SLEET, District Judge.

1. INTRODUCTION

On June 20, 1994, Jerome K. Hamilton filed this civil rights action, *pro se*, against several employees of the Delaware Department of Corrections. These defendants include: Faith Levy, Pamela Faulkner, and William Queener, who are members of the Multi-Disciplinary Team at the Gander Hill prison facility in Wilmington, Delaware (the "MDT defendants"); Frances Lewis, chairperson of the Delaware Department of Corrections Central Institutional Classification Committee ("CICC"); and George M. Dixon, Jack W. Stephenson, Deborah L. Craig, Joanne Smith, Dennis Loebe, Francis Cockroft, Jerry Borga, Richard Schockley and Eldora C. Tillery, who were all members of the CICC ("CICC defendants"). In his complaint, Hamilton alleges that the defendants violated his Eighth Amendment right against the imposition of cruel and unusual punishment by knowingly disregarding an excessive risk to his personal safety. *See* 42 U.S.C. § 1983. For these alleged wrongs, Hamilton seeks compensatory, punitive, and special damages. Presently before the court is the defendants' motion for summary judgment. Because of the defendants have failed to demonstrate that they are entitled to judgment as a matter of law, the court will deny the defendants' motion. The reasons for the court's decision are set forth in detail below.

II. SUMMARY JUDGMENT STANDARD

The court can grant summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). An issue is "genuine" if, given the evidence, a reasonable jury could return a verdict in favor of the non-moving party. *See, e.g., Abraham v. Raso*, 183 F.3d 279, 287 (3d Cir. 1999) (citing *Anderson*

v. Liberty Lobby, Inc., 477 U.S. 242, 248-51 (1986)). A fact is "material" if it bears on an essential element of the plaintiff's claim. *See, e.g., Abraham*, 183 F.3d at 28. In order to defeat a motion for summary judgment, the nonmoving party must demonstrate the existence of a material fact supplying sufficient evidence, not mere allegations, for a reasonable jury to find for the nonmovant. *See Steelman III v. Carper*, 124 F. Supp. 2d 219, 222 (D. Del. 2000) (citing *Olson v. General Elec. Astrospace*, 101 F.3d 947, 951 (3d Cir. 1996)).

On summary judgment, the court cannot weigh the evidence or make credibility determinations. *International Union, United Auto., Aerospace & Ag. Implement Workers of America, U.A.W. v. Skinner Engine Co.*, 188 F.3d 130, 137 (3d Cir. 1999). Instead, the court can only determine whether there is a genuine issue for trial. *See Abraham*, 183 F.3d at 287. In doing so, the court must look at the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences and resolving all reasonable doubts in favor of that party. *See Pacitti v. Macy's*, 193 F.3d 766, 772 (3d Cir. 1999).

Next, the court will describe the facts giving rise to the defendants' motion.

III. BACKGROUND

On August 5, 1992, Jerome Hamilton was assaulted by another prisoner while incarcerated at Gander Hill Prison ("Gander Hill"). Hamilton alleges that this assault occurred because of the defendants' deliberate indifference to his safety. Specifically, he alleges that the defendants failed to place him in protective custody even though they knew that his life was possibly in danger as a result of his cooperation in an official investigation into drug trafficking at a local prison which led to the arrest of both prison guards

and prison inmates.

It has been remarked that:

> Hamilton has a long history of being assaulted throughout the Delaware prison system. He has been transferred out of the State of Delaware twice, and has been placed in protective custody on numerous occasions. While an explanation for each of Hamilton's violent clashes throughout the prison system is absent from the record, the fact that Hamilton's safety has been an ongoing concern is not in dispute.

Hamilton v. Leavy, 117 F.3d 742, 744 (3d Cir. 1997) (reversing the court's grant of summary judgment to the defendants on a prior motion in this action).

Because Hamilton's experiences in prison prior to August of 1992 have already been described in detail, *see* 117 F.3d at 744-45, the court will only describe the facts relating to the assault that occurred on August 5, 1992.

On September 4, 1990, Hamilton was transferred to Virginia pursuant to the Interstate Corrections Compact. Hamilton was transferred to Virginia out of concern for his safety. In *Hamilton v. Leavy*, the Third Circuit stated that, "there appeared to be no safe place for Hamilton in the Delaware prisons." *See id.* at 745. In December of 1991, Hamilton was returned to Delaware and temporarily placed in Gander Hill Prison ("Gander Hill") for the purpose of prosecuting two actions in Delaware state court. *See id.*

A. Orders Concerning Hamilton's Return to Delaware

On December 13, 1991, the Delaware Superior Court held a replevin hearing in *Hamilton v. Redman*, C.A. No. 86c-SE-38. Jerome Hamilton appeared *pro se* at this hearing. John J. Polk, a deputy attorney general, appeared on behalf on the defendant. At the hearing, the court stated that Hamilton would be held in a Delaware prison in order "for him to have access to the lawbooks and get out his discovery and so on while he's up here." *See Appendix*, D.I. 186, at A45. The court then convened for a short

period of time so that the State could determine whether the "prison people" could maintain the "special precautions" involved in detaining Hamilton in Delaware. *See id*. at A44. After the recess, Polk stated that the deputy administrator for the Delaware Department of Corrections Compact indicated that "a one to two-month stay by Mr. Hamilton in Delaware is something they can accommodate." *Id*. at A45. Polk also stated he emphasized with the Department of Corrections representative that "Hamilton is in need of protective custody," and that he was told that Hamilton "can be accommodated in Gander Hill or SCI." *Id*. at A46. Polk then stated that "[m]y request of the Department – and I don't think that there would be a problem adhering to this – is that he be housed here in Gander Hill." *Id*. At the end of the hearing, Judge Taylor specifically stated:

> Let's leave it that way, then. So, you'll – you [Hamilton] are to be detained up here at the State Gander Hill Prison for a length of time up to two months, and it will be dependent upon what reports I get back from the Deputy Attorney General, from you and what progress is made toward resolving this thing without further trial. At that point, then we can chart, of course, which we can only speculate about today. So, we'll leave it that way. Prison will have you up to two moths and during that time Mr. Polk will cooperate with you and try to work something if possible, and will keep the Court informed immediately after the December 27th response."

Id. at A49.

On March 5, 1992, Judge Taylor wrote a letter to Polk which stated that Polk did not supply Hamilton with discovery as ordered and that Hamilton was "ordered held at the Gander Hill Prison for two months pending resolution of this matter." *Id*. at A36. The Judge further explained that the Interstate Corrections Compact Administrator "has contacted my office to see if [Hamilton] can be returned to the prison from which he had been transferred for the purpose of resolving this case." *Id*. Judge Taylor then stated that Polk had "failed to comply with my order of December 13, 1991. If Gander Hill Prison needs action, they you should take immediate action to comply with the order of December 13, 1991. Until you

comply with this Order, there is no alternative but to keep petitioner at the Gander Hill facility. IT IS SO ORDERED." *Id*.

Judge Taylor retired on June 30, 1992. On August 5, 1992 (ironically, the same day as the assault), Judge Haile Alford wrote a letter to Jerome Hamilton in response to his June 23, 1992, letter requesting court intercession on his behalf. In the letter, Judge Alford explained that Judge Taylor had ordered Hamilton held at Gander Hill until Polk attempted to resolve the matter without trial. *See id*. at 34. Also, and most significantly, Judge Alford construed Judge Taylor's prior orders in the case:

> The letter from the Court dated March 5, 1992, ***does not order that you are to be held at Gander Hill until the completion of your case***. Because this case is not set down for trial, the conditions that caused you to be incarcerated at Gander Hill have changed, and there is no longer a reason in [this] matter for you to remain at that specific facility. This letter takes no position on your continued incarceration at Gander Hill with respect to the other matters you have pending before Delaware courts. . . .

Id. (emphasis added).

B. Snitching Incident

On March 25, 1992, Hamilton submitted an "Emergency Grievance" against Correctional Officer Simpson for calling him "a good telling mother f_____g snitcher in a day room around other inmates who heard the same above threat[en]ing statement." This incident was confirmed by other witnesses. An April 11, 1992, report on the incident written by Lieutenant McCreanor, stated that "C.O. Simpson, after being provoked, exercised poor judgment by calling IM [inmate] Hamilton a snitch." After the incident, the "Resident Grievance Resolution Committee" of five prison officials recommended "a thorough investigation" to Deputy Warden George Martino ("Martino") because "statements of calling inmates 'snitches' the Committee believes that comments of this nature has the potential of a major disturbance and requires

immediate action." On June 15, 1992, Martino concluded that Simpson did make the statement; his ruling on the matter was: "Grievance upheld. C.O. Simpson's response to offender Hamilton was inappropriate." In addition, Martino directed that "C.O. Simpson's supervisor is to discuss appropriate and professional demeanor [with Simpson]."

On June 18, 1992, the Gander Hill Multi-Disciplinary Team ("MDT") consisting of defendants, Faith Levy, Pamela Faulkner, and William Queener, reviewed Hamilton's file on their own initiative and issued a unanimous written recommendation which summarized Hamilton's situation and recommended that he be placed in protective custody. In particular, the MDT's recommendation explains that:

> Per Deputy AG John Polk, the reason Hamilton was sent to VA [Virginia] was because he had worked with IA [Internal Affairs] in a drug investigation involving officers and inmates. Prior to this Hamilton had been off and on protective custody and administrative segregation and classified to MSU [Maximum Security Unit] and close custody. He has reportedly been involved in . . . [misconduct] as well as victimized in an assault(s). Subsequently, Hamilton claims that protective custody concerns still exist 'throughout the state.'

D.I. 186, A164-166.

On June 24, 1992, the Institutional Classification Committee ("ICC"), which had the authority to put Hamilton in protective custody, reviewed and considered the MDT's recommendation. The ICC decided to take no action. Defendant Frances Lewis[1], chairperson of the ICC, acknowledged in deposition testimony that an MDT protective custody recommendation is a "serious matter," and agreed that the MDT "is in the best position to make enlightened decisions" about assigning inmates to the proper programs and security levels. D.I. 186, at A150.

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[1]In *Hamilton v. Leavy*, the Third Circuit noted that Lewis had previously personally approved transfers of Hamilton into protective custody on November 16, 1998 and February 8, 1989. These transfers resulted from Hamilton being labeled a snitch. *See id.* at 745.

On July 24, 1992, Steven M. Clayton was placed in the Gander Hill Facility following his July 9, 1992 escape and recapture from the Sussex Work Release Center. Sometime thereafter, Clayton was placed in the same cell with Hamilton. On August 5, 1992, Clayton assaulted Hamilton. According to Hamilton, Clayton accused Hamilton of being a snitch during the assault. Clayton, who pleaded guilty to the assault, stated that he committed the offense because Hamilton was "a snitcher on inmates and officers at [Gander Hill]." *See Hamilton v. Leavy*, 117 F.3d at 745. As a result of the assault, Hamilton required surgery to repair two jaw fractures. *See id*. On August 12, 1992, Frances Lewis then requested an emergency change of Hamilton's classification and transfer to Protective Custody.

C. Litigation Resulting From the August 5, 1992 Assault

1. *Hamilton v. Martino*

As a result of the August, 1992 assault, Hamilton filed a civil rights against Deputy Warden Martino, Warden Elizabeth Neal, and Bureau Chief Hank Risley in this court on September 8, 1993. This matter was captioned *Hamilton v. Martino*, CA 93-93-439-LON. A subsequent suit filed by Hamilton against Colleen Schotzberger was consolidated with the *Martino* case on December 1, 1993. In the *Martino* action, the court construed Hamilton's complaint as

> asserting two claims against each of these defendants pursuant to 42 U.S.C. § 1983. First, the plaintiff charges that defendants violated his Eighth Amendment right to be free from cruel and unusual punishment in failing to protect him from the August 25, 1992 [sic] assault. Second, plaintiff charges that defendants did not transfer him to protective custody, where he would have received protection from other inmates, on the basis of his race in violation of the Equal Protection Clause of the Fourteenth Amendment. Plaintiff subsequently amended his complaint in the lead action to assert failure to protect claim[s] against another defendant, Correctional Officer Simpson.

D.I. 186, at A70.

In a June 10, 1997 Order, the court granted the defendants' motion to dismiss which it considered

as one for summary judgment because the parties attached matters outside of the pleadings. Applying *Farmer v. Brennan*, 511 U.S. 825, the *Martino* court granted summary judgment in favor of the defendants because "[t]here is no evidence to establish that any of the defendants knew or should have known that Clayton posed a substantial risk of serious harm to plaintiff." *Id*. at A76. Hamilton attempted to appeal the court's decision, however, on August 8, 1998, his appeal was dismissed for lack of jurisdiction because it was untimely filed.

2. *Hamilton v. Leavy*

Hamilton filed the present action on June 20, 1994. In his complaint, Hamilton named Faith Leavy, Pamela Faulkner, William Queener and Frances Lewis as defendants. D.I. 2. On August 25, 1994, Hamilton filed a motion for appointment of counsel. On September 2, 1994, the defendants filed a motion pursuant to FRCP Rule 20(a) that their case be "joined with the case of *Hamilton v. Martino, et. al.*, Case No. 93-439-LON. D.I. 15. On that same date, the defendants also filed a motion to dismiss. D.I. 16. On September 13, 1994, the defendants followed up their "Motion of Joinder of Defendants" with a Motion to Consolidate the case with *Hamilton v. Martino*. D.I. 20.

On November 3, 1994, the court issued an Order granting summary judgment in favor of MDT defendants, Levy, Faulkner, and Queener.[2] The court granted summary judgment to the MDT defendants because "they recommended that Hamilton be placed in protective custody, and were without authority to effectuate that recommendation." *See Hamilton v. Leavy*, 117 F.3d at 745. As to defendant Lewis, the court stated that: "the only issue of fact remaining in the case is whether defendant Lewis was either

[2]Because the defendants attached affidavits to their motion to dismiss, the court decided the motion as one for summary judgment.

informed by plaintiff or was otherwise specifically aware that plaintiff was facing a substantial risk of serious harm while housed in the general population at the MPCJF." D.I. 47, at ¶5.

In addition, the court's November 3, 1994 Order denied Hamilton's request for appointment of counsel, prevented him from pursuing additional discovery, and did not allow him to amend his complaint to add new defendants. *Id*. The Order also denied the defendants' motions for joinder and consolidation.

The parties then submitted further briefing on the one remaining factual issue in the case. *See* D.I. 53 & 56. On May 26, 1995, the court entered summary judgment in favor of defendant Lewis and the case was dismissed. Specifically, the court granted summary judgment in Lewis's favor on the ground that the facts did not establish that she was aware of the risk to Hamilton, and that a reasonable factfinder could not find otherwise. *Hamilton v. Leavy*, 117 F.3d at 745.

In June of 1997, the Third Circuit reversed the court's decision in *Hamilton v. Leavy*, 117 F.3d 742 (3d Cir. 1997). Specifically, the circuit court determined that the district court erred in "failing to acknowledge the MDT's recommendation that Hamilton should be placed in protective custody as evidence that he faced a substantial risk of serious harm." *Id*. at 747. The court also determined that "a factfinder could infer that Lewis knew that the threat to Hamilton's safety was imminent." *Id*. As to the MDT defendants, the court held that a there was a genuine issue of material fact as to whether the MDT defendants acted reasonably following the rejection of their recommendation. *Id*. at 748. Finally, the Third Circuit instructed the district court on remand to appoint counsel for Hamilton, allow him to pursue

discovery, and permit him to amend his complaint. *Id. at 749-50.*[3]

With this background in mind, the court will turn to the substance of the defendants' arguments.

IV. DISCUSSION

In their motion for summary judgment, the defendants argue that they are shielded from suit because they are entitled to sovereign, absolute, "absolute quasi-judicial immunity," and qualified immunities. The defendants also contend that Hamilton is precluded from asserting any Eighth Amendment claims as a result of an adverse judgment in *Hamilton v. Martino*. In addition, the defendants maintain that Hamilton's claims against certain defendants cannot proceed because of procedural errors. Specifically, they allege that claims against certain defendants are time barred, and that Hamilton has failed to properly serve other defendants. Finally, the defendants assert that Hamilton's claims under Delaware statutes fail to state a claim upon which relief can be granted. The court will address these arguments in turn

A. Immunities From Suit

1. Eleventh Amendment Immunity

The defendants first assert that they are immune from suit in their official capacities[4] pursuant to the doctrine of sovereign immunity according to the Eleventh Amendment.[5] The court agrees and will dismiss all claims for monetary damages brought against the defendants in their official capacities because they

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[3]After the Third's Circuit's decision, this case was reassigned to Judge Gregory M. Sleet on September 28, 1998.

[4]In his second amended complaint, Hamilton attempts to sue the defendants in their individual and official capacities.

[5]The Eleventh Amendment provides: "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another state, or by Citizens or subjects of any Foreign State." U.S. Const. amend. XI.

enjoy sovereign immunity under the Eleventh Amendment. *See Edelman v. Jordan*, 415 U.S. 651, 663 (1974). However, to the extent that Hamilton seeks to recover from the defendants in their individual capacities, such claims are within the scope of 42 U.S.C. § 1983 and are not barred by the Eleventh Amendment.

2. Absolute Judicial Immunity

The defendants next contend that they are entitled to absolute judicial immunity because they were complying with a December 13, 1991 Delaware Superior Court Order which they allege called for Hamilton to remain at the Gander Hill facility. As the defendants correctly state in support of their argument, public officials acting pursuant to a court order are absolutely immune from suit. *See Wolfe v. City of Pittsburgh*, 140 F.3d 236, 240 (3d Cir. 1998) (citing *Lockhart v. Hoenstine*, 411 F.2d 455, 460 (3d Cir. 1969)). However, the defendants' argument is without merit because they were under no express order that would have precluded them from providing Hamilton with effective protection. *See Wade v. Bethesda Hospital*, 356 F. Supp. 380, (S.D. Ohio, 1973) (rejecting a similar claim to absolute immunity because the defendants' attempted to misconstrue the court order at issue). In fact, a fair reading of the court orders in question actually lead the court to the opposite conclusion. In other words, despite the defendants' claims to the contrary, actual compliance with the orders would have likely resulted in Hamilton's placement into protective custody.

In this case, the defendants allege that "all defendants acted in accordance with the Superior Court's December 13, 1991 and March 5, 1992 Orders to keep Hamilton at Gander Hill." They also suggest that defendant Lewis and the CICC were attempting to comply with these orders when they took "no action" on the MDT's recommendation. First, as the court described the orders in section III. A.

above, the orders would not have prevented the defendants from providing Hamilton with effective protection at Gander Hill. In fact, on December 13, 1991, the Superior Court emphasized that Hamilton was in need of protective custody and only agreed to have him placed at Gander Hill after being assured that the facility could meet Hamilton's needs for heightened protection. *See* D.I. 186, at A43-46. In addition, the Orders simply did not prevent the defendants from having Hamilton moved elsewhere for protective custody during this time period. As Judge Alford explained in her August 5, 1992 letter to Jerome Hamilton, Hamilton was "not order[ed] . . . to be held at Gander Hill until completion of [the] case." *Id*. at A34. Finally, the defendants have also failed to establish that the members of the CICC interpreted the court orders as preventing them from moving Hamilton from Gander Hill. In fact, in requesting emergency review of Hamilton's classification status after the assault, Frances Lewis included a copy of Judge Alford's August 5th letter and stated that the Judge's "interpretation *agrees with my prior opinion that the court never specifically stated that Mr. Hamilton was required to remain at this facility.*" D.I. 186 at A35 (emphasis added). As Hamilton points out, the defendants "try to say that they failed to protect Hamilton in order to comply with an alleged order that they actually did not know about, and which did not actually affect their decision, and which did not really forbid them to move Hamilton away from Gander Hill, had they so decided, nor forbid them to protect him at Gander Hill, had they so decided." D.I. 205, at 14. In light of the language of the orders in question and the facts in this case, the court concludes that the defendants are not entitled to absolute immunity based on any alleged compliance with a court order.

3. Quasi-Absolute Judicial Immunity

The defendants next argue that they are entitled to "quasi-absolute judicial immunity." Specifically,

they assert that members of the MDT or ICC would be absolutely immune from any claims under Section 1983. In support of their arguments, the defendants cite to *Jordan v. Keve*, 387 F. Supp. 765 (D. Del 1974). In *Jordan v. Keve*, two prisoners challenged the constitutionality of their maximum security classification. *See id*. at 767. In rejecting the prisoner's claims, the court stated that it would "not review the factual basis of initial classification decisions reached by the institutional classification committee of the Delaware Correctional Center unless those decisions are demonstrated to have been made for reasons wholly irrelevant to considerations of custody and rehabilitation and for reasons designed to infringe fundamental constitutional rights." *Id*. at 771. The defendants urge the court to "follow its precedent and find the actions of the defendants in classification decisions are not subject to review and make them absolutely immune." *See* D.I. 185 at 19.

After briefly reviewing *Jordan v. Keve*, the court finds the defendants' argument to be unpersuasive. At the outset, the court notes that *Jordan v. Keve* does not address whether the prison classification committee enjoys any sort of immunity, "quasi-absolute judicial" or otherwise. In fact, the words immunity or immune do not even appear in the opinion. Despite the defendants' claims to the contrary, Jordan is inapposite to the case presently before the court.

Furthermore, *Jordan v. Keve* is not an Eighth Amendment case at all. As Hamilton points out, if the court were to agree with the defendants, prison officials would never be liable for failure to provide protective custody, no matter how plain, extreme, and clearly known the dangers to the prisoner. This contradicts *Farmer v. Brennan*, 511 U.S. 825 (1994), which undoubtedly contemplated a situation where prison officials could be liable for failure to protect a prisoner from known dangers. *See id.* at 834 ("prison official[s] have a duty . . . to protect prisoners from violence at the hands of other prisoners"). In light of

clear Supreme Court precedent, the court will decline the defendants' invitation to effectively ignore *Farmer v. Brennan*.

Finally, the court notes that the defendants fail to cite to one case which grants prison officials quasi-absolute judicial immunity. Although it is true that certain quasi-judicial positions that function in a manner similar to judges will be afforded this type of immunity, *see Butz v. Economou*, 438 U.S. 478 (1978), this type of immunity generally does not extend to prison officials. *See e.g., Cleavinger v. Saxoner*, 474 U.S. 193 (1985) (holding that a committee of prison officials who disciplined an inmate after a hearing did not enjoy quasi-absolute judicial immunity); *Hilliard v. Scully*, 537 F. Supp. 1084, 1088-89 (S.D.N.Y. 1982) (holding that absolute immunity does not extend to prison officials, even though they are "functionally comparable to judges in certain respects"). Therefore, the defendants' are not entitled to summary judgment based on their claim of so-called quasi-absolute judicial immunity.

4. Qualified Immunity

The defendants also argue that they are entitled to qualified immunity because their conduct did not violate clearly established statutory or constitutional rights of which would have been known to a reasonable person.

In determining whether the defendants are entitled to claim qualified immunity, the court must engage in a three-part inquiry: 1) whether the plaintiffs alleged a violation of his constitutional rights; 2) whether the right alleged to have been violated was clearly established in the existing law at the time of the violation; and 3) whether a reasonable official knew or should have known that the alleged action violated the plaintiffs' rights. *See Rouse v. Plantier*, 182 F.3d 192, 196-97 (3d Cir. 1999).

Here, the defendants argue that in August of 1992, the law defining the requisite mental intent for

a deliberate indifference claim was not clearly established and that reasonable officials in their position would not have known that their conduct violated Hamilton's constitutional rights.

In response to this argument, Hamilton claims that although *Farmer v. Brennan* did indeed resolve a material legal issue as to the requisite mental intent for an Eighth Amendment violation, the rights at issue were clearly established, and a reasonable factfinder could still conclude that the defendants could not have justified their conduct in August of 1992. The court agrees with Hamilton.

In 1984 in *Blizzard v. Quillen*, 579 F. Supp. , 1450 (D. Del. 1984), the court stated that "it is well settled that 'when a prison official or guard has reason to know that an inmate is in danger he must take . . . reasonable care to provide reasonable protection from such unreasonable risk of harm.'" *Id.* at 1449-50 (internal quotations omitted) (citing *Withers v. Levine*, 615 F.2d 158, 162 (4th Cir.); *Holmes v. Goldin*, 615 F.2d 83, 85 (2d Cir. 1980); *Little v. Walker*, 552 F.2d 193 (7th Cir. 1977); *Curtis v. Everette*, 489 F.2d 516 (3d Cir. 1973); *Holt v. Sarver*, 442 F.2d 304 (8th Cir. 1971); *Schaal v. Rowe*, 460 F. Supp. 155 (S.D. Ill. 1978)). In addition, in *Powell v. Schriver*, 175 F.3d 107 (2d Cir. 1999), when faced with a similar issue, the Second Circuit Court of Appeals stated that:

> By December of 1991, a reasonable prison official would have known that [**22] under the Eighth Amendment he could not remain deliberately indifferent to the possibility that one of his charges might suffer violence at the hands of fellow inmates.

Id. at 114-15. Thus, without a doubt, Hamilton's right to be protected from known risks was clearly established in August 5, 1992.

Moreover, as the Third Circuit has already explained in *Hamilton v. Leavy*, 117 F.3d at 745-48, there is still a genuine issue of material fact as to whether the defendants' conduct was reasonable under the circumstances. In light of the existence of genuine issues for trial, the defendants' claim to qualified

immunity also must fail.

B. Issue Preclusion

The defendants next argue that they are entitled to summary judgment because Hamilton is precluded from asserting any Eight Amendment arising from the August 5, 1992 assault as a result of the adverse judgment in *Hamilton v. Martino*. In particular, the defendants maintain that because the *Martino* court held that Hamilton failed to establish either prong of the *Farmer v. Brennan*, test,[6] there has been a final, preclusive judgment on the merits of this action. Therefore, according to the defendants, Hamilton's separate suit against the *Martino* defendants collaterally estops his suit against these defendants because both suits were based on the same attack.

"The doctrine of collateral estoppel, now commonly referred to as issue preclusion, prevents parties from litigating again the same issues when a court of competent jurisdiction has already adjudicated the issue on its merits, and a final judgment has been entered as to those parties and their privies." *Witkowski v. Welch*, 173 F.3d 192, 198-99 (3d Cir. 1999). The doctrine of issue preclusion, "reduces the costs of multiple lawsuits, facilitates judicial consistency, conserves resources, and "encourage[s] reliance on adjudication." *Witkowski*, 173 F.3d at 199 (quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980)).

Under federal law, issue preclusion applies if: 1) the issue sought to be litigated is identical to one decided in a prior action; 2) the issue is actually litigated in the prior action; 3) resolution of the issue is

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[6]The *Farmer v. Brennan* test states that: first, the inmate must demonstrate that there is an objective substantial risk of serious harm. 511 U.S. at 834. Second, it must be shown that the prison official responsible "knows of and disregards a substantial risk to inmate health or safety; the official must be both aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* at 838

essential to a final judgment in the prior action; and 4) the party against whom collateral estoppel is sought had a full and fair opportunity to litigate the issue in the first action *See Graco Children's Product, Inc. v. Regalo Int'l, LLC*, 77 F. Supp. 2d 660, 662 (E.D. Pa. 1999); *see also Seborowski v. Pittsburgh Press Co.*, 188 F.3d 163, 169 (3d Cir. 1999); *Dici v. Commonwealth of Pennsylvania*, 91 F.3d 542, 548 (3d Cir.1996); *Berwind Corp. v. Apfel*, 94 F. Supp. 2d 597, 611 (E.D. Pa. 2000).

In response to the defendants' contention that he is precluded from pursuing his Eighth Amendment claim, Hamilton maintains that issue preclusion does not apply here. He argues that neither the issues nor the parties are identical. Hamilton also argues that he did not have a full and fair opportunity to litigate this matter. The court agrees.

First, issue preclusion does not apply in this case because the legal issues in this case are not identical. The *Martino* court held that Hamilton "failed to raise a genuine issue" as to whether the *Martino* defendants' action, inactions, and attitudes amounted to "deliberate indifference to [Hamilton's] health and safety." D.I. 186 at A77. In particular, the *Martino* court found that the defendants in that matter did not know that Clayton posed a risk of harm to Hamilton. In the *Martino* action, however, the court never considered nor decided whether the MDT and CICC defendants knew that their failure to place Hamilton in protective custody placed him at serious risk. In fact, the *Martino* court never mentioned the June 18th MDT recommendation of protective custody, or the CICC's June 24th no action decision. Both of these decisions are central in the present action, but would not have been central to the *Martino* litigation.[7] In light of this fact, the court concludes that the issue in Martino is not the same as the issue in this case. *See*

[7]In addition, the court notes that the defendants motions to consolidate these two actions were denied. *See* D.I. 47.

e.g., Popp Telcom v. American Sharecom, Inc., 210 F.3d 928, 939-40 (8th Cir. 2000) (finding that collateral estoppel did not apply because the issue sought to be precluded had not actually been litigated in the prior case). Because the central issue in this case concerns the conduct of the MDT and CICC defendants, and the *Martino* litigation concerned the conduct of the Warden and other prison officials, the court concludes that collateral estoppel does not apply.[8]

In addition, the court has serious concerns as to whether Hamilton had a full and fair opportunity to litigate the *Martino* action.[9] *See e.g., West v. Ruff*, 961 F.2d 1064, 1065 (2d Cir. 1992) (holding that a *pro se* inmate did not have a full and fair opportunity to litigate a prior state court action because of the absence of counsel). In December of 1994, the *Martino* action was stayed based on correspondence from a consulting psychiatrist in Virginia which stated that Hamilton suffered from a disabling paranoid delusional disorder. Moreover, in *Hamilton v. Leavy*, the Third Circuit held that the court erred in not appointing counsel for Hamilton because Hamilton was "ill-equipped to represent himself or to litigate the

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[8]Also, as Hamilton points out, the *Martino* court's ruled that Hamilton failed to prove deliberate indifference on the part of the *Martino* defendants. This is not the issue presently before the court.

[9]"The scope of the 'full and fair opportunity' requirement is less than clear." *Studiengesellschaft Kohle v. USX Corp*., 675 F. Supp. 182, 185 (D. Del. 1987). The Supreme Court has defined this requirement as "a fair opportunity procedurally, substantively and evidentially to pursue [a] claim the first time." *Blonder-Tongue Labs. v. University Foundation*, 402 U.S. 313, 333 (1971). Moreover, it has been further explained that the "full and fair opportunity" requirement established in *Blonder-Tongue* is subsumed within a more general requirement that the party sought to be precluded must have been fully represented in the prior action. *Studiengesellschaft Kohle v. USX Corp.*, 675 F. Supp. at 185. *See also Witkowski*, 173 F.3d at 205 ("A party does not have an opportunity for a full and fair hearing when procedures fall below the minimum requirements of due process as defined by federal law.") (internal quotations omitted). Although the defendants vigorously protests Hamilton's claim that he lacked a full and fair opportunity to litigate the *Martino* matter, in light of Hamilton's mental disorders and the Third Circuit's mandate that he be appointed counsel in this matter, the court is not persuaded by the defendants' arguments.

claim inasmuch as there is unrebutted medical evidence that he suffers from a paranoid delusional disorder." *Id.* While there is insufficient evidence concerning whether Hamilton had a full and fair opportunity to litigate the *Martino* action, the court does have doubts. "[D]oubts about its [collateral estoppel's] application should be usually resolved against its use." *Witkowski*, 173 F.3d at 206. Moreover, "'[r]easonable doubt as to what was decided by a prior judgment should be resolved against it as an estoppel.'" *Id.* (quoting *Kauffman v. Moss*, 420 F.3d 1270, 1274 (3d Cir. 1970).

Consequently, because the issues in *Hamilton v. Martino* are different from the issues in *Hamilton v. Leavy*, and because Hamilton has raised serious doubts as to whether he had a full and fair opportunity to litigate the earlier action, the court finds that the doctrine of issue preclusion does not apply. Therefore, the defendant's motion for summary judgment based on the doctrine of collateral estoppel is denied.

C. Procedural Errors

1. Whether Hamilton's Claims Against Certain Defendants Are Time Barred?

The defendants next argue that Hamilton's Section 1983 claims based on the Eighth Amendment against the nine CICC defendants[10] added after August 6, 1994[11] are time barred. In particular, the defendants contend that Hamilton's amendment of the six CICC defendants does not relate back to the original pleading.

As the court has already clearly explained to the defendants, this argument is without merit. Under

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[10]The defendants have identified these nine CICC defendants as: George M. Dixon, Jack W. Stephenson, Deobrah L. Craig, Joanne Smith, Dennis Loebe, Eldora C. Tillery, Francis Cockroft, Jerry Borga and Richard Schockley.

[11]Hamilton was attacked on August 5, 1992. Under 10 Del. C. § 8119, the Delaware limitations period would have expired two years later, on August 6, 1994.

Rule 15 (c)(2) of the Federal Rules of Civil Procedure, "an amendment of a pleading relates back to the original pleading," when "the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Fed. R. Civ. P. (15)(c)(2).

As an initial matter, the court must emphasize that "[t]he purpose of Fed. R. Civ. P. 15(c) is "to provide the opportunity for a claim to be tried on its merits, rather than being dismissed on procedural technicalities." 3 *Moore's Federal Practice*, Section 15.19[3][a] at 15-84. Without a doubt, Hamilton's claims against the defendants added in his second amended complaint arose out of the same occurrence complained of in the original complaint. In addition, the court finds that the nine CICC defendants had timely constructive notice of the suit. In this case, considering that Hamilton named the individual members of the MDT and Lewis, the chair of the CICC in the original complaint, the nine CICC defendants could have reasonably expected that they could be properly included in this lawsuit. *See Kinnally v. Bell of Pennsylvania*, 748 F. Supp. 1136, 1141 (E.D. Pa. 1990) ("The conclusion of a growing number of courts and commentators is that sufficient notice may be deemed to have occurred where a party who has some reason to expect his potential involvement as a defendant hears of the commencement of litigation through some informal means."). Therefore, the court holds that Hamilton's addition of the nine CICC defendants relates back to the June 20, 1994 filing of the original complaint.

Moreover, the court's prior rulings on the issue of whether the addition of the nine CICC defendants relates back is clearly law of the case. The law of the case doctrine limits the extent to which an issue will be reconsidered once the court has made a ruling on it. *Fagan v. City of Vineland*, 22 F.3d 1283, 1290 (3d Cir.1994). As the defendants are now well aware, the Third Circuit in *Hamilton v.*

Leavy, 117 F.3d at 749-50, expressly directed the court to allow Hamilton to amend his complaint. In light of the Third Circuit's mandate, the court has already issued two separate orders granting Hamilton's motion to amend. In opposing Hamilton's motion to amend to add the six CICC defendants, the defendants again made the same argument they are making now – that Hamilton "wholly failed to establish a mistake in not naming the new defendants originally" and had failed to show that "sufficient notice [w]as . . . provided to the individuals to be joined during the Rule 4(m) time period." The court granted Hamilton's motion to amend over the defendants' objection. In doing so, the court stated, "[c]onsequently, this court cannot understand why the defendants would stand on their previous opposition since it plainly raised arguments that were rejected not more than three months earlier."[12]

Just as the defendants' arguments that Hamilton's amendments should not relate back failed in deciding Hamilton's motion to amend, the court concludes that their argument must fail again for the same reasons.

2. Whether Hamilton Failed to Serve Certain Defendants

The defendants next argue that Hamilton has failed to serve defendants George Dixon ("Dixon") and Joanne Smith ("Smith"). In response, Hamilton alleges that the defendants' counsel agreed to accept service on behalf of both Dixon and Smith. Thus, according to Hamilton, the defendants should not be allowed to benefit from false assertions that he did not serve Dixon and Smith.

A review of the docket shows that Hamilton amended his complaint and added defendants Dixon

[12]In granting Hamilton's motion to amend, the court also ordered the defendants to show cause why they should not be sanctioned pursuant to Rule 11(c)(1)(B) of the Federal Rules of Civil Procedure, for their baseless opposition to Plaintiff's Second Motion to Amend.

and Smith on May 15, 1998. That same day, summons were issued for both defendants. At this time, Hamilton also amended his complaint to add four other defendants, for whom summons were also issued the same day. An original, signed waiver of service of summons formed was returned for these other four defendants. On August 30, 1999, over one year later, defendants Dixon and Smith first raised the defense that service of process was insufficient in their motion for summary judgment.[13]

Hamilton has submitted an affidavit from one of his former counsel, which states that defense counsel agreed to accept service for defendants Smith and Dixon. According to this former counsel's affidavit, on October 27, 1998, an associate advised him that Dixon and Smith had yet to return the original waiver of service of summons forms and that their time to do so would soon expire. D.I. 206 at A373. The associate then contacted defense counsel to propose that he accept service for the two in exchange for an agreement not to pursue default judgment against those defendants. Later that day, the associate advised Hamilton's former counsel that defense counsel had agreed to accept service for Smith and Dixon. Hamilton also submitted documentary evidence which shows that defendant Dixon did sign a waiver of service of summons.[14] There is no evidence that defendant Smith ever returned a signed waiver or was ever served.

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[13]Federal Rule of Procedure 12(g) requires that "[a] party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party." Fed. R. Civ. P 12(g). Thus, while it is clear that it is proper to raise the defense of insufficiency of process in a Rule 12 motion, there is some suggestion that the defense is improperly raised, and thus, waived, in a motion for summary judgment that also attacks the claim on the merits. *See United States v. Marple Community Record, Inc.*, 335 F. Supp. 95, 101 (E.D. Pa. 1971) *see also Indium Corp. of America v. Semi-Alloys, Inc.*, 781 F.2d 879 883 (Fed. Cir. 1985) (explaining that defense of insufficiency of process is improperly raised in summary judgment motion because motion for summary judgment seeks judgment on the merits while the defense of improper service involves a matter in abatement).

[14]Hamilton submitted a copy of Dixon's waiver of service of summons, however, an original is required.

In response to Hamilton's supporting affidavit and documents, the defendants state that there is "no evidence of service of Dixon and Smith by serving counsel." D.I. 212, at 24. The defendants also maintain that defense counsel "never agreed to accept service of process on behalf of these defendants; defense counsel did agreed [sic] to try to obtain signed waivers. However, plaintiff's counsel was supposed to provide counsel with duplicate originals of the waiver of service form, since defense counsel did not know what defendants had received and not sent back the signed original forms." *Id.* In support of their arguments, the defendants have also submitted a letter from Hamilton's former counsel which supports defense counsel's claim that he believed there was a "distinction between agreeing to secure signatures on the Waiver of Service forms from [his] clients and agreeing to accept service on behalf of [his] clients." *See* D.I. 212, at C25.

Upon consideration of the affidavits and other documentary support submitted by the parties, it is undisputed that on October 27, 1998, the parties came to some agreement concerning defense counsel's assistance in completing service of process for Dixon and Smith. In light of this undisputed fact, the court must deny the defendants' motion for summary judgment.

Furthermore, in light of the facts in the record, the court will deem the defendants objection to insuffiency of service of process to be waived. "Where a defendant leads a plaintiff to believe that service is adequate and that no such defense will be interposed, for example, courts have not hesitated to conclude that the defense is waived." *Trustees of Cent. Laborers' Welfare Fund v. Lowery*, 924 F.2d 731, 733 (7th Cir. 1991) citing *Broadcast Music, Inc. v. M.T.S. Enterprises, Inc.*, 811 F.2d 278, 281; *Norlock v. City of Garland*, 768 F.2d 654, 657 (5th Cir.1985); *R. Clinton Constr. Co. v. Bryant & Reaves, Inc.*, 442 F. Supp. 838, 848-49 (N.D. Miss. 1977)). *Cf. Suegart v. United Stated Customs Serv.*, 180

F.R.D. 276, 280 (E.D. Pa. 1998) (finding that plaintiff's efforts to serve the defendants were frustrated by representations of defense counsel and thus, plaintiff had demonstrated good cause for failure to serve the defendant); *Brown v. Bellaplast Maschinenbau*, Civ. A. No. 84-1865, 1986 WL 6145 (E.D. Pa. May 27, 1986) (denying defendants motion for summary judgment based on alleged insufficient service of process where the plaintiff demonstrated that delay in service was caused by defense counsel's assertion that he would attempt to accept service). The defendants cannot make an agreement to assist in completing service of process, then at some later time, "pull failure of service out of the hat like a rabbit." *See Broadcast Music*, 811 F.2d at 281.[15]

In this case, the court holds that defendants Dixon and Smith have through the actions of their counsel waived the defense of insufficiency of service of process.

D. Claims under Delaware Statutes

The defendants also maintain that Hamilton's Delaware state law claims should be dismissed because they fail to state a claim upon which relief can be granted. In support of this argument, the defendants cite to *Johnson v. Indian River School District*, 723 A.2d 1200, 1203 (Del. Super. Ct. 1998). In *Johnson*, a plaintiff sued state employees who issued a driver's license to the driver who struck and killed the plaintiff's child. The court held that the state employees duties ran to the public as a whole and not to a specific individual. *Id*. at 1203.

In response, Hamilton argues that he has adequately stated a claim under Delaware law because

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[15]"The general attitude of the federal courts is that the provisions of Rule 4 should be liberally construed in the interest of doing substantial justice and that the propriety of service in each case should turn on its own facts within the limits of the flexibility provided by the rule itself." *Williams v. General Services Administration*, 582 F. Supp. 442, 443 (E.D. Pa. 1984).

the defendants willfully failed to protect him, thereby violating his right to humane treatment under Delaware state law. In support of his argument, Hamilton cites to 11 Del C. S 6531, which states that "[p]ersons committed to the institutional care of the Department [of Corrections] shall be dealt with humanely." In light of the language of Section 6531, the court holds that Hamilton has adequately stated a claim under Delaware law.

V. CONCLUSION

In sum, the defendants have only successfully established that claims against them in their official capacities should be dismissed because they are barred under the doctrine of sovereign immunity. As to the defendants remaining claims, the court concludes the following as a matter of law: 1) the defendants are not entitled to absolute or quasi absolute immunity, 2) Hamilton is not collaterally estopped from pursuing his claims, 3) the claims against the nine CICC defendants are not time barred, 4) as to defendants Dixon and Smith, any defense of insufficiency of service of process is deemed waived and 5) Hamilton's state law claims adequately state a claim upon which relief can be granted. Finally, the court finds that there are still genuine issues of material fact concerning whether the defendants should be entitled to qualified immunity. Therefore, the court will deny the defendants motion for summary judgment.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

JEROME K. HAMILTON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 94-336-GMS
	)	
FAITH LEAVY, *et al.*	)	
	)	
Defendants.	)	

Deborah L. Cirilla Sellis, of BLANK ROME COMISKY & MCCAULEY LLP, Wilmington Delaware.
Attorney for Plaintiff

Marc P. Niedzielski and Stuart B. Drowos, Deputy Attorney Generals of THE STATE OF DELAWARE DEPARTMENT OF JUSTICE, Wilmington, Delaware.
Attorney for Defendants.

M E M O R A N D U M O P I N I O N

July 27, 2001.

Wilmington, Delaware.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

JEROME K. HAMILTON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 94-336-GMS
	)	
FAITH LEAVY, *et al.*	)	
	)	
Defendants.	)	

O R D E R

For the reasons stated in the court's opinion of this date, IT IS HEREBY ORDERED, ADJUDGED, and DECREED that:

1. Pursuant to Rule 56(e) of the Federal Rules of Civil Procedure, the defendants' Motion for Summary Judgment is GRANTED in part, and DENIED in part:

   a. As to all claims for damages against the defendants in their official capacities, the defendants' motion for summary judgment is GRANTED.

   b. As to all other claims, the defendants' motion for summary judgment is DENIED.

Date: July 27, 2001

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE