

CASREF, MEDREQ, PAW, REF\_DISCOV

**U.S. District Court  
Southern District of Florida (West Palm Beach)  
CIVIL DOCKET FOR CASE #: 9:08-cv-80108-DTKH**

Aurich v. Thomas et al  
Assigned to: Judge Daniel T. K. Hurley  
Referred to: Magistrate Judge James M. Hopkins  
Cause: 42:1983 State Prisoner Civil Rights

Date Filed: 02/04/2008  
Jury Demand: Defendant  
Nature of Suit: 550 Prisoner: Civil Rights  
Jurisdiction: Federal Question

**Plaintiff**

**Stuart Duane Aurich**

represented by **Stuart Duane Aurich**  
Jail No. 547683  
Saginaw Correctional Facility  
9625 Pierce Road  
Freeland, MI 48623  
PRO SE

V.

**Defendant**

**Deputy Sherriff Harry Thomas**  
*Palm Beach County Sheriff's Office*

represented by **Bruce Wallace Jolly**  
Purdy Jolly Giuffreda & Barranco PA  
2455 E Sunrise Boulevard  
Suite 1216  
Fort Lauderdale, FL 33304  
954-462-3200  
Fax: 462-3861  
Email: [bruce@purdylaw.com](mailto:bruce@purdylaw.com)  
**LEAD ATTORNEY**  
**ATTORNEY TO BE NOTICED**

**Defendant**

**Palm Beach County Sheriff's Office**

<b>Date Filed</b>	<b>#</b>	<b>Docket Text</b>
02/04/2008	<u>1</u>	COMPLAINT against Harry Thomas, Palm Beach County Sheriff's Office , filed by Stuart Duane Aurich.(vp) (Entered: 02/05/2008)
02/04/2008	<u>2</u>	APPLICATION/MOTION to Proceed without prepayment of fees with affidavit by Stuart Duane Aurich. (vp) (Entered: 02/05/2008)
02/04/2008	<u>3</u>	Clerks Notice Referring Case to Magistrate Judge Patrick A. White (vp) (Entered: 02/05/2008)

02/12/2008	<u>4</u>	Summons Issued as to Harry Thomas. (br) (Entered: 02/12/2008)
02/13/2008	<u>5</u>	REPORT AND RECOMMENDATIONS on 42 USC 1983 case re 1 Complaint filed by Stuart Duane Aurich, Recommending that the case proceed against Palm Beach County Deputy Sheriff Thomas in his individual capacity; and the defendant Palm Beach County Sheriff's Office be dismissed as a party to this action pursuant to 28 U.S.C. Section 1915(e)(2)(b)(ii)0, for failure to state a claim upon which relief can be granted. Objections to R&R due by 2/28/2008 Signed by Magistrate Judge Patrick A. White on 2/13/08.(br) (Entered: 02/13/2008)
02/13/2008	<u>6</u>	ORDER that the United States Marshal shall serve a copy of the complaint and appropriate summons upon: Deputy Sheriff Harry Thomas.Signed by Magistrate Judge Patrick A. White on 2/13/08.(br) (Entered: 02/13/2008)
02/13/2008	<u>7</u>	ORDER Permitting Plaintiff to Proceed Without Prepayment of Filing Fee but Establishing Debt to Clerk of \$ 350.00 and granting 2 Motion for Leave to Proceed in forma pauperis.Signed by Magistrate Judge Patrick A. White on 2/13/08. (br) (Entered: 02/13/2008)
02/13/2008	<u>8</u>	ORDER OF INSTRUCTIONS TO PRO SE CIVIL RIGHTS LITIGANTS.Signed by Magistrate Judge Patrick A. White on 2/13/08.(br) (Entered: 02/13/2008)
03/06/2008	<u>9</u>	Summons Returned Unexecuted by Stuart Duane Aurich as to Harry Thomas. Harry Thomas on vacation, returns 3/2/08. (lk) (Entered: 03/07/2008)
03/18/2008	<u>10</u>	ORDER ADOPTING REPORT AND RECOMMENDATIONS for 5 Report and Recommendations, This case shall proceed against Palm Beach County Deputy Sheriff Thomas in his individual capacity, Signed by Judge Daniel T. K. Hurley on 3/18/08.(tp) (Entered: 03/19/2008)
05/06/2008	<u>11</u>	ORDER OF DIRECTIONS TO MARSHAL TO FILE RETURN FOR DEFENANT.Signed by Magistrate Judge Patrick A. White on 05/05/08.(tw) (Entered: 05/06/2008)
07/14/2008	<u>12</u>	ORDER RE SERVICE OF PROCESS REQUIRING PERSONAL SERVICE UPON AN INDIVIDUAL that the United States Marshal shall serve a copy of the complaint and appropriate summons upon: Deputy Sheriff Harry Thomas, Palm Beach Co. Sheriffs Office, 3228 Gun Club Road, West Palm Beach, FL 33406. Signed by Magistrate Judge Patrick A. White on 07/11/08. (tw) (Entered: 07/14/2008)
07/17/2008	<u>13</u>	MOTION to Suspend Filing Fees Until Release From Prison by Stuart Duane Aurich. (tp) (Entered: 07/18/2008)
07/21/2008	<u>14</u>	ORDER denying <u>13</u> Motion to suspend filing fee. The payment of the filing fee is decreed by statute. This is a paperless order.. Signed by Magistrate Judge Patrick A. White on 07/21/08. (cz) (Entered: 07/21/2008)
08/08/2008	<u>15</u>	Summons Issued as to Harry Thomas. (br) (Entered: 08/08/2008)
08/26/2008	<u>16</u>	SUMMONS (Affidavit) Returned Executed by Stuart Duane Aurich. Harry Thomas served on 2/27/2008, answer due 3/18/2008. (vj) (Entered: 08/26/2008)

		09/02/2008)
09/22/2008	<u>17</u>	CLERK'S NOTICE of Receipt of Filing Fee amount \$350.00; receipt number 987537 (vjk) (Entered: 09/23/2008)
10/01/2008	<u>18</u>	NOTICE by Stuart Duane Aurich. 1.If the plaintiff intends to request the entry of a default against defendant Thomas, he shall do so by filing such a motion on or before October 20, 2008. 2.The plaintiff is cautioned that failure to move for default or otherwise prosecute this case on or before October 20,2008, may result in dismissal of the case for lack of prosecution pursuant to local rule 41.1. (tw) (Entered: 10/01/2008)
11/20/2008	<u>19</u>	MOTION requesting return of over paid filing fees by Stuart Duane Aurich. (tb) (Entered: 11/21/2008)
01/12/2009	<u>20</u>	(VACATED by DE# 37)REPORT OF MAGISTRATE JUDGE on 42 USC 1983 case re 1 Complaint filed by Stuart Duane Aurich. Recommending that this case be dismissed without prejudice, for lack of prosecution pursuant to local rule 41.1. Objections to R&R due by 1/30/2009. Signed by Magistrate Judge Patrick A. White on 1/12/2009. (tw) Modified to reflect "vacated" on 4/21/2009 (wc). (Entered: 01/12/2009)
01/29/2009	<u>21</u>	MOTION for Default Judgment as to Defendant Harry Thomas by Stuart Duane Aurich. (cqs) (Entered: 01/29/2009)
01/29/2009	<u>22</u>	OBJECTION to <u>20</u> Report and Recommendations by Stuart Duane Aurich. (cqs) (Entered: 01/29/2009)
02/03/2009	<u>23</u>	ORDER granting <u>21</u> Motion for Default Judgment. 1. The Clerk is DIRECTED to enter a Clerks entry of default against defendant Deputy Sheriff Harry Thomas. 2. The plaintiff must then file a motion for entry of Default Judgment to Senior United States District Judge Daniel T.K. Hurley. In that motion, the plaintiff must clearly state the relief he is seeking and submit proof of the amount of damages he seeks. Signed by Magistrate Judge Patrick A. White on 2/2/2009. (tw) (Entered: 02/03/2009)
02/04/2009	<u>24</u>	Clerks Entry of Default as to Harry Thomas (See DE# <u>23</u> .) (wc) (Entered: 02/04/2009)
02/06/2009	<u>25</u>	NOTICE of Attorney Appearance by Bruce Wallace Jolly on behalf of Harry Thomas (Jolly, Bruce) (Entered: 02/06/2009)
02/06/2009	<u>26</u>	MOTION to Vacate <i>Default</i> by Harry Thomas. Responses due by 2/26/2009 (Jolly, Bruce) (Entered: 02/06/2009)
02/09/2009	<u>27</u>	ORDER granting <u>26</u> Motion to Vacate.. Signed by Magistrate Judge Patrick A. White on 2/9/2009. (tw) (Entered: 02/09/2009)
02/10/2009	<u>28</u>	ANSWER and Affirmative Defenses to Complaint with Jury Demand by Harry Thomas.(Jolly, Bruce) (Entered: 02/10/2009)
02/12/2009	<u>29</u>	ORDER granting <u>19</u> Motion for return of overpaid filing fees & terminating as moot <u>20</u> Report and Recommendations.. Signed by Judge Daniel T. K. Hurley on 2/12/09. (lr) (Entered: 02/12/2009)

02/12/2009	<u>30</u>	ORDER Scheduling Pretrial Proceedings When Plaintiff is Proceeding Pro Se. Discovery due by 6/4/2009. Joinder of Parties due by 6/18/2009. Motions due by 7/9/2009. Plaintiff's Pretrial Statement due 7/23/09; Defendant's Pretrial Statement due 8/6/09. Signed by Magistrate Judge Patrick A. White on 2/12/2009. (br) (Entered: 02/13/2009)
02/19/2009	<u>31</u>	Defendant's MOTION to Take Deposition from Stuart Duane Aurich by Harry Thomas. (Jolly, Bruce) (Entered: 02/19/2009)
02/23/2009	<u>32</u>	ORDER granting <u>31</u> Motion to Take Deposition from plaintiff Stuart Aurich. This is a pro se plaintiff and the defendants shall govern themselves accordingly. A copy of the deposition shall be supplied to the plaintiff upon completion. This is a paperless order.. Signed by Magistrate Judge Patrick A. White on 2/23/2009. (cz) (Entered: 02/23/2009)
03/05/2009	<u>33</u>	MOTION to Appoint Counsel by Stuart Duane Aurich. (tb) (Entered: 03/06/2009)
03/10/2009	<u>34</u>	ORDER denying <u>33</u> Motion to Appoint Counsel. This is a paperless order.. Signed by Magistrate Judge Patrick A. White on 3/10/2009. (cz) (Entered: 03/10/2009)
03/23/2009	<u>35</u>	ORDER 1)The defendants Silverstone, Linder and Beauzile are dismissed as parties to this action pursuant to 28 U.S.C.§1915(e)(2)(B)(ii), for failure to state a claim upon which relief can be granted. 2) The claim concerning denial of medical care against the defendant Ambrogia shall remain pending, in her individual capacity. Signed by Magistrate Judge Patrick A. White on 3/23/2009. (tw) (Entered: 03/23/2009)
04/20/2009	<u>36</u>	ORDER VACATING AND WITHDRAWING <u>20</u> REPORT AND RECOMMENDATIONS on 42 USC 1983 case re <u>1</u> Complaint filed by Stuart Duane Aurich Recommending that this case be dismissed without prejudice, for lack of prosecution pursuant to local rule 41.1. REPORT AND RECOMMENDATIONS on 42 USC 1983 case re <u>1</u> Complaint filed by Stuart Duane Aurich Recommending that this case be dismissed without prejudice, for lack of prosecution pursuant to local rule 41.1.. Signed by Magistrate Judge Patrick A. White on 4/20/2009. (tw) (Entered: 04/20/2009)
04/20/2009	<u>37</u>	Clerks Notice of Docket Correction. Error(s): <b>Document Not Related to Case</b> ; Correction - Original document restricted and docket text modified. Due to scrivener's error de# 35 was inadvertently docketed in this case. (tw) (Entered: 04/20/2009)
04/20/2009	<u>38</u>	MOTION/ Request for Production by Stuart Duane Aurich. (cqs) (Entered: 04/21/2009)
04/20/2009	<u>39</u>	NOTICE of Filing Interrogatories by Stuart Duane Aurich (cqs) (Entered: 04/21/2009)
06/23/2009	<u>40</u>	MOTION to Object and Compel for Failure to Make Disclosures or to Cooperate In Discovery, ( Responses due by 7/13/2009), MOTION for Sanctions, Rule 37 Federal Rules of Civil Procedure by Stuart Duane Aurich. (cqs) (Entered: 06/23/2009)

06/23/2009	<u>41</u>	NOTICE of Filing Interrogatories by Stuart Duane Aurich (cqs) (Entered: 06/23/2009)
07/02/2009	<u>42</u>	ORDER granting <u>38</u> Motion to Produce; granting <u>40</u> Motion to Compel; denying <u>40</u> Motion for Sanctions. The defendants shall respond to plaintiff's discovery requests or file objections to the Court. The date for requesting new discovery has passed. This is a paperless order.. Signed by Magistrate Judge Patrick A. White on 7/2/2009. (cz) (Entered: 07/02/2009)
07/06/2009	<u>43</u>	Defendant's MOTION for Reconsideration re 42 Order on Motion to Produce, Order on Motion to Compel, Order on Motion for Sanctions,, by Harry Thomas. (Attachments: # <u>1</u> Exhibit A - Defendant's Response in Opposition to Plaintiff's Motion to Compel)(Jolly, Bruce) (Entered: 07/06/2009)
07/06/2009	<u>44</u>	RESPONSE in Opposition re <u>40</u> MOTION to Compel MOTION for Sanctions filed by Harry Thomas. (Attachments: # <u>1</u> Exhibit A-Defendant's Objections to Plaintiff's Interrogatories, # <u>2</u> Exhibit B - Defendant's Objections to Plaintiff's Request for Production)(Jolly, Bruce) (Entered: 07/06/2009)
07/07/2009	<u>45</u>	ORDER granting <u>43</u> Motion for Reconsideration. The plaintiff's motion to compel was granted by prior order only to the extent that the defendant provide the requested discovery or file objections with the Court. The defendant has now filed objections and the motion to compel is denied for the reasons stated in the defendant's response/motion for reconsideration. This is a paperless order.. Signed by Magistrate Judge Patrick A. White on 7/7/2009. (cz) (Entered: 07/07/2009)
07/14/2009	<u>46</u>	MOTION for Summary Judgment by Stuart Duane Aurich. Responses due by 7/31/2009 (cqs) (Additional attachment(s) added on 7/14/2009: # <u>1</u> Exhibit) (cqs). (Entered: 07/14/2009)
07/27/2009	<u>47</u>	MOTION for Extension of Time to File by Stuart Duane Aurich. (lh) (Entered: 07/27/2009)
07/28/2009	<u>48</u>	ORDER granting <u>47</u> Plaintiff's Motion for Extension of Time to File to file p/t statement on 8/23/09, defendants pre-trial statement due 9/6/09. This is a paperless order.. Signed by Magistrate Judge Patrick A. White on 7/27/2009. (cz) (Entered: 07/28/2009)
07/31/2009	<u>49</u>	RESPONSE in Opposition re <u>46</u> MOTION for Summary Judgment filed by Harry Thomas. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B)(Jolly, Bruce) (Entered: 07/31/2009)
08/10/2009	<u>50</u>	MOTION for Reconsideration re 45 Order on Motion for Reconsideration, by Stuart Duane Aurich. (mg) (Entered: 08/10/2009)
08/11/2009	<u>51</u>	ORDER denying <u>50</u> Motion for Reconsideration of the Court's Order. After reviewing the plaintiff's objections, the Court's Order remains unchanged. This is a paperless order.. Signed by Magistrate Judge Patrick A. White on 8/11/2009. (cz) (Entered: 08/11/2009)
08/20/2009	<u>52</u>	NOTICE by Harry Thomas re <u>49</u> Response in Opposition to Motion of Filing Executed Affidavit of Deputy Harry Thomas (Attachments: # <u>1</u> Affidavit of Deputy Thomas harry)(Jisa, Adriana) (Entered: 08/20/2009)

08/25/2009	<u>53</u>	RESPONSE/OPPOSITION to the Defendant's Affidavit Federal Rules of Civil Procedure, Summary Judgment Rule 56(g) Affidavit submitted in bad faith by Stuart Duane Aurich. (lh) (Entered: 08/25/2009)
08/25/2009	<u>54</u>	MEMORANDUM in Opposition re <u>49</u> Response in Opposition to Motion for summary judgment by Stuart Duane Aurich. (lh) (Entered: 08/25/2009)
09/15/2009	<u>55</u>	MOTION giving the Court notice that the Pretrial Statement is going to be late by Stuart Duane Aurich. (lh) (Entered: 09/15/2009)
10/15/2009	<u>56</u>	MOTION/NOTICE GIVING THE COURT NOTICE THAT THE PRETRIAL STATEMENT IS GOING TO BE LATE by Stuart Duane Aurich (lh) (Entered: 10/15/2009)
11/30/2009	<u>57</u>	Statement of: Pretrial by Stuart Duane Aurich. (Attachments: # <u>1</u> Exhibit A thur U, # <u>2</u> Exhibit V thru Z)(gme) (Entered: 12/01/2009)
01/22/2010	<u>58</u>	ORDER granting <u>55</u> Motion for Extension of Time to File. Pretrial Statement due on or before February 5, 2010. Signed by Magistrate Judge Patrick A. White on 1/21/2010. (tw) (Entered: 01/22/2010)
01/22/2010	<u>59</u>	REPORT AND RECOMMENDATIONS on 42 USC 1983 case re <u>46</u> MOTION for Summary Judgment filed by Stuart Duane Aurich. Recommending 1) the plaintiff's motion for summary judgment (DE#46) be DENIED as to all claims; and 2) the case remain pending against the defendant Palm Beach County Deputy Sheriff Harry Thomas, on the claims of use of excessive force on arrest, and denial of medical care or access thereto. Objections to R&R due by 2/8/2010. Signed by Magistrate Judge Patrick A. White on 1/22/2010. (tw) (Entered: 01/22/2010)
01/22/2010	<u>60</u>	REPORT AND RECOMMENDATIONS. Recommending that this case be placed on the trial calendar of the District Judge. Objections to R&R due by 2/8/2010. Signed by Magistrate Judge Patrick A. White on 1/22/2010. (tw) (Entered: 01/22/2010)
02/03/2010	<u>61</u>	Statement of: Pretrial by Harry Thomas. (Jolly, Bruce) (Entered: 02/03/2010)
02/18/2010	<u>62</u>	ORDER denying <u>46</u> Motion for Summary Judgment; adopting Report and Recommendations re <u>59</u> . Case remains pending against Deputy Sheriff Thomas on claims of excessive force & denial of medical care or access. Signed by Judge Daniel T. K. Hurley on 2/17/10. (lr) Modified signature date on 2/19/2010 (wc). (Entered: 02/18/2010)
02/26/2010	<u>63</u>	NOTICE THAT THE DEFENDANT DEPUTY SHERIFF HARRY THOMAS HAS FAILED TO FILE HIS PRETRIAL STATEMENT by Stuart Duane Aurich re <u>58</u> Order on Motion for Extension of Time to File (lh) (Entered: 02/26/2010)
03/05/2010	<u>64</u>	ORDER OF REFERRAL TO VOLUNTEER LAWYERS' PROJECT & <i>directions to clerk</i> . Signed by Judge Daniel T. K. Hurley on 3/5/10. (lr) (Entered: 03/05/2010)
03/05/2010	<u>65</u>	NOTICE THAT THE PLAINTIFF FINALLY RECEIVED THE DEFENDANT THOMAS PRETRIAL STATEMENT by Stuart Duane Aurich

		(lh) (Entered: 03/05/2010)
03/09/2010	<u>66</u>	SCHEDULING ORDER: ( Jury Trial set for 2/7/2011 09:00 AM in West Palm Beach Division before Judge Daniel T. K. Hurley., Calendar Call set for 1/27/2011 08:30 AM in West Palm Beach Division before Judge Daniel T. K. Hurley.), ORDER REFERRING CASE to Mediation., ORDER REFERRING CASE to Magistrate Judge James M. Hopkins for Discovery Proceedings.. Signed by Judge Daniel T. K. Hurley on 3/9/2010. (tb) (Entered: 03/10/2010)

<b>PACER Service Center</b>			
<b>Transaction Receipt</b>			
04/08/2010 13:32:49			
<b>PACER Login:</b>	vl0006	<b>Client Code:</b>	
<b>Description:</b>	Docket Report	<b>Search Criteria:</b>	9:08-cv-80108-DTKH
<b>Billable Pages:</b>	5	<b>Cost:</b>	0.40

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-80108-CIV-HURLEY  
MAGISTRATE JUDGE P. A. WHITE

STUART DUANE AURICH, :  
 :  
 Plaintiff, :  
 :  
 v. :  
 :  
 PALM BEACH COUNTY DEPUTY :  
 SHERIFF HARRY THOMAS, et al., :  
 :  
 Defendants. :

REPORT OF  
MAGISTRATE JUDGE

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**I INTRODUCTION**

Plaintiff Stuart Duane Aurich, now confined at the Saginaw Correctional Facility in Freeland, Michigan, filed a pro se civil rights complaint pursuant to 42 U.S.C. §1983, alleging that Palm Beach County Deputy Sheriff Harry Thomas used excessive force, and denied him medical care, during an arrest on February 28, 2006. Upon entry of a Preliminary Report and an Order of partial dismissal (DE#s 5, 10), the Palm Beach County Sheriff's Office, which also was a named defendant, was dismissed, and the case remained pending only on the brutality and medical claims against Deputy Thomas.

**This Cause is before the Court upon a Motion for Summary Judgment filed by Plaintiff Aurich (DE#46) with numerous attachments, in opposition to which defendant Thomas filed a Response (DE#49) with supporting exhibits: Exhibit A, consisting of an unexecuted copy of Thomas' Affidavit (at DE#49-1),<sup>1</sup> and Exhibit B, consisting of Thomas' Objections and Answers to plaintiff's interrogatories (at DE#49-2). Plaintiff Aurich filed an "opposition" to defendant Thomas' Affidavit (DE#53), and a "Memorandum" which is in effect a Reply to Thomas' Response opposing Aurich's summary judgment motion. (DE#54). Thomas' Response does not incorporate a cross motion, nor did he file a separate motion for summary judgment.**

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<sup>1</sup> Thomas' executed affidavit is filed at DE#52-1.

## II DISCUSSION

In the Preliminary Report, Aurich's complaint was summarized as alleging that on February 28, 2006, Thomas engaged in excessive and unnecessary force upon his arrest when, knowing that Aurich was scheduled for reconstructive shoulder surgery, he dragged him out of his apartment, smashed his shoulder with his knee, and refused to allow him to have his medical records and medication.

### A. Excessive Force

A claim that a law enforcement officer used excessive force in the course of an arrest, an investigatory stop, or any other seizure of a free citizen is to be analyzed under the Fourth Amendment and its "reasonableness" standard. Graham v. Connor, 490 U.S. 386 (1989); Vinyard v. Wilson, 311 F.3d 1340, 1346-47 (11 Cir. 2002); Lee v. Ferraro, 284 F.3d 1188, 1197 (11 Cir. 2002); Ortega v. Schram, 922 F.2d 684, 694 (11 Cir. 1991). Such an analysis requires a court to balance "the nature and quality of the intrusion on the individual's fourth amendment interests against the importance of the government interest alleged to justify the intrusion." Graham, supra, quoting United States v. Place, 462 U.S. 696 (1983). The factors a Court considers when balancing the necessity for an application of force against an arrestee's constitutional rights include: (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight; Graham, supra, 490 U.S. at 396; Vinyard, supra, 311 F.3d at 1347; Lee, supra, 284 F.3d at 1197; Ortega, supra, 922 F.2d at 695. In determining whether force applied was "reasonable" under the circumstances (i.e., proportional to the need for its use), the Court must examine: (1) the need for the application of force; (2) the relationship between the need and the amount of force that was used; and (3) the extent of the injury inflicted upon the individual to whom the force was applied. Vinyard, at 1347; Lee at 1998. Although the test applied by the Eleventh Circuit previously

included a subjective prong, examining whether the force was applied maliciously, see e.g. Leslie v. Ingraham, 786 F.2d 1533, 1536 (11 Cir. 1986), that factor has been eliminated from the analysis by Graham and other cases establishing that the excessive force inquiry should be completely objective, thereby excluding consideration of the Officer's intentions. Lee, supra, 284 F.3d at 1198 n.7. Thus, "Reasonableness" for purposes of such an analysis is judged according to an objective standard under the totality of the circumstances, without regard to the officers' underlying intent. Graham, supra at 389.

If the force applied was reasonable under the circumstances and not excessive, the police officer has not violated any clearly established constitutional right, and is entitled to summary judgment based upon qualified immunity. Moore v. Gwinnett County, 967 F.2d 1495, 1498 (11 Cir. 1992), quoting, Leslie v. Ingram, 786 F.2d 1533, 1536 (11 Cir. 1986). The defense of qualified immunity insulates governmental officials from personal liability for actions taken pursuant to their discretionary authority. See: Saucier v. Katz, 533 U.S. 194 (2001); Harlow v. Fitzgerald, 457 U.S. 800 (1982); Flores v. Satz, 137 F.3d 1275 (11 Cir. 1998); Foy v. Holston, 94 F.3d 1528 (11 Cir. 1996).

In this case, the excessive force allegations by Aurich in his sworn complaint, and the statements by defendant Thomas in his summary judgment response and Affidavit are diametrically opposed.

Specifically, Aurich alleges that prior to his 2/28/06 arrest he had suffered shoulder trauma, and was scheduled to undergo surgery on 3/6/06. Aurich states that he did not resist arrest, and that the arresting officer, Deputy Sheriff Thomas, knew he had the medical condition before effecting the arrest. He alleges that "D/S Harry Thomas drug me out of my apartment by my arms," causing pain that was "so intense I could feel the inside of my shoulder ripping and grinding until I passed out. Aurich alleges that after he "came to" Thomas "smashed in my shoulder with his knee causing me to pass out again." Aurich alleges that in addition to the pain that

Thomas' actions caused, he was "passing blood in the county jail from all the abuse." He states that his medical records prove that his "condition was worsened because of this treatment."

In his Response to plaintiff Aurich's summary judgment motion, the defendant Thomas describes the incident in question as "a routine warrant arrest that took place without resistance from Mr. Aurich." According to Thomas' executed Affidavit (DE#52-1), he and other Palm Beach Sheriff's Deputies, including a K-9 officer, went to 4961 Bayberry Drive, #23, in West Palm Beach, Florida, to execute an active arrest warrant issued for Stuart D. Aurich by the State of Michigan, for robbery with a firearm. The officers contacted Aurich at the front door of the residence, and he was placed in handcuffs, without resistance. Thomas states that "at no time during Mr. Aurich's arrest did I punch, kick or strike Mr. Aurich." He also states that "I did not 'stomp' my foot or knee into Mr. Aurich's back, nor did I 'smash' into his left shoulder as he alleges." Thomas further states that "I did not 'drag' Mr. Aurich out of the apartment after being placed in handcuffs," and he adds that "[o]nce restrained, Mr. Aurich walked out of the apartment without any resistance."

The defendant Thomas states argues in his Response opposing plaintiff's summary judgment motion, that "there are genuine issues of material fact in dispute as to whether force which was excessive was used on Mr. Aurich...". Thomas argues, therefore, that Aurich's motion for summary judgment should be denied.<sup>2</sup> The defendant's argument is correct. It is readily apparent, based on the record which is before the Court, that the existence of genuine issues of material fact, regarding the nature and extent of force that was

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<sup>2</sup> Thomas also argues that to the extent that Aurich had a pre-existing shoulder condition of which he was unaware, even if it were assumed *arguendo* that he [Thomas] somehow aggravated that injury during the process of applying handcuffs to Aurich, it would not lead to the conclusion that the force used was excessive, or that he [Thomas] might not be entitled to qualified immunity. (Response, DE#49, p.4). This argument/observation, however, is not dispositive of the use of force claim at this juncture, as the material facts are in dispute regarding the nature and amount of force which was applied.

used, and the necessity for using it, precludes summary disposition of the excessive use of force claim in this case. See Celotex Corp. v. Catrett, 477 U.S. 317 (1986); and Fed.R.Civ.P. 56(c).

**B. Denial of Medical Care**

It is undisputed that denial of medical care to an arrestee/detainee or pretrial detainee can form the basis for a claim against an arresting officer or other officer detaining an individual. See e.g. Boone v. Spurgess, 385 F.3d 923, 933-34 (6 Cir. 2004). The Court in Boone noted that in the landmark Fourth Amendment case of Graham v. Connor, supra, at 389-90, the excessive force claim was partially based on the officers' refusal to provide medical care to a handcuffed suspect suffering from a diabetic attack. The Court in Boone also noted that the Fourth Amendment's guarantee of "reasonable seizures" was applied by the Seventh Circuit to a claim that police failed to provide adequate medical care to a suspect in their custody. Boone, supra, 385 F.3d at 933, citing Estate of Phillips v. City of Milwaukee, 123 F.3d 586, 595-96 (7 Cir. 1997). In doing so, however, the Court in Boone acknowledged that some courts, including the Sixth Circuit in the past had previously applied the Fourteenth and not the Fourth Amendment to such claims.

While it is clear that there is a general constitutional right to medical care under the Cruel and Unusual Punishment Clause of the Eighth Amendment for convicted prisoners, and under the substantive due process clause for pre-trial detainees under the Fourteenth Amendment who are housed in detention facilities awaiting adjudication, see Lancaster v. Monroe County, Ala., 116 F.3d 1419, 1425, n. 6 (11 Cir. 1997), it has recently been discussed in the case of Ponce de Leon v. Jackson Memorial Hospital, No. 09-22809-Civ., 2009 WL 3818429, at \*3-4 (S.D.Fla., Nov. 13, 2009) that the Eleventh Circuit has never been squarely faced with the question whether a court should apply the "deliberate indifference" standard of the Fourteenth Amendment, or the "reasonableness" standard of the Fourth Amendment to a claim of denial of medical care by arresting officers.

While the Fourth Amendment applies to seizures, and the handcuffing and placement of an individual into a police car, see Graham v. Connor, supra, the precise point at which Fourth Amendment protections end, and Fourteenth Amendment protections begin is unsettled in this Circuit. See Hicks v. Moore, 422 F.3d 1246, 1253 n. 7 (11 Cir.2005). In a recent Eleventh Circuit case decided in February 2009, Fennell v. Gilstrap, 559 F.3d 1212 (11 Cir.2009), which involved use of force, the Court applied the Fourteenth Amendment, and not the Fourth, to a claim by an individual who had been arrested and transported in a police car to the jail, where the alleged excessive force occurred in the "pat-down room" shortly after his arrival there. More recently, the District Court for the Southern District of Florida in the opinion in Ponce de Leon noted that Eleventh Circuit in Thomas v. Town of Davie, 847 F.2d 771 (11 Cir. 1998) had applied the Fourteenth Amendment to a claim of denial of medical care by police to an arrestee, who was labeled a "pretrial detainee" although the claim arose while the plaintiff was in police custody prior to actual detention. The Court in Ponce de Leon concluded, therefore, that in the absence of other Eleventh Circuit precedent, Thomas was controlling.

As noted, supra, in this case, the plaintiff Aurich has alleged in his complaint that before Deputy Thomas applied force which caused him great pain, Thomas knew he had the pre-existing shoulder condition. Aurich's sworn complaint also includes his allegation that Deputy Thomas "refused to allow me to have my medical records, x-rays, and pain medications." This allegation was the basis for the claim of denial of medical care, gleaned from the complaint upon its initial review. (See Preliminary Report).

Aurich's summary judgment motion (at DE#46, p.17) provides additional details. According to him, when he followed officers' verbal orders to get down on the floor, he told them he was unarmed, and that he had a broken shoulder for which his surgery was scheduled. He states that he asked that his medical records and pain medications which he were on the kitchen table be taken with

him to jail, but Deputy Thomas, the arresting officer refused. According to Aurich, Deputy Thomas said "I will not be needing those records and prescribed pain medications because I will be taken care of at the county jail."

Aurich in his motion (DE#46, p.20) further indicates that after he arrived at the Palm Beach County Jail the medical staff "only documented the damages caused at the time of the arrest;" and states "I was denied all of my prescribed pain medications."

In contrast to Aurich's statement in his sworn complaint that Deputy Thomas knew he had a pre-existing shoulder condition, Thomas in his own Affidavit states "I was not aware of Mr. Aurich's alleged left shoulder injury at the time of the arrest, nor was I aware that Mr. Aurich had a scheduled reconstructive surgery to the left shoulder." (DE#52-1). Defendant Thomas in his Affidavit does not address plaintiff Aurich's statement that he [Thomas] refused to allow him to take his medical records, x-rays, and pain medications with him to the jail. In his Response to Aurich's motion, Thomas notes Aurich's additional statement [from Aurich's motion] that he [Thomas] "informed him that he would not be needing those because he will be taken care of at the jail." (Response, at DE#49, p.3, citing Motion for summary judgment at p.16).

The defendant Thomas argues in his Response that "there are genuine issues of material fact in dispute as to...whether the Defendant Thomas was aware of Mr. Aurich's serious medical condition but intentionally disregarded it, causing the plaintiff more harm...". He argues, therefore, that on the medical claim the plaintiff is not entitled to summary judgment in his favor. (Response, DE#49, p.4).

It is not appropriate for the Court, at summary judgment, to speculate on whether the alleged refusal by Thomas to allow plaintiff's medical information and medication to be transported with him caused Aurich an injury of constitutional dimension through delay of medical care, or access to medication for pain in

his shoulder. Summary judgment is not a procedure for resolving a swearing contest. Chandler v. Baird, 926 F.2d 1057 (11 Cir. 1991). In this case, resolution of the issues and facts that are in dispute, based upon the parties' opposing and conflicting Affidavits/statements would require the Court to step outside its assigned role, and invade the province of the jury. As the Supreme Court stated in its opinion in Anderson v. Liberty Lobby, Inc., supra, "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson, supra, 477 U.S. at 255 (citing Adickes v. S. H. Kress & Co., 398 U.S. 144, 158-59 (1970)).

It is disputed in the plaintiff's and defendants' opposing sworn documents [Aurich's sworn complaint, and Thomas' Affidavit] whether Thomas was aware of the plaintiff's medical condition. While the plaintiff Aurich does not allege, and there anything in the record to suggest that the defendant Deputy Sheriff Thomas had any responsibility for or control over the plaintiff's medical care once he was transported to and detained inside the county jail, the sworn complaint includes Aurich's allegations that not only did Deputy Thomas deny him his medical records and x-rays, but that he also denied him access to his pain medication. If, as alleged, Deputy Thomas was aware of plaintiff's medical condition, and pain associated with it, and/or if Thomas was responsible for exacerbating that injury and increasing plaintiff's level of pain to the point that the plaintiff passed out from the pain -- as the plaintiff Aurich has alleged, but Thomas then denied plaintiff Aurich access to his pain medication, that alone could form the basis for a medical claim against Thomas. This is because obvious pain can be an indicator of a serious medical need. See McElligott v. Foley, 182 F.3d 1248, 1257 (11 Cir.1999) (finding that an inmate's complaints of abdominal pain should have signaled a serious medical need); Brown v. Hughes, 894 F.2d 1533, 1538 (11 Cir.1990) (painful broken foot can be serious medical need, and an

official's deliberate delay on the order of hours in providing care for a serious and painful broken foot is sufficient to state a constitutional claim). See also Aldridge v. Montgomery, 753 F.2d 970, 972-73 (11 Cir. 1985) (2½ hour delay in treatment for a bleeding cut under the eye held actionable); Hughes v. Noble, 295 F.2d 495 (5 Cir. 1961) (13 hour delay for broken and dislocated cervical vertebrae).

In sum, it is apparent, here, with regard to the claim of denial of access to medical care, that existing genuine issues of material fact preclude summary judgment in the plaintiff's favor, on the basis of the plaintiff's motion and the record that is before the Court. On his medical claim, the plaintiff's motion for summary judgment should therefore be denied.

### III CONCLUSION

It is therefore recommended that: 1) the plaintiff's motion for summary judgment (DE#46) be DENIED as to all claims; and 2) the case remain pending against the defendant Palm Beach County Deputy Sheriff Harry Thomas, on the claims of use of excessive force on arrest, and denial of medical care or access thereto.

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report.

Dated: January 22<sup>nd</sup>, 2010.



UNITED STATES MAGISTRATE JUDGE

cc: Stuart Duane Aurich, Pro Se  
No. 547683  
Saginaw Correctional Facility  
9625 Pierce Road  
Freeland, MI 48623

Adriana M. Jisa, Esquire  
Bruce Wa. Jolly, Esquire  
Purdy, Jolly, Giuffreda & Barranco, P.A.  
2455 East Sunrise Blvd., Suite 1216  
Fort Lauderdale, FL 33304

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-08-80108-CIV-HURLEY  
MAGISTRATE JUDGE P. A. WHITE

STUART DUANE AURICH, :  
 :  
 Plaintiff, :  
 :  
 v. :  
 :  
 PALM BEACH COUNTY DEPUTY :  
 SHERIFF HARRY THOMAS, et al., :  
 :  
 Defendants. :  
 :

REPORT THAT CASE IS  
READY FOR TRIAL

In this *pro se* civil rights action pursuant to 42 U.S.C. §1983, a separate Report has been entered this date recommending, for reasons stated therein, that the plaintiff Aurich's motion for summary Judgment (DE#46) be DENIED as to all claims. The Report recommends that as to the defendant Palm Beach County Deputy Sheriff Harry Thomas, who responded in opposition to Aurich's motion, but did not himself move for summary judgment, the case remain pending on Aurich's claims of excessive use of force on arrest, and denial of medical care or access thereto.

The plaintiff has filed a pretrial statement (DE#57) and a separate Order has been entered instructing the defendant to file his pretrial statement on or before February 5, 2010. The case is otherwise now at issue; and the parties have not consented to trial before a Magistrate Judge pursuant to 28 U.S.C. §636(c). The undersigned respectfully recommends that this case be placed on the trial calendar of the District Judge.

Dated: January 22<sup>nd</sup>, 2010.

  
UNITED STATES MAGISTRATE JUDGE

cc: The Honorable Daniel T. K. Hurley,  
United States District Judge

Stuart Duane Aurich, Pro Se  
No. 547683  
Saginaw Correctional Facility  
9625 Pierce Road  
Freeland, MI 48623

Counsel of Record

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-80108-CIV-HURLEY  
MAGISTRATE JUDGE P. A. WHITE

STUART DUANE AURICH, :  
 :  
 Plaintiff, :  
 :  
 v. :  
 :  
 PALM BEACH COUNTY DEPUTY :  
 SHERIFF HARRY THOMAS, et al., :  
 :  
 Defendants. :

ORDER

For the reasons stated in the Report of the Magistrate Judge, and upon independent review of the file, it is thereupon

ORDERED AND ADJUDGED as follows:

1. The plaintiff Aurich's motion for summary judgment (DE#46) is DENIED as to all claims.
2. The case remains pending against the defendant Palm Beach County Deputy Sheriff Harry Thomas, on the claims of use of excessive force on arrest, and denial of medical care or access thereto.

DONE AND ORDERED at West Palm Beach, Florida, this 17<sup>th</sup> day of February, 2010.

  
UNITED STATES DISTRICT JUDGE

cc: Stuart Duane Aurich, Pro Se  
Counsel of Record

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-80108- HURLEY/WHITE

STUART DUANE AURICH,  
plaintiff,

vs.

PALM BEACH COUNTY DEPUTY  
SHERIFF HARRY THOMAS, et al.,  
defendants.

---

ORDER OF REFERRAL TO VOLUNTEER LAWYERS' PROJECT

THIS CAUSE is before the court *sua sponte* upon review of the case file and consideration of the appointment of counsel for the *pro se* plaintiff who was previously granted leave to proceed *in forma pauperis* in this forum.

The court recently adopted the report and recommendation of Magistrate Judge White, allowing plaintiff's § 1983 claims for excessive force and denial of medical care against Palm Beach County Sheriff Harry Thomas to proceed to trial [DE# 59, 60, 62].

Upon consideration, the court believes that this case ought to be referred to the Volunteer Lawyers' Project for review. It appears that the plaintiff meets the Project's criteria as a possible client. It also appears to the court that plaintiff would benefit from the assistance of counsel were he able to obtain representation on a volunteer basis. Accordingly, the court will refer the plaintiff's *pro se* complaint to the Project for consideration as to whether the case should be referred to a volunteer lawyer.

The *pro se* plaintiff should understand that this referral does not mean that a volunteer lawyer automatically will be appointed for him. Rather, that determination is made by the Project,

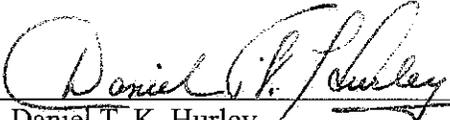
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following review of the plaintiff's case. If the Project determines that the case should not be referred to a volunteer lawyer, plaintiff is at liberty to continue to pursue this matter on a *pro se* basis, although the court strongly encourages plaintiff to retain counsel to represent his interests in this litigation if he seeks to pursue the suit.

It is therefore **ORDERED and ADJUDGED:**

1. This case is **REFERRED** to the Volunteer Lawyers' Project for review.
2. The Clerk of Court is directed to forward a copy of the plaintiff's complaint [DE# 1], the Report and Recommendation of the Magistrate Judge on Plaintiff's Motion for summary Judgment [DE# 59] , Report that Case is Ready for Trial [DE# 60] and Order Adopting Report & Recommendation of Magistrate Judge [DE# 62] to the Volunteer Lawyers' Project, located at First Union Financial Center, Suite 2870, 200 South Biscayne Boulevard, Miami, Florida 33131 [fax (305) 373-2971] for screening.

**DONE AND SIGNED** in Chambers at West Palm Beach, Florida this 5th day of March, 2010.

  
Daniel T. K. Hurley  
United States District Judge

cc.

All counsel

Stuart Duane Aurich, *pro se*  
Jail No. 547683  
Saginaw Correctional Facility  
9625 Pierce Road  
Freeland, MI 48623

Volunteer Lawyers' Project  
(with above-noted enclosures)

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-80108-CIV-HURLEY/HOPKINS

STUART DUANE AURICH,

Plaintiff(s),

vs.

PALM BEACH COUNTY DEPUTY  
SHERIFF HARRY THOMAS, et al.,

Defendant(s).

---

**ORDER SETTING TRIAL DATE & DISCOVERY DEADLINES,  
REFERRING CASE TO MEDIATION &  
REFERRING DISCOVERY TO  
UNITED STATES MAGISTRATE JUDGE JAMES M. HOPKINS**

THIS CAUSE is before the court sua sponte for the scheduling of trial. It is thereupon,

**ORDERED and ADJUDGED:**

**Plaintiff's Obligation to Serve a Copy of this Order**

1. In the event this order is served prior to the time of the defendant's first appearance, plaintiff's counsel shall provide a copy of this order to each defendant within five days of defendant's first notice of appearance, whether by counsel or *pro se*. Thereafter, plaintiff's counsel shall immediately file a notice of compliance indicating the name of the person served and the date on which a copy of this order was served. This obligation is not applicable if all defendants have filed an appearance by the time this order is served.

**Trial Date & Location**

2. This case is set for trial on the **February 2011 Trial Calendar** (4 week docket) which commences on **Monday, February 7, 2011**. Counsel for all parties shall appear at a calendar

call commencing at **8:30** a.m. on **Thursday, January 27, 2011**, in courtroom 5 at the U.S. Courthouse, 701 Clematis Street, West Palm Beach, Florida.

**No Joint Scheduling Report**

3. This order supersedes the requirements listed in Rule 16.1(B) of the Local Rules of the Southern District of Florida. The parties in this case are not required to file any joint scheduling reports or proposed scheduling orders with the court as prescribed by that rule.

**Discovery Referred to Magistrate Judge**

4. In accordance with the Magistrate Act, 28 U.S.C. § 636(b)(1)(A), and Rule 72 of the Federal Rules of Civil Procedure, all pretrial discovery motions filed in this case and all motions that relate directly to these motions, (e.g., extension of time, reconsideration, sanctions, and mental or physical examinations, etc.) are **REFERRED** to the Honorable James M. Hopkins, United States Magistrate Judge, for final disposition.

In light of this referral, copies of discovery motions and responsive pleadings shall be sent only to Judge Hopkins and not to the undersigned. Counsel are reminded of Local Rule 5.1(A)(5)(b) which requires that the Magistrate Judge's name appear on all pleadings (e.g. 03-99999-CIV-HURLEY/HOPKINS).

5. This referral shall expire on the date of commencement of trial.

**Pretrial Discovery Schedule**

6. Pretrial discovery shall be conducted in accordance with Local Rule 16.1 and Rule 26(a) of the Federal Rules of Civil Procedure. Unless amended by subsequent order, the following deadlines shall apply.

Rule 14 and Rule 19 Motions

180 days before calendar call

Rule 26(a)(2) Expert Testimony Disclosures 90 days before calendar call  
[\*\*This includes the Rule 26(a)(2)(B) requirement for the disclosure of written expert reports which conform to the prescriptions of this Rule. This requirement will be strictly enforced.]

Summary Judgment Motions 90 days before calendar call  
[\*\*This deadline will be strictly enforced. Motions for extension of time to file the motion or response will not be granted absent exceptional cause.]

Mediation Conference 60 days before calendar call

Rule 26(a)(3) Witness and Exhibit List Exchange 30 days before calendar call

Discovery Cutoff 10 days before calendar call

Motions in Limine 5 days before calendar call

Pretrial Stipulation 5 days before calendar call  
(note Local Rule 16.1.E)

Exhibit Inspection 5 days before calendar call  
[\*\*All exhibits listed on each party's Rule 26(a)(3) disclosures must be made available for inspection and/or copying by the opposing party(s) by this date.]

Voir Dire Questions First day of jury trial

Jury Instructions First day of jury trial

Proposed Findings of Fact & Conclusions of Law First day of non-jury trial

Failure to comply with these deadlines may result in exclusion of testimony or exhibits. See Fed R.

Civ. P. 37(c)(1); Klonoski v. Mahlab, 156 F.3d 255 (1st Cir. 1998).

### **Requirements for Trial**

7. On the first day of trial, each party shall hand to the court reporter **two complete copies of its exhibit list**. The list, set out on Form AO 187, shall indicate the pre-marked number, a brief description of the exhibit and shall contain a space or a line for the court's ruling on the

admissibility of each exhibit.

8. On the first day of trial, each party shall hand to the court reporter **two complete copies of its witness list**. The witness list shall include the names of all persons intended to present expert testimony, and shall clearly mark their intended designation as "expert" witnesses.

#### **Mediation**

9. Pursuant to Rule 16 of the Federal Rules of Civil Procedure and Local Rule 16.2, this case is referred to mediation as follows:

(a) To the extent they do not conflict with the provisions of this order, all terms and provisions of the form mediation order set forth at Local Rule 16.2(H) are hereby incorporated by reference and shall be binding upon the parties in this case;

(b) The parties shall, within one-hundred-twenty (120) days from the date of entry of this order, agree upon a mediator. If they are unable to agree, plaintiff's counsel shall promptly notify the Clerk's office of their disagreement, and the Clerk will designate a mediator from the list of certified mediators on a blind rotation basis;

(c) Plaintiff's counsel shall be responsible for coordinating the mediation conference date and location agreeable to the mediator and all counsel of record.

#### **Motion Practice**

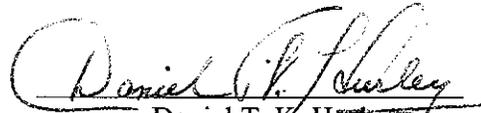
10. Every motion filed in this case shall be accompanied by **one proposed order** (*in PDF format*) granting the motion. The order shall contain an **up-to-date service list** (names and addresses) of all attorneys in the case. All motions shall be efiled or filed with the Clerk's office. The court will not accept any motions mailed directly to chambers.

#### **Telephonic Conferencing**

11. When practical, counsel are urged to utilize telephonic conferencing for pretrial

appearances, including calendar call. It is imperative, however, that telephonic conferencing be done only with *operator assisted* conferencing. For technical reasons related to the court's conferencing equipment, your office equipment is not an acceptable means of telephonic conferencing. Counsel wishing to appear in this manner for any proceeding must notify the Court at 561-803-3450 at least 24 hours prior to the proceeding. **Counsel wishing to appear for the calendar call by telephone must make arrangements with chambers by noon of the Tuesday preceding the date of the calendar call.**

**DONE and SIGNED** in Chambers at West Palm Beach, Florida, this 9<sup>th</sup> day of March, 2010.

  
Daniel T. K. Hurley  
United States District Judge

*Copy provided counsel*