). The procedural protections in section 402 may

1 Under this process, before being released from prison, inmates who had been
2 deemed "sexually violent predators" would be evaluated by two OMH
3 psychiatrists, each of whom would render an opinion as to whether the inmate
4 should be involuntarily committed to a state psychiatric facility. Before the
5 evaluation, DOCS would provide OMH with criminal history reports for each
6 inmate. OMH would use these reports to create editorialized descriptions of the
7 inmate's criminal history and an assessment of their likelihood of recidivism.
8 They would then provide these materials to the OMH psychiatrists. If the OMH
9 psychiatrists recommended civil commitment, the inmate would be transferred
10 to a psychiatric center and examined by a psychiatrist to confirm the diagnosis.
11 Once admitted to the facility, the inmate would begin undergoing a specialized
12 course of treatment.

13 OMH officials informed Governor Pataki's office that they needed four to
14 six months to prepare for the implementation of the SVP Initiative, including
15 training the psychiatrists responsible for examining the inmates. Governor
16 Pataki nonetheless ordered that the SVP Initiative begin forthwith.

only be bypassed where admission to a hospital is sought on
an emergency basis. Correction Law § 402(9).

708 F.3d at 394-95.

1 Thereafter, under Goord's direction, DOCS began identifying inmates to be
2 evaluated for civil commitment by OMH psychiatrists. The pool of inmates was
3 drawn from those who had committed a violent offense as defined by New York
4 Penal Law § 70.02, and those who had committed a sex offense as defined by
5 Penal Law § 130, as well as from another list of inmates who had committed
6 felonies that had been, to some extent, sexually motivated. Any inmate who
7 refused to appear for an evaluation was potentially subject to disciplinary action,
8 and refusal could have constituted a parole violation.

9 The SVP Initiative was in effect only briefly. In 2006, after several inmates
10 who were confined under the SVP Initiative sought habeas corpus relief in state
11 courts, the New York Court of Appeals held that the SVP Initiative should
12 proceed under Correction Law § 402 instead of MHL Article 9, and ordered that
13 each civilly committed individual remaining in OMH custody be provided an
14 immediate retention hearing. *State ex rel. Harkavy v. Consilvio*, 7 N.Y.3d 607, 614,
15 859 N.E.2d 508, 512, 825 N.Y.S.2d 702, 706 (2006). Then, in 2007, the New York
16 State Legislature ended the SVP Initiative by enacting a comprehensive statutory
17 scheme for the civil commitment of dangerous sex offenders nearing release from
18 incarceration or supervision.

1 *The Defendants' Roles*

2 Each of the defendants played a unique role in the design and
3 implementation of the SVP Initiative.

4 George Pataki was the Governor of New York State from 1995 to 2006. He
5 authorized the SVP Initiative, made it the official policy of the State of New York,
6 and tasked DOCS and OMH with developing a detailed plan for its
7 implementation.

8 Sharon Carpinello was Commissioner of OMH at the time the SVP
9 Initiative was in place. Her duties as Commissioner included establishing,
10 developing, and coordinating OMH programs and procedures. She helped to
11 develop OMH's plan for implementing the SVP Initiative, reviewed the plan, and
12 approved it for submission to Governor Pataki. After Governor Pataki approved
13 the plan, she ordered OMH to carry it out.

14 Glenn Goord was the Commissioner of DOCS during the implementation
15 of the SVP Initiative. He was involved in the process of planning the SVP
16 Initiative, and understood that it called for inmates to be committed without a
17 prior hearing. Goord ordered DOCS to implement the SVP Initiative by selecting
18 for examination inmates due to be released and, depending on the result of the

1 examination, arranging for their transportation to psychiatric hospitals for
2 commitment.

3 Eileen Consilvio was Executive Director of Manhattan Psychiatric Center
4 ("MPC") when the SVP Initiative was created. She agreed to make the MPC
5 available to receive inmates designated for involuntary civil commitment under
6 the initiative. Consilvio handled the logistics of Warren's and Brooks's civil
7 commitment there.

8 Dale Artus was Superintendent of the Clinton Correctional Facility³
9 ("Clinton"), where Warren was imprisoned and to where he was returned after
10 he was civilly committed. Warren allegedly filed complaints about his
11 confinement with Artus, who did not respond to them.

12 At the time that the SVP Initiative became effective, Robert Dennison was
13 the highest-ranking officer in the Division of Parole ("Parole").⁴ Warren alleges
14 that when he was confined at Clinton, he wrote to Dennison complaining about
15 his reconfinement despite his having been granted parole. It is not clear from the

³ The Clinton Correctional Facility may be better known by the name of the town in which it is located: Dannemora, New York. *See* Village of Dannemora, <http://www.villageofdannemora.com> (last visited May 16, 2016).

⁴ In 2011, the Division of Parole was merged with DOCS (which, as explained above, is now known as DOCCS).

1 record what if anything Dennison did to investigate or otherwise address the
2 situation.

3 *Plaintiffs' Confinement*

4 Plaintiffs Robert Warren and Charles Brooks, both convicted sex offenders,
5 were involuntarily committed at the MPC and Kirby Psychiatric Center pursuant
6 to the SVP Initiative after they were scheduled to be released from prison. Their
7 involuntary civil commitment was based entirely on the recommendations of
8 OMH psychiatrists.

9 Robert Warren was serving a sentence for multiple crimes, including
10 sexual abuse in the first degree, when he was approved for parole and scheduled
11 to be conditionally released from prison on September 27, 2005, under the
12 supervision of Parole. The day before his scheduled release, and without prior
13 notice, two OMH psychiatrists evaluated Warren by conducting short
14 interviews, one of which was done remotely by video, and completing with
15 respect to each of them a so-called Certification of Examining Physician to
16 Support an Application for Involuntary Admission form. On that basis, they
17 determined that he required involuntary commitment in a psychiatric hospital.
18 On the day of his scheduled release, he was transferred to a state psychiatric
19 institution instead.

1 Less than two months later, Warren was again examined by a psychiatrist,
2 but this time he was found not to require confinement. On October 23, 2005, he
3 was discharged into the custody of Parole. He was never in fact released on
4 parole, however, nor was he given a parole revocation hearing. Instead, he was
5 returned to DOCS and housed at Clinton, where he remained until October 23,
6 2006—the latest possible expiration date for his original prison sentence.⁵

7 Charles Brooks had nearly completed serving his eight-year prison term
8 for burglary and sexual abuse in the second degree when, on Friday, October 7,
9 2005, the last business day before his scheduled release, he was evaluated by two
10 OMH staff psychiatrists, who determined that he required involuntary
11 commitment in a psychiatric hospital. Brooks was then sent to the MPC, where
12 he remained confined pursuant to Article 9 until May 2009, at which time he was

⁵ Warren later challenged his reconfinement as part of a state habeas corpus petition. The county court that heard the petition deemed his reconfinement to be unlawful, but found the appropriate remedy to be "merely a judgment directing petitioner's re-release to parole supervision subject to appropriate conditions imposed b[y] parole authorities, including special conditions which must be satisfied prior to the petitioner's re-release," which in Warren's case encompassed an approved-residence special condition. *Warren v. Artus*, No. 06-15, at 7-8 (N.Y. Sup. Ct., Clinton Cty., July 5, 2006), reproduced at Joint Appendix filed on this Appeal ("J.A.") 1498-99. Warren was ultimately unable to obtain Parole's approval of a residence, and thus remained at Clinton until October 23, 2006.

1 committed under the statute that replaced the SVP Initiative, MHL §§ 10.06-.17
2 ("Article 10").⁶

3 *Procedural History*

4 Brooks, Warren, and several other similarly situated persons filed actions
5 in 2008 in the U.S. District Court for the Southern District of New York seeking
6 compensatory damages for their involuntary civil commitment under the SVP
7 Initiative. The plaintiffs alleged violations of their Fourth Amendment right
8 against false imprisonment, their Fourteenth Amendment rights to equal
9 protection and substantive and procedural due process, and several rights under
10 state law. The actions were designated as related and consolidated for trial.

11 During discovery, the plaintiffs filed notices of depositions for all of the
12 defendants named in the complaints. The district court informed the plaintiffs
13 that they would be permitted to take the depositions of only four senior official
14 defendants of their choice, however, and that each deposition could not exceed

⁶ Brooks's confinement under Article 10 was the subject of separate litigation challenging Article 10's validity, whether the state had jurisdiction over Brooks as a consequence of his illegal commitment under Article 9, and the adequacy of Brooks's legal representation. The challenges were unsuccessful. *See Brooks v. State*, 120 A.D.3d 1577, 993 N.Y.S.2d 409 (4th Dep't 2014), *leave to appeal denied*, 25 N.Y.3d 901, 30 N.E.3d 164, 7 N.Y.S.3d 273 (2015); *Brooks v. Sawyer*, No. 9:11-CV-248 (N.D.N.Y. Dec. 16, 2013); *State v. C.B.*, 88 A.D.3d 599, 931 N.Y.S.2d 300 (1st Dep't 2011), *appeal dismissed and leave to appeal denied*, 18 N.Y.3d 905, 963 N.E.2d 790, 940 N.Y.S.2d 213 (2012).

1 two hours. The plaintiffs chose to, and did, take the depositions of Pataki,
2 Carpinello, Goord, and Consilvio.

3 On March 31, 2010, the parties filed cross-motions for summary judgment.
4 The district court issued a "bottom line" order granting the defendants' motion in
5 part on statute of limitations grounds, but denying it on the issues of qualified
6 immunity and lack of personal involvement.⁷ The court also denied the
7 plaintiffs' motion in its entirety. The district court later issued two opinions and
8 orders setting forth its reasoning for its summary judgment decisions, which we
9 affirmed on interlocutory appeal. *See Bailey v. Pataki*, 708 F.3d 391 (2d Cir. 2013).

10 Back in the district court, both sides then filed motions *in limine* in
11 preparation for trial. Three of those motions are relevant to this appeal. First, the
12 plaintiffs moved to preclude the defendants from arguing that the plaintiffs
13 suffered no injury because they would have been confined nonetheless had they
14 received a constitutionally sufficient pre-deprivation hearing. Second, the
15 plaintiffs moved to preclude evidence concerning their criminal histories, prison
16 disciplinary records, and OMH records, or, in the alternative, to bifurcate the
17 trial. Third, the plaintiffs moved to require the defendants to bear the burden of

⁷ Warren's claim against defendant Paul Annetts was dismissed by the court for lack of his personal involvement in the events at issue.

1 disproving that plaintiffs had suffered compensable damages. The district court
2 denied the first two of these motions, and granted the third.

3 A jury trial was conducted between July 9 and July 31, 2013. The parties
4 called twenty-nine fact witnesses in all, but no expert witnesses.

5 During the trial, the district court entered several judgments as a matter of
6 law in the defendants' favor pursuant to Rule 50: for Artus and Dennison on all
7 claims, and for the other defendants on all state-law claims except for negligence
8 claims against Carpinello and Consilvio. The district court also entered
9 judgment for the defendants on the false-imprisonment claims because it deemed
10 them duplicative of the plaintiffs' procedural due-process claims. The court
11 reasoned that the jury would need to find a procedural due-process violation in
12 order to find that the false imprisonment was not otherwise "privileged," and
13 that the damages recoverable under both causes of action were the same. J.A.
14 1293 (Trial Transcript ("Tr.") 2871:20-2874:14).

15 After the district court entered judgment for the defendants on the false-
16 imprisonment claims, the plaintiffs moved for judgment as a matter of law on
17 their procedural due-process claims, and noted for the record their view that
18 judgment as a matter of law under Rule 50 would also be appropriate on the

1 false-imprisonment claims, whose dismissal they contested. The district court
2 denied the motion.

3 Before the case was submitted to the jury, the plaintiffs withdrew their
4 remaining negligence claims. As a result, the principal disputed issues sent to
5 the jury were whether: (1) the plaintiffs had established violations of their
6 substantive due-process rights; (2) each defendant proximately caused the
7 procedural due-process violations at issue; and (3) the plaintiffs were entitled to
8 compensatory or punitive damages, and if so, in what amount or amounts.

9 On July 26, 2013, the district court held a charging conference during
10 which the parties discussed how to instruct the jury on the meaning of proximate
11 causation in the context of a procedural due-process violation. To establish a
12 section 1983 claim, "a plaintiff must establish a given defendant's personal
13 involvement in the claimed violation in order to hold that defendant liable in his
14 individual capacity." *Patterson v. Cty. of Oneida, N.Y.*, 375 F.3d 206, 229 (2d Cir.
15 2004). To proximately cause a procedural due-process violation, therefore, a
16 defendant must be personally involved in the violation. A plaintiff may establish
17 such personal involvement by making any one of five showings (the "*Colon*
18 factors"):

1 (1) the defendant participated directly in the alleged constitutional
2 violation, (2) the defendant, after being informed of the violation
3 through a report or appeal, failed to remedy the wrong, (3) the
4 defendant created a policy or custom under which unconstitutional
5 practices occurred, or allowed the continuance of such a policy or
6 custom, (4) the defendant was grossly negligent in supervising
7 subordinates who committed the wrongful acts, or (5) the defendant
8 exhibited deliberate indifference to the rights of [the plaintiffs] by
9 failing to act on information indicating that unconstitutional acts
10 were occurring.

11
12 *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995).

13 In preparation for the charging conference, the plaintiffs requested a jury
14 instruction on proximate causation that listed the five *Colon* factors and
15 explained that each would be sufficient to establish a defendant's personal
16 involvement. During the conference, the court proposed an alternative
17 instruction that described the threshold for personal involvement more briefly,
18 with language that tracked only the third *Colon* factor. The plaintiffs made no
19 objection to the court's proposed instruction on the threshold requirement for
20 finding personal involvement. *See* J.A. 1304 (Tr. 2915:21-2916:8).

21 The court subsequently delivered its proposed proximate causation
22 instruction, with one modification not relevant here, to the jury. The court first
23 explained that each defendant could be held liable for violating a plaintiff's
24 procedural due-process rights if he or she took steps that "proximately caused

1 that plaintiff to be involuntarily committed under the sexually-violent predator
2 initiative." J.A. 1350 (Tr. 3100:02-04). The court then addressed the threshold for
3 personal involvement:

4 If a given defendant played a material role, directly or indirectly, in
5 creating or implementing, even in good faith, the aforementioned
6 aspects of the sexually-violent predator initiative that were
7 constitutionally defective, and that foreseeably would be applied to
8 someone in a given plaintiff[s] position, that would be sufficient to
9 establish that that defendant proximately caused the violation of
10 that plaintiff[s] constitutional right to procedural due process.

11 J.A. 1350 (Tr. 3100:17-24).

12 On the issue of damages, the district court gave the following instruction:

13 In addition to disputing plaintiffs' proof of damages in various
14 respects, defendants also raise a special defense, namely, that even if
15 the given plaintiff you are considering had been given full due
16 process, he would still have been involuntarily committed, and so he
17 did not suffer any actual injury. On this defense, it is the defendants
18 who bear the burden of proving this defense by a preponderance of
19 the credible evidence. If you find that, notwithstanding [] a
20 defendant[s] liability on a given claim, the plaintiff who made that
21 claim did not suffer any injury, you should then award damages of
22 one dollar. These are called "nominal damages."

23 J.A. 1351 (Tr. 3102:20-3103:05).

24 On July 31, 2013, the jury reached its verdict. It rejected the plaintiffs'
25 substantive due-process claims and found Carpinello alone liable for procedural
26 due-process violations. It further found that the plaintiffs were not entitled to

1 compensatory damages or punitive damages, and awarded nominal damages of
2 one dollar to each plaintiff.

3 On August 8, 2013, the plaintiffs renewed their motion for judgment as a
4 matter of law pursuant to Rule 50(b), which the district court summarily denied.
5 This appeal followed.

6 DISCUSSION

7 I. Standards of Review

8 A. *Judgment as a Matter of Law*

9 We review the district court's decision to grant or deny a Rule 50 motion
10 for judgment as a matter of law *de novo*. *SEC v. Ginder*, 752 F.3d 569, 574 (2d Cir.
11 2014).

12 B. *Jury Instructions*

13 We review "a claim of error in jury instructions *de novo*, reversing only
14 where appellant can show that, viewing the charge as a whole, there was a
15 prejudicial error." *United States v. Tropeano*, 252 F.3d 653, 657-58 (2d Cir. 2001).

16 "'An erroneous instruction requires a new trial unless the error is harmless' . . .

17 [and a]n error is harmless only if the court is convinced that the error did not

18 influence the jury's verdict." *Gordon v. N.Y.C. Bd. of Educ.*, 232 F.3d 111, 116 (2d

19 Cir. 2000) (quoting *LNC Invs., Inc. v. First Fid. Bank, N.A. N.J.*, 173 F.3d 454, 460

(2d Cir. 1999)). If an instruction improperly directs the jury on whether a party has satisfied its burden of proof, "it is not harmless error because it goes directly to the [merits of the] claim, and a new trial is warranted." *Id.* (quoting *LNC Invs., Inc.*, 173 F.3d at 462).

C. *Discovery Rulings*

"We review a district court's discovery rulings for abuse of discretion." *Moll v. Telesector Res. Grp.*, 760 F.3d 198, 204 (2d Cir. 2014). "A district court has abused its discretion if it has (1) based its ruling on an erroneous view of the law, (2) made a clearly erroneous assessment of the evidence, or (3) rendered a decision that cannot be located within the range of permissible decisions." *Lynch v. City of New York*, 589 F.3d 94, 99 (2d Cir. 2009) (internal quotation marks omitted).

D. *Evidentiary Rulings*

We review the district court's evidentiary rulings for abuse of discretion. *Manley v. AmBase Corp.*, 337 F.3d 237, 247 (2d Cir. 2003). We "give district court judges wide latitude in determining whether evidence is admissible at trial." *Meloff v. N.Y. Life Ins. Co.*, 240 F.3d 138, 148 (2d Cir. 2001) (internal quotation marks omitted). Even if we conclude that the district court abused its discretion, however, "an erroneous evidentiary ruling warrants a new trial only when a

1 substantial right of a party is affected, as when a jury's judgment would be
2 swayed in a material fashion by the error." *Lore v. City of Syracuse*, 670 F.3d 127,
3 155 (2d Cir. 2012) (internal quotation marks omitted). We "will not grant a new
4 trial if we find that the improperly admitted evidence was 'harmless—i.e., [that]
5 the evidence was unimportant in relation to everything else the jury considered
6 on the issue in question.'" *Cameron v. City of New York*, 598 F.3d 50, 61 (2d Cir.
7 2010) (brackets in original) (quoting *United States v. Germosen*, 139 F.3d 120, 127
8 (2d Cir. 1998)). "An error is harmless if we 'can conclude with fair assurance that
9 the evidence did not substantially influence the jury.'" *Cameron*, 598 F.3d at 61
10 (quoting *United States v. Rea*, 958 F.2d 1206, 1220 (2d Cir. 1992)). In civil cases, the
11 burden falls on the appellant to show that the error was not harmless and that "it
12 is likely that in some material respect the factfinder's judgment was swayed by
13 the error." *Tesser v. Bd. of Educ. of City Sch. Dist. of City of N.Y.*, 370 F.3d 314, 319
14 (2d Cir. 2004) (internal quotation marks omitted).

15 II. Jury Instructions on Personal Involvement

16 The plaintiffs now argue, for the first time, that the district court made a
17 prejudicial error in the portion of its proximate-causation instruction that
18 described the standard for personal involvement. The plaintiffs contend that the
19 instruction improperly took into account only the third of the five *Colon* factors,

1 and that the district court improperly added the terms "material" and
2 "foreseeably" to the third *Colon* factor, thereby increasing the plaintiffs' burden of
3 proof. **Blue 33-36.** The plaintiffs waived these arguments by failing to object to
4 the instruction at trial, and we accordingly affirm as to this issue. *See United*
5 *States v. Bradley*, 812 F.2d 774, 778 (2d Cir.) (a "failure to object at trial" to a jury
6 instruction "result[s] in a waiver of any claim of error on appeal"), *cert. denied*, 484
7 U.S. 832 (1987). The plaintiffs had previously requested a substantially different
8 proximate-causation charge as to their procedural due-process claims, which
9 included all five *Colon* factors. When the district court proposed its shorter
10 alternative, however, the plaintiffs' counsel made no mention of *Colon* or the
11 inclusion of the terms "material" or "foreseeably."⁸ Instead, the plaintiffs' counsel
12 objected only to the omission of the words "without counsel" from another
13 portion of the instruction. After the district court agreed with this objection, the
14 plaintiffs' counsel stated, "[a]nd that's all we had for that one." *See* J.A. 1304 (Tr.
15 2915:21-2916:8).

⁸ The plaintiffs' counsel's failure to object to the inclusion of the terms "material" and "foreseeably" in the proximate-cause instruction was understandable, because the proximate-cause inquiry is focused on whether "the causal connection between the defendant's action and the plaintiff's injury is sufficiently direct," *Gierlinger v. Gleason*, 160 F.3d 858, 872 (2d Cir. 1998), and the district court's use of those terms was therefore apt.

1 We "will disregard the failure to object where there is plain error affecting
2 substantial rights that goes to the very essence of the case, or where the party's
3 position has previously been made clear to the trial court and it was apparent
4 that further efforts to object would be unavailing." *Anderson v. Branen*, 17 F.3d
5 552, 556-57 (2d Cir.) (citations omitted), *reh'g denied*, 27 F.3d 29 (2d Cir. 1994).
6 Neither condition is met here. As to the former, a substantial right is not
7 implicated if there is no likelihood that the error or defect affected the outcome of
8 the case, *see, e.g., Tesser*, 370 F.3d at 319, and there is no evidence in the record
9 before us sufficient to establish that the plaintiffs could have demonstrated any
10 of the other four *Colon* factors. As to the latter condition, when the plaintiffs'
11 counsel requested an instruction as to all of the *Colon* categories early in the trial,
12 the district court judge responded that he "agree[d] . . . we're going to have to
13 spell this out in some detail in the final instructions.," J.A. 706 (Tr. 542:07-08).
14 That hardly suggests that further objections would have been unavailing.
15 Accordingly, the plaintiffs' arguments as to the personal-involvement instruction
16 have been waived.

1 III. Judgment as a Matter of Law on the Plaintiffs' Procedural Due-
2 Process Claims

3 The district court properly granted judgment as a matter of law to
4 Dennison and Artus pursuant to Rule 50(a). The district court also properly
5 denied the plaintiffs' renewed judgment as a matter of law against Consilvio,
6 Goord, and Pataki under Rule 50(b).

7 Judgment as a matter of law is appropriate "only if [the court] can
8 conclude that, with credibility assessments made against the moving party and
9 all inferences drawn against the moving party, a reasonable juror would have
10 been compelled to accept the view of the moving party." *Zellner v. Summerlin*,
11 494 F.3d 344, 370-71 (2d Cir. 2007) (emphasis removed and internal quotation
12 marks omitted). A Rule 50 motion may only be granted if "there exists such a
13 complete absence of evidence supporting the verdict that the jury's findings
14 could only have been the result of sheer surmise and conjecture, or the evidence
15 in favor of the movant is so overwhelming that reasonable and fair minded
16 [persons] could not arrive at a verdict against [it]." *Ginder*, 752 F.3d at 574
17 (brackets in original) (quoting *Tepperwien v. Entergy Nuclear Operations, Inc.*, 663
18 F.3d 556, 567 (2d Cir. 2011)).

1 The district court properly dismissed the action against Artus and
2 Dennison pursuant to their Rule 50(a) motion. They were defendants only as to
3 Warren's claim that he was improperly returned to prison rather than released
4 on parole after he was found not to require further civil commitment. There was
5 no evidence that either defendant was responsible—either directly or
6 indirectly—for Warren's continued imprisonment. To be sure, Warren testified
7 that he wrote to them to lodge complaints about his reconfinement, but that
8 testimony was an insufficient basis for a reasonable juror to conclude that Artus
9 and Dennison knew of Warren's plight, let alone had the ability or responsibility
10 to do something about it.

11 The district court also correctly declined to hold as a matter of law that
12 Consilvio, Goord, and Pataki were liable for violating the plaintiffs' procedural
13 due-process rights. The evidence does not compel a finding that these
14 defendants proximately caused the procedural due-process violations allegedly
15 suffered by the plaintiffs. The evidence at trial established that Consilvio—who
16 was the Executive Director of the MPC in 2005—was aware that the plaintiffs
17 were being committed under Article 9, but only handled the logistics for civil
18 confinement at the facility. She was not otherwise involved in planning or

1 carrying out the SVP Initiative. A reasonable juror would not have been
2 compelled to conclude, based on this evidence, that Consilvio proximately
3 caused any of the alleged violations of the plaintiffs' constitutional rights, given
4 her mere logistical role in one of the intermediate steps of the civil commitment
5 process.

6 The evidence at trial with respect to Goord established that while he was
7 involved in the implementation of the SVP Initiative—by overseeing the sharing
8 of information between DOCS and OMH about soon-to-be-released inmates and
9 assisting with the transportation of inmates to psychiatric facilities—he played
10 only a minor role in designing it. Although Goord participated in several
11 planning meetings, this evidence, standing alone, was not so powerful that it
12 would compel a reasonable juror to conclude that Goord proximately caused the
13 relevant harm: the plaintiffs' confinement without notice or a pre-deprivation
14 hearing.

15 Finally, a reasonable juror would not have been compelled to conclude
16 that Pataki played a material role in creating, coordinating, or implementing the

1 specific aspects of the SVP Initiative that were constitutionally defective.⁹ Pataki
2 testified that he "directed [his] team to work with OMH and to work with
3 [DOCS] to put in place the program," J.A. 1071 (Tr. 1988:02-03), and that he "gave
4 a green light to go forward with the program," J.A. 1070 (Tr. 1987:04-05). But
5 with respect to the degree of his knowledge and involvement, he testified:

6 Before there was a court decision, I did not understand any of the
7 specifics of the initiative other than that there were three medical
8 professionals who had to evaluate and conclude that the inmates
9 were mentally ill and posed an imminent threat to themselves or
10 others, and that they were entitled to a hearing. Beyond that, I
11 didn't know any of the other details. I didn't know what section of
12 law was being used; I didn't know even what article of law was
13 being used. That was left to the professionals to determine.

14 J.A. 1073 (Tr. 1999:11-20). He testified further that he "didn't know whether the
15 hearing was before or after the commitment." J.A. 1073-74 (Tr. 1999:25-2000:03).

16 Pataki had admitted earlier in the course of the litigation that he ordered
17 DOCS and OMH to use the MHL § 9.27 standard for evaluating individuals
18 under the SVP Initiative and to follow the procedures laid out in Article 9. The
19 district court cautioned the jury, however, that none of these admissions

⁹ In *Bailey*, we explained that the SVP Initiative's use of the procedures set forth in Article 9 did not provide for adequate due process protections, because "absent exigent circumstances . . . it was unconstitutional to civilly commit inmates to a psychiatric facility prior to any notice or adversarial hearing." 708 F.3d at 408.

1 "necessarily mean[t] that he personally ordered that." J.A. 1087-88 (Tr. 2055:22-
2 2056:01). In light of this evidence, and accepting Pataki's testimony as credible, a
3 reasonable juror would not have been compelled to conclude that Pataki played
4 a material role in creating, coordinating, or implementing the defective aspects of
5 the SVP Initiative.

6 In sum, the district court did not err in granting the defendants' Rule 50(a)
7 motion for judgment as a matter of law as to Artus and Dennison or in denying
8 the plaintiffs' Rule 50(b) renewed motion for judgment as a matter of law against
9 Consilvio, Goord, and Pataki.

10 IV. Actual Damages

11 The plaintiffs argue that the district court erred in denying them judgment
12 as a matter of law as to whether the defendants' alleged due-process violations
13 caused the plaintiffs' injuries, and therefore whether they were entitled to actual
14 damages instead of only nominal damages. The defendants counter that the
15 district court improperly shifted the burden of proof on this issue to them. We
16 conclude that the district court did not err in denying judgment as a matter of
17 law to the plaintiffs on the causation question and submitting it to the jury.
18 Because the defendants shouldered the burden of proof on this issue, we need

1 not reach their arguments as to whether the district court's decision to shift this
2 burden to them was permissible.

3 It is well-settled that "[a]bsent a showing of causation [of the plaintiffs'
4 injuries by the defendants' unconstitutional acts] and actual injury, a plaintiff is
5 entitled only to nominal damages." *Miner*, 999 F.2d at 660 (citing *Carey v. Piphus*,
6 435 U.S. 247, 263, 266-67 (1978); *Patterson*, 905 F.2d at 568). At trial, the
7 defendants asserted what the parties term a "no harm, no foul" defense¹⁰—they
8 argued, in essence, that even if the plaintiffs had been provided constitutionally
9 adequate pre-confinement process they would nonetheless have been committed.
10 The plaintiffs argue that the district court erred in denying them judgment as a
11 matter of law on this issue, and that because the defendants did not call any
12 expert witnesses to opine on what might have happened in a hypothetical pre-
13 deprivation hearing in 2005, the defendants could not satisfy their burden of
14 proof. The plaintiffs further assert that the jury would have to engage in

¹⁰ We reject the plaintiffs' argument that the defendants waived their "no harm, no foul" defense because they failed to plead it as an affirmative defense. Causation is a requirement for establishing a viable section 1983 procedural due-process claim, not an affirmative defense that must be raised in the pleadings. And in any event, the defendants' failure to plead this defense was excusable because it was not clear at the outset that they would bear the initial burden on this issue, as the district court correctly recognized. *See* J.A. 555-56 (Tr. 60:22-61:03).

1 impermissible speculation in order to resolve this question. We disagree. There
2 was sufficient evidence before the jury to support a finding that Warren and
3 Brooks would have been committed even if they had received due process, and
4 therefore that the defendants had carried their burden on this issue.

5 The plaintiffs were constitutionally entitled only to "notice and an
6 adversarial hearing prior to civil commitment." *Bailey*, 708 F.3d at 405. Principles
7 of due process did not require the defendants to provide the plaintiffs with a
8 hearing conducted pursuant to Correction Law § 402, nor were they
9 constitutionally entitled to call a physician, psychiatrist, or expert witnesses
10 favorable to them, no matter that their ability to call such witnesses might have
11 rendered the proceedings fairer. Thus, in establishing their "no harm, no foul"
12 defense, the defendants were not required to present evidence—either through
13 expert testimony or otherwise—establishing that the plaintiffs would have been
14 confined under Correction Law § 402 or under Article 10, or that the plaintiffs
15 would have been committed in the face of testimony by favorable witnesses.
16 Rather, the defendants needed only to have presented *some* evidence sufficient to
17 enable a jury to conclude that the plaintiffs would have been civilly committed
18 following an adversarial proceeding on notice.

1 This the defendants did. As the district court correctly noted, the trial
2 itself replicated the presentation of proof at a constitutionally adequate pre-
3 commitment hearing, allowing the jury to evaluate what the strength of the
4 State's evidence at such a hearing would have been. J.A. 1301 (Tr. 2905:19-22).
5 Further, as the plaintiffs acknowledge, Pls.' Br. at 45, the examining OMH
6 psychiatrists testified regarding information that they were given in 2005 and
7 conclusions that they drew based on that information, which is presumably what
8 an examining OMH psychiatrist would have testified to at a properly convened
9 and conducted pre-commitment hearing. The cross-examination by the
10 plaintiffs' counsel of the examining OMH psychiatrists—which the district court
11 described as "piercing," J.A. 1301 (Tr. 2903:07-08)—permitted the jury to see
12 "what would [have] happen[ed] if the plaintiff[s] had had counsel" at a pre-
13 commitment hearing in 2005. J.A. 1300 (Tr. 2899:01-05). The jury was well aware
14 that the psychiatrists were employed by OMH, and it was free to take that fact
15 into account in assessing damages. Even though the jury did not have before it
16 the testimony of any court-appointed or plaintiff-retained psychiatrist, it could
17 nevertheless infer from the state psychiatrists' testimony what other psychiatrists
18 might have recommended.

1 Permitting the defendants to establish their defense based on such
2 evidence might, of course, have placed the plaintiffs at a decided disadvantage in
3 light of the fact that the defendants effectively deprived the plaintiffs of evidence
4 that would have been relevant to establishing causation: a contemporaneous pre-
5 deprivation psychiatric evaluation by an independent party. But once the
6 defendants carried their burden, the plaintiffs had an obligation to rebut it. The
7 plaintiffs' challenge in mounting a rebuttal, while perhaps difficult, was not
8 necessarily impossible to overcome. For instance, they might have presented
9 expert testimony on the variability of medical opinions,¹¹ or testimony based on a
10 contemporary medical examination that cast doubt on the 2005 evaluations of the
11 OMH doctors. They did not pursue either possibility, or use any alternative
12 approach.

13 In light of the evidence at trial, then, a juror would not have been
14 compelled to accept the plaintiffs' view that the defendants had failed to carry
15 their burden on their "no harm, no foul" defense. The district court therefore did

¹¹ As the Supreme Court has recognized, "[t]he subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations." *Addington v. Texas*, 441 U.S. 418, 430 (1979). We have also acknowledged that "some psychiatrists tend to favor institutionalization more often than others who tend to favor release." *Goetz v. Crosson*, 967 F.2d 29, 34 (2d Cir. 1992).

1 not err in denying the plaintiffs judgment as a matter of law on this issue and
2 submitting it to the jury.

3 V. Judgment as a Matter of Law on the False-Imprisonment Claims

4 We conclude that the district court did not err in granting judgment as a
5 matter of law for the defendants on the false imprisonment claims on the basis
6 that these claims duplicated the plaintiffs' procedural due-process claims. The
7 district court reasoned that the false-imprisonment and procedural due-process
8 claims were duplicative on the grounds that, first, the jury would need to find a
9 procedural due-process violation in order to conclude that the false
10 imprisonment was not otherwise "privileged," and second, the damages for both
11 claims were necessarily the same. *See* J.A. 1293 (Tr. 2871:20-2874:14). As to the
12 first basis for the court's decision, the fact that two claims share a common
13 element of proof does not necessarily render them duplicative, and because the
14 plaintiffs' procedural due-process claims were submitted to the jury, the first
15 ground was, standing on its own, insufficient to support the entry of judgment as
16 a matter of law for the defendants on the false-imprisonment claims. Perhaps it
17 is usually the better practice to allow all liability claims to go to the jury, with
18 careful instructions not to award duplicative damages. But the district court was
19 correct here that the plaintiffs could not have obtained any additional damages if

1 their false imprisonment claims had been submitted to the jury, and therefore no
2 new trial is warranted.

3 "Rights, constitutional and otherwise, do not exist in a vacuum. Their
4 purpose is to protect persons from injuries to particular interests, and their
5 contours are shaped by the interests they protect." *Carey*, 435 U.S. at 254.
6 Damages awards in section 1983 suits therefore "must be considered with
7 reference to the nature of the interests protected by the particular constitutional
8 right in question," and accordingly, "the elements and prerequisites for recovery
9 of damages appropriate to compensate injuries caused by the deprivation of one
10 constitutional right are not necessarily appropriate to compensate injuries caused
11 by the deprivation of another." *Id.* at 264-65. Thus, the compensatory damages
12 calculation for different constitutional violations turns on the nature of the
13 injuries suffered even though the amount of compensatory damages awarded is
14 in any event limited to the actual injuries suffered by the plaintiff.

15 In the procedural due-process context, actual damages are based on the
16 compensation for injuries that resulted from the plaintiff's receipt of deficient
17 process. *See Poventud v. City of New York*, 750 F.3d 121, 135-36 (2d Cir. 2014) (en
18 banc). To calculate such damages, courts must determine whether a different

1 outcome would have been obtained had adequate procedural protections been
2 given. If the outcome would not have been different, the plaintiff is
3 presumptively entitled to no more than nominal damages. *See id.*; *see also Carey*,
4 435 U.S. at 262-63. If, however, a plaintiff can show that he suffered mental and
5 emotional distress caused by the denial of procedural due process itself (as
6 opposed to the mental and emotional distress caused by, for instance, the
7 incarceration that would have occurred absent the due-process violation), he is
8 entitled to recover actual damages only to that extent. *See Carey*, 435 U.S. at 263
9 (distinguishing between distress attributable to "the justified deprivation" and
10 that caused by "deficiencies in procedure").

11 In the false-imprisonment context, "upon pleading and proving merely the
12 unlawful interference with his liberty, the plaintiff is entitled to 'general'
13 damages for [proved injuries arising from] loss of time and humiliation or
14 mental suffering." *Kerman v. City of New York*, 374 F.3d 93, 125 (2d Cir. 2004)
15 (some internal quotation marks omitted).¹²

¹² The compensatory damages that may be awarded for false imprisonment fall into two categories: general damages and special damages. General damage is a harm of a sort inseparable from the unlawful restraint. . . . Items of special damage commonly include physical discomfort, shock, or

1 Although at first blush these categories of damages appear to be different,
2 in this case, all of the damages that the plaintiffs could have sought from a false
3 imprisonment claim were also available on the plaintiffs' procedural due process
4 claim, and were rejected by the jury. The defendants were able to prove to the
5 jury's satisfaction that the plaintiffs would have been confined even if they had
6 been given a pre-confinement hearing. That barred any award of compensatory
7 damages for the plaintiffs' loss of time outside confinement, under both a
8 procedural-due-process and a false-imprisonment theory.

9 It is possible that other claims for compensatory damages remained viable.
10 For example, the plaintiffs alleged injuries related to the humiliation and mental
11 suffering caused by the unlawfulness of their confinement. J.A. 205-08. But, if
12 actually proven, those injuries would have been similarly available under a
13 procedural due process theory, as *Carey* makes clear. *See Carey*, 435 U.S. at 264
14 (recognizing that "mental and emotional distress caused by the denial of
15 procedural due process itself is compensable under § 1983," even when proper
16 procedures would have had the same result). The jury, by awarding no such

injury to health, loss of employment, and injury to the plaintiff's
reputation or credit, and must be specifically pleaded and proven.

Kerman, 374 F.3d at 125 (citations, internal quotation marks, and alterations omitted).
The plaintiffs here did not seek special damages.

1 damages, necessarily concluded that the plaintiffs had failed to prove any such
2 injury. Remanding this case to the district court to allow the plaintiffs to pursue
3 such damages on a false imprisonment claim would be, in effect, an invitation to
4 retry questions already presented to, and rejected by, a jury.

5 Because the jury found that the plaintiffs suffered no compensable injury
6 that could be linked to their false imprisonment claim, no new trial on their false
7 imprisonment claim is necessary. We therefore affirm the judgment of the
8 district court on this claim.

9 VI. Discovery and Evidentiary Issues

10 Lastly, the plaintiffs challenge the district court's decision to limit the
11 plaintiffs to four two-hour depositions of the defendants; its decision to permit
12 the defendants to make several statements to the jury that the plaintiffs
13 characterize as inflammatory, irrelevant, and cumulatively prejudicial; and its
14 admission of evidence regarding Brooks's Article 10 hearing in 2009. We reject
15 all three arguments.

16 A. *Limitation on Depositions*

17 "A district court has wide latitude to determine the scope of discovery, and
18 we ordinarily defer to the discretion of district courts regarding discovery
19 matters." *In re "Agent Orange" Prod. Liab. Litig.*, 517 F.3d 76, 103 (2d Cir. 2008)

(brackets and internal quotation marks omitted), *cert. denied sub nom. Isaacson v. Dow Chem. Co.*, 555 U.S. 1218 (2009), and *Stephenson v. Dow Chem. Co.*, 555 U.S. 1218 (2009). We see no reason to second-guess the district court's decision to limit the plaintiffs to four depositions of no longer than two hours each of the key players involved in the SVP Initiative. Because of the number of defendants, the number of people involved in the case, and the breadth of its subject matter, the district court's eagerness to keep the discovery process on a tight leash is easily understood. Moreover, as the district court pointed out, the plaintiffs' inability to depose certain witnesses before trial was mitigated by the plaintiffs' counsel's ability to request permission to depose witnesses during the trial—which requests the district court granted as to other witnesses—or to question them outside the presence of the jury. J.A. 1170 (Tr. 2385:13-20). We therefore decline to disturb the judgment on this basis.

B. Inflammatory Statements

In their opening statements, defense counsel referred to the plaintiffs' "serious sex offenses like rape and sexual abuse of children," J.A. 577 (Tr. 28:20-21), "unspeakable crimes," J.A. 583 (Tr. 49:20), and "sickening backgrounds," J.A. 583 (Tr. 51:09-10), as well as the "crimes you cannot even imagine" committed by "people like the plaintiffs," J.A. 583 (Tr. 49:09). Similarly, in their summation,

1 defense counsel graphically described the plaintiffs' sex offenses; described the
2 plaintiffs as among "the worst criminals in society," J.A. 1345 (Tr. 3078:21-22); and
3 implored the jury to remember that the "six or more victims of these plaintiffs,
4 they are not just numbers; they are mothers, wives, and daughters," J.A. 1347 (Tr.
5 3086:02-03). Defense counsel also made several statements to which the plaintiffs
6 objected as inaccurate, including that Warren's "plea was based on his having
7 been charged [with] raping his 8-year-old stepdaughter." J.A. 580 (Tr. 39:09-10).
8 The plaintiffs argue that the district court abused its discretion in permitting
9 defense counsel to dwell on and so characterize the plaintiffs' sex offenses, which
10 the plaintiffs argue was both irrelevant and cumulatively prejudicial.

11 While we are troubled by the specter of a jury deciding this case on the
12 basis of revulsion against the plaintiffs' crimes rather than strictly on the
13 evidence of the alleged deprivation of their constitutional rights, we must
14 nonetheless affirm. First and most important, the plaintiffs did not object to
15 these comments at the time of opening or closing statements. The plaintiffs'
16 arguments in this regard were therefore waived. *Cf. United States v. Terry*, 702
17 F.2d 299, 317 (2d Cir.) (defendant waived claims based on statement in
18 summation by failure to contemporaneously object), *cert. denied sub nom.*

1 *Guippone v. United States*, 464 U.S. 992 (1983), and *Williams v. United States*, 461
2 U.S. 931 (1983). Second, as to closing statements, both plaintiffs had earlier
3 opened the door to information about their past through their counsel's broad
4 questioning of them on direct examination.¹³

5 C. *Admission of Evidence of Brooks's Article 10 Hearing*

6 We also reject the plaintiffs' argument that the district court abused its
7 discretion in admitting evidence regarding Brooks's Article 10 hearing in 2009.
8 The fact that Brooks was civilly committed following that hearing is probative of
9 whether he would have been committed in 2005. Indeed, the evidence at
10 Brooks's Article 10 hearing overlapped substantially with the evidence reviewed
11 by the examining OMH psychiatrists in 2005. The outcome of Brooks's Article 10

¹³ For example, as the district court recognized:

THE COURT: The door was clearly opened to virtually anything in his past that you have a good-faith basis for asking him. I am once again surprised that after I spent many minutes yesterday going through all this, that plaintiff then chose to elicit broad statements from Mr. Brooks that opens, it seems to me, opens the door to anything in his past. The one thing that was not opened is the fact that he is presently incarcerated and being held on a burglary charge. Clearly that is just a charge.

J.A. 859 (Tr. 1146:09-17).

1 hearing was thus probative as to what the results of a 2005 hearing that complied
2 with the Constitution's due-process requirements would likely have been.

3 Moreover, the district court issued a cautionary instruction to "clue [the
4 jury] in as to why Article 10 may, in [the jury's] discretion, be relevant." J.A. 869
5 (Tr. 1186:16-18). The district court explained that Article 10 employs different
6 substantive standards; that information may have been available in 2009 that was
7 not available in 2005; and that the plaintiffs contended that it was "too
8 speculative to assume that because someone was confined several years later
9 under Article 10, that they would have been confined if given due process under
10 Article 9." J.A. 868-69 (Tr. 1185:12-1186:14). Inasmuch as the jury was thus fully
11 equipped to assess the import of the Article 10 hearing on Brooks's claim for
12 damages, the district court did not abuse its discretion in admitting this
13 evidence.

14 CONCLUSION

15 For the foregoing reasons, the judgment of the district court is AFFIRMED.