

**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
Member case: ([View Member Case](#))
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
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Palm Beach County Sheriff's Office

V.

Consol Defendant

Leia Sanchez
LPN
also known as
Lillia Ambrogia

represented by **Jennifer L. Phillips**
Grower Ketcham More Rutherford et al
390 North Orange Avenue
Suite 1900 PO Box 538065
Orlando, FL 32853-8065
Email: jlphillips@growerketcham.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Patrick Harman Telan

Grower Ketcham Rutherford et al
 PO Box 538065
 Orlando, FL 32853-8065
 407-423-9545
 Fax: 407-425-7104
 Email: gk@growerketcham.com
 ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
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 <u>1</u> 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), 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 <u>2</u> 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 <u>5</u> 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. (vjk) (Entered: 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 <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. 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): Document Not Related to Case ; 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 <u>45</u> 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 thru 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)
04/09/2010	<u>67</u>	Letter/Response from Volunteer Lawyers' Project advising case eligible for services. (lr) (Entered: 04/09/2010)
07/14/2010	<u>68</u>	Letter from Volunteer Lawyers' Project dated 7/13/10 re status of finding attorney for plaintiff (lr) (Entered: 07/14/2010)
08/02/2010	<u>69</u>	Defendant's MOTION for Summary Judgment (<i>And Memorandum of Law</i>) by Harry Thomas. Responses due by 8/26/2010 (Attachments: # <u>1</u> Exhibit A - Deputy Thomas' Objections and Answers to Plf's Interrogs, # <u>2</u> Exhibit Affidavit of Eric Carr)(Jolly, Bruce) (Entered: 08/02/2010)
08/26/2010	<u>70</u>	Letter from Stuart Aurich (lh) (Entered: 08/27/2010)
08/27/2010	<u>71</u>	MOTION for Extension of Time to File by Stuart Duane Aurich. (lh) (Entered: 08/30/2010)
09/02/2010	<u>75</u>	Writ of Habeas Corpus ad Testificandum Issued as to Stuart Duane Aurich, Jail No. 547683 for 12/6/10.. Signed by Judge Daniel T. K. Hurley on 9/2/2010. (ail) (Entered: 09/03/2010)
09/03/2010	<u>72</u>	Order Vacating <u>66</u> Scheduling Order, Order Referring Case to Mediation, Order Referring Case to Magistrate Judge James Hopkins. See order for

		details. Signed by Judge Daniel T. K. Hurley on 9/3/2010. (dgj) (Entered: 09/03/2010)
09/03/2010	<u>73</u>	ORDER RE-SETTING TRIAL & BRIEFING SCHEDULE ON SUMMARY JUDGMENT PROCEEDINGS; granting <u>71</u> Motion for Extension of Time to File Response/Reply re <u>69</u> Defendant's MOTION for Summary Judgment (<i>And Memorandum of Law</i>). Responses due by 9/27/2010. Replies due by 10/6/2010. See order for details.. Signed by Judge Daniel T. K. Hurley on 9/3/2010. (dgj) (Entered: 09/03/2010)
09/03/2010		Pursuant to DE# <u>73</u> Set/Reset Hearings Jury Trial set for 12/6/2010 before Judge Daniel T. K. Hurley. (dgj) (Entered: 09/03/2010)
09/03/2010	<u>74</u>	ORDER directing submission of status report by Volunteer Lawyers' Project within 10 days. Signed by Judge Daniel T. K. Hurley on 9/3/10. (lr) (Entered: 09/03/2010)
09/08/2010	<u>76</u>	STATUS REPORT of Volunteer Lawyers' Project dated 9/7/10. (lr) (Entered: 09/08/2010)
09/15/2010	<u>77</u>	LETTER MOTION to Appoint Counsel by Stuart Duane Aurich. (Attachments: # <u>1</u> Exhibit)(lh) (Entered: 09/15/2010)
09/22/2010	<u>78</u>	MOTION to Appoint Counsel giving Notice that the Volunteer Lawyers Project has Suspended their Search in Finding Representation for the Plaintiff by Stuart Duane Aurich. (lh) (Entered: 09/22/2010)
09/27/2010	<u>79</u>	MEMORANDUM in Opposition re <u>78</u> MOTION to Appoint Counsel by Harry Thomas. (Jolly, Bruce) (Entered: 09/27/2010)
09/29/2010	<u>80</u>	MOTION for Extension of Time to File Response as to <u>69</u> Defendant's MOTION for Summary Judgment (<i>And Memorandum of Law</i>) by Stuart Duane Aurich. (lh) (Entered: 09/29/2010)
10/06/2010	<u>81</u>	ORDER granting <u>80</u> Motion for Extension of Time to File Response/Reply re <u>80</u> as to <u>69</u> Defendant's MOTION for Summary Judgment and <i>Order Recalling Writ of Habeas Corpus ad testificandum</i> <u>75</u> . Responses due by 10/18/2010. Replies due by 10/27/2010. Signed by Judge Daniel T. K. Hurley on 10/6/10. (lr) Modified linkage on 10/6/2010 (dgj). (Entered: 10/06/2010)
10/06/2010	<u>82</u>	RESPONSE to <u>69</u> Defendant's MOTION for Summary Judgment (<i>And Memorandum of Law</i>) Defendant's MOTION for Summary Judgment (<i>And Memorandum of Law</i>) filed by Stuart Duane Aurich. Replies due by 10/18/2010. (jcy) (Entered: 10/06/2010)
10/18/2010	<u>83</u>	ORDER denying <u>77</u> Motion to Appoint Counsel ; denying <u>78</u> Motion to Appoint Counsel. Signed by Magistrate Judge Patrick A. White on 10/18/2010. (cz) (Entered: 10/18/2010)
10/25/2010	<u>84</u>	RESPONSE in Support re <u>69</u> Defendant's MOTION for Summary Judgment (<i>And Memorandum of Law</i>) Defendant's MOTION for Summary Judgment (<i>And Memorandum of Law</i>) filed by Harry Thomas. (Jolly, Bruce) (Entered: 10/25/2010)

10/28/2010	<u>85</u>	Minute Entry for Calendar Call proceedings held before Judge Daniel T. K. Hurley 10/28/2010. The case is specially set for trial on 12/6/2010. Court Reporter: Pauline Stipes, 561-803-3458 / Pauline_Stipes@flsd.uscourts.gov (jc1) (Entered: 11/05/2010)
11/05/2010	<u>86</u>	ORDER granting in part and denying in part <u>69</u> Defendant's Motion for Summary Judgment.Signed by Judge Daniel T. K. Hurley on 11/5/2010. (tda) Modified signature date on 11/5/2010 (wc). (Entered: 11/05/2010)
11/12/2010	<u>89</u>	ORDER TO SHOW CAUSE ON CONSOLIDATION OF CASES. Signed by Judge Daniel T. K. Hurley on 11/10/2010. (jcy) (Entered: 11/15/2010)
11/15/2010	<u>87</u>	Proposed Jury Instructions by Harry Thomas. (Jolly, Bruce) (Entered: 11/15/2010)
11/15/2010	<u>88</u>	Proposed Jury Instructions by Harry Thomas. (Jolly, Bruce) (Entered: 11/15/2010)
11/18/2010	<u>90</u>	Order Continuing Trial. Signed by Judge Daniel T. K. Hurley on 11/18/2010. (jcy) (Entered: 11/18/2010)
11/18/2010	<u>91</u>	Motion for Protective Order by Stuart Duane Aurich. (jcy) (Entered: 11/18/2010)
11/19/2010	<u>92</u>	Motion Requesting Explanation on <u>83</u> Order on Motion to Appoint Counsel, by Stuart Duane Aurich. Responses due by 12/6/2010 (jcy) (Entered: 11/19/2010)
11/19/2010	<u>93</u>	ENDORSED ORDER denying as moot <u>91</u> Plaintiff's Motion for Protective Order over Legal Documents and Evidence. Signed by Judge Daniel T. K. Hurley on 11/18/2010. (tda) (Entered: 11/19/2010)
11/19/2010	<u>94</u>	ENDORSED ORDER denying <u>92</u> Plaintiff's Motion for Clarification. Signed by Judge Daniel T. K. Hurley on 11/19/2010. (tda) (Entered: 11/19/2010)
11/22/2010	<u>95</u>	Subpoena in a Civil Case by Stuart Duane Aurich (jcy) (Entered: 11/22/2010)
11/22/2010	<u>96</u>	RESPONSE TO ORDER TO SHOW CAUSE by Harry Thomas. (Jolly, Bruce) (Entered: 11/22/2010)
12/06/2010	<u>97</u>	ORDER Consolidating Actions with 08-80113-CIV-Hurley. Signed by Judge Daniel T. K. Hurley on 12/6/2010. (ls) (Entered: 12/07/2010)
12/06/2010	<u>98</u>	ORDER Lifting Stay in Case No. 08-80113 and Setting Consolidated Action for Trial; (Calendar Call set for 3/24/2011 08:30 AM in West Palm Beach Division before Judge Daniel T. K. Hurley.). Signed by Judge Daniel T. K. Hurley on 12/6/2010. (ls) (Entered: 12/07/2010)
12/13/2010	<u>99</u>	RESPONSE TO ORDER TO SHOW CAUSE by Stuart Duane Aurich. (jcy) (Entered: 12/13/2010)
01/05/2011	<u>100</u>	MOTION for Extension of Time to File by Stuart Duane Aurich. (ots) (Entered: 01/05/2011)
01/06/2011	<u>101</u>	ORDER denying <u>100</u> Motion to Extend Future Discovery Response Dates.

		Signed by Judge Daniel T. K. Hurley on 1/6/11. (lr) (Entered: 01/06/2011)
01/10/2011	<u>102</u>	MOTION to Compel <i>Discovery Responses and for extension of discovery cut-off and summary judgment motion deadline</i> by Leia Sanchez. Responses due by 1/27/2011 (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B, # <u>3</u> Exhibit C) Associated Cases: 9:08-cv-80108-DTKH, 9:08-cv-80113-DTKH(Phillips, Jennifer) (Entered: 01/10/2011)
01/10/2011	<u>103</u>	MOTION to Take Deposition from Stuart Duane Aurich <i>a person confined to prison and to redepose plaintiff and memorandum of law</i> by Leia Sanchez. (Attachments: # <u>1</u> Exhibit A)Associated Cases: 9:08-cv-80108-DTKH, 9:08-cv-80113-DTKH(Phillips, Jennifer) (Entered: 01/10/2011)
01/12/2011	<u>104</u>	ORDER granting <u>103</u> Sanchez' Motion to Take Deposition of Stuart Duane Aurich. Signed by Judge Daniel T. K. Hurley on 1/12/11. (lr) (Entered: 01/12/2011)
01/12/2011	<u>105</u>	ORDER granting <u>102</u> Motion to Compel discovery responses from pro se plaintiff and denying motion to extend summary judgment deadline. Signed by Judge Daniel T. K. Hurley on 1/12/11. (lr) (Entered: 01/12/2011)
01/28/2011	<u>106</u>	RESPONSE to <u>102</u> MOTION to Compel <i>Discovery Responses and for extension of discovery cut-off and summary judgment motion deadline</i> by Stuart Duane Aurich. (jcy) (Entered: 01/28/2011)
01/28/2011	<u>107</u>	Response and Objections to Leia Sanchez's Notice of Service of First Interrogatories to Plaintiff by Stuart Duane Aurich. (jcy) (Entered: 01/28/2011)
02/02/2011	<u>108</u>	Notice of Service of First Interrogatories to Defendant Leia Sanchez, L.P.N. by Stuart Duane Aurich (jcy) (Entered: 02/02/2011)
02/24/2011	<u>109</u>	ORDER ON TRIAL PREPARATION. Signed by Judge Daniel T. K. Hurley on 2/24/11. Associated Cases: 9:08-cv-80108-DTKH, 9:08-cv-80113-DTKH (lr) (Entered: 02/24/2011)
02/25/2011	<u>111</u>	MOTION the Court to issue Subpoenas under Federal Rules of Civil Procedure 5 by Stuart Duane Aurich. (lk) (Entered: 02/28/2011)
02/28/2011	<u>110</u>	ORDER Setting Status Conference for 3/9/2011 at 10:00 AM in West Palm Beach Division before Judge Daniel T. K. Hurley. Plaintiff shall appear via telephonic conferencing which the court shall arrange. Signed by Judge Daniel T. K. Hurley on 2/28/11. (lr) (Entered: 02/28/2011)
03/03/2011	<u>112</u>	MOTION for Summary Judgment <i>and Memorandum of Law</i> by Leia Sanchez. Responses due by 3/21/2011 (Attachments: # <u>1</u> Exhibit 1, # <u>2</u> Exhibit 2, # <u>3</u> Exhibit 3, # <u>4</u> Exhibit 4)Associated Cases: 9:08-cv-80108-DTKH, 9:08-cv-80113-DTKH(Phillips, Jennifer) (Entered: 03/03/2011)
03/08/2011		Set/Reset Hearings Jury Trial set for 5/2/2011 before Judge Daniel T. K. Hurley. Associated Cases: 9:08-cv-80108-DTKH, 9:08-cv-80113-DTKH(dgj) (Entered: 03/08/2011)
03/09/2011	<u>113</u>	Minute Entry for Status Conference proceedings held before Judge Daniel T.

		K. Hurley on 3/9/2011. It was decided to have two seperate trials and the plaintiff agreed to attend via video conference. Court Reporter: Karl Shires, 561-514-3728 / Karl_Shires@flsd.uscourts.gov Associated Cases: 9:08-cv-80108-DTKH, 9:08-cv-80113-DTKH(jc1) (Entered: 03/09/2011)
03/10/2011	<u>114</u>	Order Severing Actions for Trial & Specially Setting Trial in Case No. 08-80108. (Jury Trial set for 5/2/2011 before Judge Daniel T. K. Hurley.). Signed by Judge Daniel T. K. Hurley on 3/10/2011. (jcy) (Entered: 03/10/2011)
03/10/2011	<u>116</u>	Motion for Extension of Time to File Papers by Stuart Duane Aurich. Responses due by 3/28/2011 (jcy) (Entered: 03/11/2011)
03/11/2011	<u>115</u>	ORDER denying <i>without prejudice to renew</i> <u>111</u> Motion for Issuance of Trial Subpoenas. Signed by Judge Daniel T. K. Hurley on 3/11/11. (lr) (Entered: 03/11/2011)
03/14/2011	<u>117</u>	ORDER directing submission of status report by Volunteer Lawyers' Project within 10 days. Signed by Judge Daniel T. K. Hurley on 3/14/11. (lr) (Entered: 03/14/2011)
03/14/2011	<u>118</u>	Order Granting Plaintiff's Request for Extension of Time on Pretrial Deadlines in Case No 08-80113.(Responses due by 4/21/2011). Signed by Judge Daniel T. K. Hurley on 3/12/2011. (jcy) (Entered: 03/14/2011)
03/16/2011	<u>119</u>	Motion for Extension of Time by Stuart Duane Aurich. Responses due by 4/4/2011 (jcy) (Entered: 03/16/2011)
03/21/2011	<u>120</u>	ENDORSED ORDER denying as moot <u>119</u> Plaintiff's Motion for Extension of Time. See DE <u>118</u> . Signed by Judge Daniel T. K. Hurley on 3/21/2011. (tda) (Entered: 03/21/2011)

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03/22/2011 10:58:55			
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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 08-80108-CIV-HURLEY

**STUART DUANE AURICH,
Plaintiff,**

vs.

**DEPUTY SHERIFF HARRY THOMAS,
PALM BEACH SHERIFF'S OFFICE,
Defendant.**

**ORDER DENYING in PART & GRANTING in PART
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Plaintiff Stuart Duane Aurich ("Aurich") sues defendant Palm Beach County Deputy Sheriff Harry Thomas ("Officer Thomas"), bringing claim under 42 U.S.C. § 1983 for unconstitutionally excessive force during the course of an arrest (Count 1) and delayed medical care (Count 2).

I. Procedural History

In earlier proceedings, the court denied Aurich's motion for summary judgment, finding disputed issues of material fact on the issues of whether Officer Thomas used excessive force in effecting Aurich's arrest, and whether Officer Thomas unreasonably denied Aurich access to timely medical care for a serious medical condition. [DE# 62].

Officer Thomas later filed a separate motion for summary judgment on ground that he did not use excessive force in effecting Aurich's arrest as a matter of law, or in the alternative, that he is entitled to qualified immunity [DE# 69]. On September 3, 2010, the court accepted Officer Thomas' motion for filing, re-opened the time for both parties to file summary judgment motions, and established briefing deadlines on the motion and cross motion, if any. [DE# 73]. Aurich has since filed his response in opposition to Officer Thomas' motion [DE# 82], without cross motion,

and Officer Thomas has filed his reply [DE# 84].

In evaluating Officer Thomas' motion, the court views the evidence and factual inferences in the light most favorable to Aurich, the the non-moving party, and avoids all credibility judgments. *Behrens v Pelletier*, 516 U.S. 299, 116 S. Ct. 834, 133 L.Ed.2d 773 (1996); *Mize v Jefferson City Bd of Education*, 93 F.3d 739 (11th Cir. 1996).

Applying this standard here, the court reaffirms its earlier finding that Aurich alleges sufficient facts to create a genuine issue of material fact on the question of whether Officer Thomas used a reasonable amount of force when arresting him. The court further finds that Officer Thomas' conduct, as alleged by Aurich, facially violates the Fourth Amendment with obvious clarity and violates clearly established law in view of the Eleventh Circuit Court of Appeals decisions in *Smith v Mattox*, 127 F.3d 1416 911th Cir. 1997)(per curiam) and *Wells v Cramer*, 262 Fed. Appx. 184, 2008 WL 11088 (11th Cir. 2008)(unpub), such that Officer Thomas is not entitled to qualified immunity on the excessive force claim at this stage of the litigation.

Finally, with regard to Aurich's Fourteenth Amendment due process claim based on delayed or denied medical care, the court concludes that Aurich fails to establish facts showing a deliberate indifference to a serious medical need on the part of Officer Thomas. Accordingly, the court shall grant the motion for summary judgment as to Aurich's delayed/denied medical care claim.

II. FACTS

There is no genuine issue as to any of the following facts, except as otherwise noted:

On February 6, 2008, at approximately 10:30 p.m., several Palm Beach County Sheriff's Deputies, including a K-9 Officer and Officer Thomas, arrested Aurich at his apartment in West Palm Beach, Florida to execute an active arrest warrant for robbery with a firearm issued for

Aurich by the State of Michigan.

The officers enlisted the assistance of a security guard at the apartment complex to induce Aurich to open his front door. After Aurich opened the door, the security guard stepped aside and the officers entered and placed Aurich under arrest. According to Officer Thomas, Aurich was promptly placed in handcuffs without resistance, and, once restrained, complied by walking out of the apartment without any resistance [DE# 49-1]. Officer Thomas described it as a “basic arrest,” where Aurich was “compliant” at all times.

Aurich delivers a diametrically opposed account of the arrest. According to him, the officers charged into his apartment screaming to get down on the floor. He says he promptly complied, and, as he was going down, told the officers that he had a broken shoulder and was scheduled for reconstructive shoulder surgery. He also pointed out a pile of medical records, prescription pain medicine and a sling on the kitchen table which he had ready to take to the jail.¹

Officer Thomas told Aurich he would not need his medical papers or medicine because he would be taken care of at the county jail. Aurich says Officer Thomas then stomped either his foot or knee into his back, grabbed both of his arms and handcuffed them behind his back. According to Aurich, Officer Thomas then “yanked my whole body by my arms and drug me out of my home

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Aurich states he had prepared for his arrest after his father called earlier that day to advise him that he had directed the police to his home. In anticipation of their arrival, Aurich gathered his prescribed pain medicine, medical records and sling and placed these items on the kitchen table for the stated purpose of providing the arresting authorities with his medical contact information and demonstrating that he was not armed [DE# 46].

Aurich’s father has filed a corroborating affidavit indicating that he was visited by three police officers earlier that day; after learning that the officers had a warrant for his son’s arrest, he told them where to find him after receiving assurances that his son would receive the shoulder surgery as scheduled. [DE# 46-1].

just like I was a wild animal or something.” [DE# 46, p. 17] At this point Aurich felt something inside his shoulder ripping, tearing and grinding, which caused him to pass out from pain. When he regained consciousness, he was lying on his back outside the building with his arms still handcuffed behind him, surrounded by several officers with guns drawn. He avers that Officer Thomas then “smashed in” his left shoulder, causing Aurich to pass out again. By the time he arrived at the Palm Beach County Jail, his shoulder was red and swollen, and he was passing blood in his urine and stools. He complains that a nurse in the prisoner medical intake unit ultimately told him he would not be receiving his prescribed pain medications or his anticipated shoulder surgery because his medical care was now the responsibility of the State of Michigan.²

III. DISCUSSION

A. Excessive Force

Aurich’s description of his arrest must be taken as true for purposes of this summary judgment proceeding. Under Aurich’s account of the event, despite his consistent compliance and cooperation, Officer Thomas stomped on his back in the process of handcuffing him, dragged him out of the apartment by the arms, and then, after Aurich passed out and regained consciousness, gratuitously “smashed” in his left vulnerable shoulder as he lay immobilized on the ground, causing Aurich to pass out again.

If the court assumes Aurich’s account to be true, Officer Thomas’ conduct, after Aurich had been subdued and was non-resistant, constitutes actionable excessive force. The officer’s alleged acts of dragging a compliant Aurich out of the apartment by the arms after handcuffing him, and

²Aurich has filed a separate § 1983 claim against the nurse and other members of the prison medical staff for lack of adequate medical treatment which is also pending in this division. Case No. 080-80113-CIV-HURLEY.

then “smashing” his injured shoulder after Aurich was handcuffed, supine and immobilized on the ground, facially violated the Fourth Amendment with obvious clarity. While the court appreciates the risk of the unknown which confronted the officers when they stormed the apartment to effect Aurich’s arrest, and takes no issue with their use of some force reasonably necessary to rapidly subdue Aurich and eliminate his access to any weaponry, at some point the force, as alleged by Aurich, became entirely gratuitous and crossed over the constitutional line.

Once Aurich was subdued, exhibiting complete cooperation toward the officers and the ability to walk under his own power, the officer’s “yanking” his body by the arms and “dragging” it out the door like a “wild animal,” – a description of the event which the court interprets, in a light most favorable to Aurich, to mean that the officer dragged his torso by the arms along the ground like a four legged animal incapable of standing erect – could serve no other purpose but the infliction of gratuitous pain. This is particularly so where, under Aurich’s account, he had already told the officer that he had a significant shoulder injury for which surgery was scheduled.

Surely once an arrestee is subdued and compliant there would be no justification for then dragging and bouncing him down a flight of stairs by his arms or legs while escorting him to the police cruiser for transport. Dragging a subdued, compliant, ambulatory arrestee with a known shoulder vulnerability along the ground during the course of a police escort is equally unjustifiable as an unreasonable “seizure” of the person offensive to any principled adherence to the Fourth

Amendment guarantees.³ Viewed in combination with the gratuitous “smashing” of Aurich’s shoulder after he regained consciousness on the ground outside, Officer Thomas’ conduct, as alleged by Aurich, is an obvious violation of the general prohibition against unreasonable force preserved by our Constitution.

Thus, Aurich’s allegations, if true, are sufficient to show that Officer Thomas used unconstitutionally excessive force at these two physical junctures of his arrest. *See e.g. Jennings v Jones*, 499 F.3d 2 (1st Cir. 2007)(whether police officer applied excessive force when he increased pressure on suspect’s ankle several seconds after suspect stopped resisting arrest and stated that pressure already applied was hurting his previously injured ankle was for jury); *Jones v Garcia*, 345 Fed. Appx. 987 (6th Cir. 2009)(unpub)(genuine issue of material fact, regarding whether police officer snatched arrestee from prone to standing solely using arm connected to arrestee’s bad shoulder after he warned officers of pre-existing injury, precluded summary judgment on arrestee’s Fourth Amendment excessive force claim); *Guite v Wright*, 147 F.3d 747 (8th Cir. 1998)(permitting excessive force claim where despite visible shoulder injury in sling, officer grabbed plaintiff’s wrist, pushed him backwards and held him against a door). *See also Howard v Dickerson*, 34 F.3d 978

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The defendant offers the affidavit of Eric Carr, the security guard, in effort to corroborate Officer Thomas’ account of the incident. Carr states that after he stepped aside, he did not see the arrest, although he was initially within earshot and did not hear any exclamations that would leave him to believe that excessive force was involved. Carr says he then walked down the stairs of the apartment and waited inside his security patrol vehicle, from where he watched Aurich leave the apartment in handcuffs, led by the deputies, without evincing any kind of pain or discomfort. [DE# 69-2]. It is not clear that Carr was in a position to view any portion of the arrest with any degree of reliability, since he did not witness the physical arrest and was sitting in his patrol car during the escort to the police cruiser. In any event, for purposes of this summary judgment proceeding, the court is bound to accept the plaintiff’s version of the event, without making any credibility judgments or weighing inconsistent testimony.

(10th Cir 1994)(upholding Fourteenth Amendment claim of deliberate indifference to medical needs where plaintiff told arresting officer that she recently underwent neck surgery and that handcuffing behind the back would aggravate injury). *Cf. Rodriguez v Farrell*, 294 F.3d 1276, 1278 n. 3 (11th Cir. 2002)(officer's alleged discounting of plaintiff's arm injury claim was reasonable where plaintiff did not tell officer about injury until after arrest began; whether Constitution would require crediting the statement if plaintiff told officer about injury before physical part of arrest began left as open question).

There are no new evidentiary developments in the record which alter the court's analysis of this threshold issue in any way. Because the factual allegations, if true, show Officer Thomas violated Aurich's constitutional right to be free of excessive force, the analysis now turns to whether Officer Thomas is entitled to qualified immunity for his actions as a matter of law.

1. QUALIFIED IMMUNITY

Qualified immunity protects public officials from § 1983 liability as long "as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L.Ed.2d 396 (1982). To receive qualified immunity, the officer must first show that he acted within his discretionary authority. *Lee v Ferraro*, 284 F.3d 1188 (11th Cir. 2002). It is undisputed in this case that Officer Thomas acted within his discretionary authority.

Once discretionary authority is established, the burden shifts to plaintiff to show that qualified immunity should not apply. *Id.* The Supreme Court has set out a two part test for determining the applicability of qualified immunity: (1) First, taken in the light most favorable to the party, do the facts alleged show the officer's conduct violated a constitutional right? (2) If

so, was the right “clearly established” at the time of the objectionable conduct? *Saucier v Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L.Ed.2d 272 (2001).

For a right to be clearly established, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. *Saucier* at 202. A right may be established for qualified immunity purposes in one of three ways: (1) case law with indistinguishable facts clearly establishing the constitutional right; (2) a broad statement of principle within the Constitution, statutes or case law, untied to particularized facts, that clearly establishes the law applicable in the future to different facts; (3) conduct so egregious that case law is not needed to establish that the conduct cannot be lawful. *Lewis v City of West Palm Beach*, 561 F.3d 1288 (11th Cir. 2009), citing *Long v Slaton*, 508 F.3d 576 (11th Cir. 2007) and *Mercado v City of Orlando*, 407 F.3d 1152, 1159 (11th Cir. 2005).

Here, the court finds that Aurich’s right to be free of excessive force during arrest was clearly established under the first and third test. As to similar case law examples clearly establishing the constitutional right to be free from excessive force from the controlling appellate court, the court is informed by the cases of *Smith v Mattox*, 127 F.3d 1416 (11th Cir. 1997) and *Wells v Cramer*, 262 Fed. Appx. 184, 2008 WL 110088 (11th Cir.2008)(unpub).

In *Smith*, the arrestee, when confronted by a police officer conducting a drug operation, raised a baseball bat at the officer, but then dropped the bat and fled. When he was later surrounded by the officer and others, he at first pretended to run again but then “docilely submitted to arrest” upon the officer’s request for him to “get down.” Once on the ground, the arresting officer put his knee on his back to handcuff him and pulled his arm, causing him to complain of discomfort. The arrestee then heard the officer grunt before delivering a blow which broke the arm in several places. The

grunt and blow to the arm, coupled with the severity of the injury and the arrestee's lack of resistance, showed at the summary judgment stage that the officer had violated clearly established law.

In *Wells*, a police officer tackled the arrestee following a low speed chase. The officer averred that he used force only in attempt to place the resisting arrestee into handcuffs, and alleged facts showing that he was an immediate threat to safety of others and that he evaded arrest by flight. Wells filed a counter-affidavit indicating that the officers immediately handcuffed him after tackling him, and then proceeded to beat him and "high five" each other while he lay handcuffed on the ground. Wells' declaration that he was handcuffed and no longer resisting arrest when he was beaten created a genuine issue of material fact as to whether the officers used a reasonable amount of force when arresting him, and also showed, at the summary judgment stage, that the arresting officer had violated clearly established law and had facially violated the Fourth Amendment with obvious clarity for purposes of qualified immunity analysis.

So too in this case, Officer Thomas' qualified immunity assertion calls for an evaluation of whether Officer Thomas's actions were objectively reasonable in light of the facts and circumstances confronting him. In making this assessment, the court must consider the severity of the crime at issue, whether the suspect posed an immediate threat to the safety of the officers or others, whether the suspect was actively resisting arrest or attempting to evade arrest by flight. At the same time, the court must view the facts from the "perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight" and must allow "for the fact that police officers are often forced to make split second judgments -- in circumstances that are tense, uncertain, and rapidly evolving -- about the amount of force that is necessary in a particular situation." *Graham v*

Connor, 490 U.S. 386, 397 (1989); *Lee v Ferraro*, 284 F.3d 1188 (11th Cir. 2002).

Recognizing the severity of the crime for which the arrest warrant had issued – armed robbery – and the corresponding possibility that the arrestee may well be armed and dangerous, the rush into Aurich’s home and immediate push to get him down on the ground and handcuffed is well within the realm of the officers’ discretionary duties and functions in effecting an arrest. However, Aurich posed no threat to the officers after he was arrested and secured in handcuffs, so the force the officer used *after* the arrest in dragging him out of the apartment by his arms and smashing in his shoulder was unnecessary and disproportionate under the circumstances, assuming as true, as alleged by Aurich, that: (1) Aurich was not resisting arrest and was compliantly subdued at the time he was dragged out of the apartment by his arms, or at the time of the blow to his shoulder; (2) the sensation of ripping, tearing and grinding in Aurich’s shoulder as he was dragged from the apartment; (3) the intermittent loss of consciousness from pain after the handcuffing; and (4) the aggravation of a pre-existing shoulder injury.

At the time of Officer Thomas’ action, both existing case law and general Fourth Amendment principles had clearly established that this use of force was excessive in violation of the Constitution. *Lee v Ferraro*, 284 F.3d 1188 (11th Cir. 2002)(qualified immunity denied to officer who was physically rough with arrestee despite no threat or physical aggression on her part); *Priester v City of Riviera Beach*, 208 F.3d 919 (11th Cir. 2000)(qualified immunity denied officer who ordered a dog attack on a passive suspect). *See also Jennings v Jones*, 499 F.3d 2 (1st Cir. 2007)(officer acted in obvious violation of general prohibition against unreasonable force and clearly established law where he increased force on ankle after arrestee stopped resisting and warned that he was hurting his previously injured ankle); *Giles v Kearney*, 571 F.3d 318, 327 (3d

Cir. 2009)(reversing summary judgment on basis of qualified immunity; assuming arrestee's version of the facts to be true at summary judgment juncture, no reasonable officer could agree that striking and kicking a subdued, non-resisting inmate in the side, with force enough to cause broken rib and collapsed lung was reasonable or necessary under established law). Accordingly, Officer Thomas is not entitled to qualified immunity on Aurich's excessive force claim at this stage of the litigation.

B. DELAYED MEDICAL CARE

Aurich also contends that Officer Thomas violated his constitutional rights by depriving him of access to his prescription pain medicine and medical records before delivering him to the custody of the Palm Beach County Jail.

Deliberate indifference to serious medical needs of prisoners is viewed as the unnecessary and wanton infliction of pain in violation of the Eighth Amendment and is cognizable under 42 U.S.C. § 1983. *Walker v Butler*, 967 F.2d 176 (5th Cir. 1992). *See also Domino v Tex. Dept of Criminal Justice*, 239 F.3d 752 (5th Cir. 2001). The failure to alleviate a significant risk that a prison official should have perceived, but did not, is insufficient to show deliberate indifference. Rather, the plaintiff must show that officials refused to treat him, ignored his complaints, intentionally treated him incorrectly, or engaged in similar conduct that clearly evinces wanton disregard for a serious medical need. *Id.*

When the plaintiff, like Aurich, is a pretrial detainee, claims of cruel and unusual punishment sound properly in the Fourteenth Amendment right to due process, as opposed to the Eighth Amendment. *Goree v City of Atlanta, Ga.*, 276 Fed. Appx. 919 (11th Cir. 2008)(unpub), citing *Lancaster v Monroe County, Ala.*, 116 F.3d 1419, 1425 n. 6 (11th Cir. 1997). Because the applicable standard is the same under either provision, case law involving prison inmates is applicable to cases

involving arrestees and pretrial detainees. *Id.*, citing *Marsh v Butler County, Ala.*, 268 F.3d 1014, 1024 n. 5 (11th Cir. 2001)(*en banc*).

In order to establish a Fourteenth Amendment violation based on deliberate indifference to medical needs, a pretrial detainee must establish: (1) an “objectively serious deprivation,” i.e. a “serious medical need” that left unattended poses a substantial risk of serious harm; (2) a response by the public official that is so inadequate that it constitutes “an unnecessary and wanton infliction of pain,” and (3) an attitude of deliberate indifference by illustrating that the public official was aware of the facts from which a substantial risk of serious harm could be inferred and drawing that indifference. *Goree, supra*, citing *Taylor v Adams*, 221 F.3d 1254 (11th Cir. 2000).

A “serious medical need” is one that has been diagnosed by a physician as requiring treatment, or one that is so obvious that a layperson would recognize the need for a doctor’s urgent attention. *Monmouth County Correctional Institutional Inmates v Lanzaro*, 834 F.2d 326 (3d Cir. 1987).

“Deliberate indifference” requires proof that the officer knew of the arrestee’s need for medical care and either (1) intentionally refused to provide such care; (2) delayed medical care for non-medical reasons, or (3) denied a reasonable request for treatment. *Durmer v O’Carroll*, 991 F.2d 64, 68 (3d Cir. 1993). Thus, to prove “deliberate indifference,” the plaintiff must show subjective knowledge of the risk of harm, disregard of that risk and conduct that is beyond mere negligence. *Brown v Johnson*, 387 F.3d 1344 (11th Cir. 2004).

Delay in access to medical attention can amount to “deliberate indifference” to a serious medical condition in violation of the Constitution when it is “tantamount to ‘unnecessary and wanton infliction of pain,’” such as delay in access to emergency medical needs involving life

threatening conditions, or situations where it is apparent that delay would detrimentally exacerbate the arrestee's medical problem. *See e.g. Brown v Hughes*, 894 F.2d 1533, 1538 (11th Cir.1990)(per curiam)(delay in medical treatment for serious and painful broken foot was sufficient to state a constitutional claim); *H.C. ex rel. Hewett v Jarrard*, 786 F.2d 1080 (11th Cir. 1986)(superintendent of juvenile detention center held responsible under §1983 for denying medical care to juvenile, where superintendent personally inflicted injury to juvenile's shoulder by throwing him against wall in isolation cell, and then effectively placed medical attention beyond his reach by authorizing and imposing isolation for period well beyond state guidelines); *Hughes v Noble*, 295 F.2d 495 (5th Cir. 1961)(per curiam) (arrestee stated claim for denial of medical care where after auto accident, arrestee was jailed for thirteen hours with dislocated and fractured cervical vertebrae without medical attention despite repeated requests for medical assistance).

On the other hand, delay or even denial of medical treatment for superficial, non-serious physical conditions does not constitute a constitutional violation. *Dickson v Colman*, 569 F.2d 1310 (5th Cir. 1978)(per curiam) (no constitutional violation for 33- day delay in treatment of shoulder injury because of failure to transfer medical records where inmate had full range of motion despite continuing pain from three year old injury); *Wesson v Oglesby*, 910 F.2d 278 (5th Cir. 1990)(state prisoner's swollen, bleeding wrists from handcuffs that were too tight did not constitute a "serious medical need" such that any minor delay caused by prison officials in delivering inmate to care of medical personnel could be construed as "deliberate indifference.")

In this case, Aurich contends that Officer Thomas was aware of his pre-existing shoulder injury, his scheduled shoulder surgery and the pain associated with his medical condition, yet denied him access to his medical records, x-rays and prescription pain medicine, even after he passed out

from pain twice during course of his arrest. For purposes of this analysis, the court assumes that Aurich's pre-existing shoulder injury, for which he was scheduled for surgery, constitutes a serious medical need.

However, Aurich fails to allege facts demonstrating a "deliberate indifference" to that need on the part of Officer Thomas. He does not allege that Officer Thomas delayed transporting him to appropriate medical personnel to assess his current complaints of pain or need for surgery and that such delay exacerbated his injuries. *Cf. Gaudreault v Municipality of Salem*, 923 F.2d 203 (1st Cir 1990)(per curiam) (while hospital records showed bruises and abrasions to forehead, ribs, shoulder, cornea and upper back consistent with allegation that arrestee had been assaulted by police officer, there was nothing record to suggest that ten hour delay in medical treatment exacerbated those injuries). Instead, he complains that after Officer Thomas impeded his access to his prescription medicine and medical contact information by refusing to take his medical records and prescription pill bottles to the jail at the time of his arrest.

Aurich fails to demonstrate how Officer Thomas disregarded a known risk by preventing him from transporting his pain medicine or medical records to jail, or how Officer Thomas otherwise may have contributed to any delay in treatment or surgery for his pre-existing shoulder injury. He complains only that Officer Thomas refused to bring along Aurich's prescription medicine and medical records which would have served as verification of his medical condition and useful contact information for the prison medical staff in order to facilitate his treatment. This does not rise to the level of "deliberate indifference" to a "serious medical need," *Collier v Montgomery*, 569 F.3d 214 (5th Cir. 2009)(police officer did not act with deliberate indifference to arrestee's alleged serious medical condition where arrestee complained of chest pain and officers refused to

allow contact with arrestee's own cardiologist, where officer twice attempted to provide medical care which arrestee refused); *Abshire v Prator*, 2010 WL 3278256 (5th Cir. 2010)(unpub)(arresting deputy's action of preventing diabetic from injecting himself was objectively reasonable, where deputy prevented arrestee from injecting himself with unknown substance and prevented him from transporting syringe with him to jail, as deputy had no way to know if syringe contained insulin).

While Aurich complains that impeded access to his medical and prescription medicine records contributed to the delay in an accurate diagnosis and treatment by prison medical authorities after he was delivered to prison officials, he adduces no verifying medical evidence to establish how Officer Thomas' failure to carry his medical records to prison officials contributed to an exacerbation or worsening of his pre-existing medical condition. *Langston v Peters*, 100 F.3d 1235 (7th Cir. 1996)(rejecting allegations of "deliberate indifference" where plaintiff failed to present any evidence of a detrimental effect caused by the one hour delay between time he notified defendant of problem and time defendant notified medical technician).

Because Aurich thus does not present evidence of "deliberate indifference," and has not presented any medical evidence linking his enhanced injuries to the allegedly unconstitutional conduct of Officer Thomas, the court will grant summary judgment on the claim which accuses Officer Thomas of exhibiting deliberate indifference to plaintiff's medical needs.

IV. Decretal Provisions

Based on the foregoing, it is **ORDERED AND ADJUDGED:**

1. The defendant's motion for summary judgment on grounds of qualified immunity is **DENIED** as to the excessive force claim.

2. The defendant's motion for summary judgment is **GRANTED** as to the denial/delay in medical care claim.

DONE AND ORDERED in Chambers at West Palm Beach, Florida this 5th day of November, 2010.



Daniel T. K. Hurley
United States District Judge

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

Bruce Wallace Jolly, Esq.

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

**CASE NO. 08-80108-CIV-HURLEY (lead case)
(consolidated with: Case No. 08-80113)**

**STUART DUANE AURICH,
Plaintiff,**

v.

**DEPUTY SHERIFF HARRY THOMAS,
PALM BEACH SHERIFF'S OFFICE,
Defendant.**

Case No. 08-80108-Civ

**STUART DUANE AURICH,
Plaintiff,**

v.

**LEIA SANCHEZ, LPN,
Defendant.**

Case No. 08-80113-Civ

ORDER CONSOLIDATING ACTIONS

THIS CAUSE is before the Court *sua sponte* for consideration of consolidation.

Federal Rule of Civil Procedure 42(a) provides that actions involving a common question of law or fact may be consolidated. Consolidation under this rule is a procedural device designed to promote judicial economy that does not merge the actions or defenses of separate parties and does not change the rights of parties in separate suits. *Cole v. Schenley Indus. Inc.*, 563 F.2d 35, 38 (2d Cir. 1977). Further, under this rule, the court may consolidate the cases completely or for limited proceedings or stages, *Lewis v ACB Bus. Services Inc.*, 135 F.3d 389, 412 (6th Cir. 1998), with the decision on whether to consolidate left to the discretion of the trial court. *NAACP of Louisiana v. Michot*, 480 F.2d 547, 548 (5th Cir. 1973).

Upon consideration of the parties' responses to the Court's Order to Show Cause on Consolidation of Cases [DE# 89, Case NO. 08-80113][DE#96, Case No. 08-80108], the Court finds that the consolidation of the above two cases for all purposes, including trial, would serve the interests of judicial economy. It is therefore **ORDERED** and **ADJUDGED**:

1. The above cases currently pending in the Southern District as captioned above are now **CONSOLIDATED** in this division for all purposes.
2. Unless otherwise directed by the Court, **all further pleadings in these actions shall bear the above case style, *Stuart Duane Aurich v Deputy Sheriff Harry Thomas, Case No. 08-80108--CIV-HURLEY***. Pleadings shall only be filed under this case number. ***No cross filings are needed.***
3. The Clerk shall file a copy of this Order in all related cases.

DONE and SIGNED in Chambers in West Palm Beach, Florida this 6th day of December, 2010.


Daniel T.K. Hurley
United States District Court Judge

cc.
Stuart Duane Aurich, *pro se*

Patrick H. Telan, Esq.

Bruce W. Jolly, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-80108-CIV-HURLEY (lead case)
(consolidated with: Case No. 08-80113)

STUART DUANE AURICH,
Plaintiff,

v.

DEPUTY SHERIFF HARRY THOMAS,
PALM BEACH SHERIFF'S OFFICE,
Defendant.

Case No. 08-80108-Civ

STUART DUANE AURICH,
Plaintiff,

v.

LEIA SANCHEZ, LPN,
Defendant.

Case No. 08-80113-Civ

**ORDER LIFTING STAY in CASE NO. 08-80113
& SETTING CONSOLIDATED ACTION FOR TRIAL**

THIS CAUSE is before the court following consolidation of the above actions for all purposes, including trial. In light of the consolidation of these actions it is now

ORDERED AND ADJUDGED:

1. The **STAY** of proceedings previously entered by endorsed order of the court, per the Honorable Magistrate Judge Patrick White, on November 15, 2010 [DE# 87] is **LIFTED**.

2. The Order Scheduling Pretrial Proceedings entered in Case No. 08-80113-Civ on October 13, 2010 by the Honorable Magistrate Judge Patrick White [DE# 81, Case No. 08-80113] is reaffirmed and reinstated in all respects. The pretrial deadlines outlined in this order shall apply to Case No. 08-80113 *only*, and all parties to that action shall govern themselves accordingly.

3. All pretrial procedures and deadlines established in the order scheduling pretrial proceedings entered on February 13, 2009 by Magistrate Judge White in the lead action [DE# 30, Case No. 08-80108] shall remain in full force and effect. Accordingly, all discovery proceedings in Case No. 08-80108 remain **CLOSED**.

4. This consolidated action is now **SET for TRIAL** on the court's eight week **April/May 2011** trial calendar. However, in order to permit the parties in Case No. 08-80113 adequate opportunity to timely complete discovery and meet all pretrial motion deadlines, **this consolidated action shall not be called to trial prior to May 2, 2011.**

4. Calendar call shall be conducted at 8:30 a.m. on **Thursday, March 24, 2011** at the United States Courthouse in West Palm Beach, Florida.

DONE AND ORDERED in West Palm Beach, Florida this 6th day of December, 2010.


Daniel T. K. Hurley
United States District Judge

cc. Stuart Duane Aurich, *pro se*
All counsel

For updated court information, see unofficial website
at www.judgehurley.com

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-80108-CIV-HURLEY (lead case)
(consolidated with: Case No. 08-80113)

STUART DUANE AURICH,
Plaintiff,

v.

DEPUTY SHERIFF HARRY THOMAS,
PALM BEACH SHERIFF'S OFFICE,
Defendant.

Case No. 08-80108-Civ

STUART DUANE AURICH,
Plaintiff,

v.

LEIA SANCHEZ, LPN,
Defendant.

Case No. 08-80113-Civ

**ORDER SEVERING ACTIONS FOR TRIAL
& SPECIALLY SETTING TRIAL IN CASE NO. 08-80108**

THIS CAUSE is before the Court following status conference held March 9, 2011.

Pursuant to the colloquy between the court and all parties at that hearing, it is now

ORDERED AND ADJUDGED:

1. The above actions shall be severed for trial, but shall remain consolidated for all discovery purposes.

2. The trial of the lead action, *Aurich v Deputy Sheriff Harry Thomas*, Case No. 08-80108 is specially set for trial on **MONDAY, MAY 2, 2011**.

3. The *pro se* plaintiff, Stuart Duane Aurich, presently confined as a prisoner in the Saginaw

Correctional Facility in Michigan, shall appear at trial via video-conference call, which the court shall make arrangements to initiate.

DONE and SIGNED in Chambers in West Palm Beach, Florida this 10th day of March, 2011.


Daniel T.K. Hurlley
United States District Court Judge

cc.

Stuart Duane Aurich, *pro se*

Patrick H. Telan, Esq.

Bruce W. Jolly, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-80108-CIV-HURLEY (lead action)
(Now consolidated for discovery only with Case No. 08-80113)

STUART DUANE AURICH,
Plaintiff,

vs.
DEPUTY SHERIFF HARRY THOMAS,
Defendant.

STUART DUANE AURICH
Plaintiff

vs

LEIA SANCHEZ, LPN,
Defendant.

ORDER DIRECTING SUBMISSION OF STATUS REPORT

THIS CAUSE is before the court *sua sponte* for review of the court file. On September 7, 2010, the Volunteer Lawyers' Project reported that its efforts to find *pro bono* representation for plaintiff were suspended pending resolution of pretrial motions for summary judgment in the above captioned lead action.

As the defendant's motion for summary judgment has now been resolved in that matter, and the court has specially set the lead action for trial on **MAY 2, 2011**, with the *pro se* plaintiff to appear by video-conference call from his current place of confinement in Saginaw Correctional Facility, Freeland, Michigan, it is **ORDERED AND ADJUDGED**:

1. The Volunteer Lawyers' Project is respectfully requested to submit an updated report indicating the status of its search to secure *pro bono* representation for plaintiff. The trial shall be

conducted at the United States District Court in West Palm Beach, and counsel is sought for the purpose of generally assisting plaintiff in the selection of the jury, lodging of evidentiary objections, etc., and to otherwise assist plaintiff in the prosecution of the subject §1983 excessive force claim against Deputy Sheriff Harry Thomas.

2. The Project is respectfully requested to submit its updated report within **TEN (10) DAYS** from the date of entry of this order.

DONE AND ORDERED in Chambers at West Palm Beach, Florida this 14th day of March, 2011.


Daniel T. K. Hurley
United States District Judge

cc.

Stuart Duane Aurich, *pro se*
Reg No 547683
Saginaw Correctional Facility
9625 Pierce Road
Freeland, Michigan 48623

Volunteer Lawyers' Project
Attn: Bethell Forbes
3750 Miami Tower
100 Southeast Second Street
Miami, Florida 33131-2309

All counsel

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