

IN THE
SUPREME COURT OF THE UNITED STATES

ANDREW J.J. WOLF, et al.,

Petitioners,

v.

IDAHO BARD OF CORRECTIONS, et al.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF IN REPLY

Andrew J.J. Wolf
#35408, IMSI, J-1-7
PO Box 51
Boise, ID 83707-0051

R. Hans Kruger
#38667, ISCI, Unit 14-C-6
PO Box 14
Boise, ID 83707-0014

Petitioners Pro Se

QUESTION PRESENTED

(Rephrased) Did the Ninth Circuit erroneously fail to rule on petitioners' claim that the district court abused its discretion in denying their Motion to Stay under Rule 56(d), of the Federal Rules of Civil Procedure, and upon the Federal Rule of Evidence 106 due to respondent had agreed to provide a free copy of the full transcript of petitioner Kruger's deposition which has deprived them a full and fair opportunity to demonstrate there is a genuine dispute of material facts which would have denied respondents second motion for summary judgment.

PARTIES TO THE PROCEEDING

Petitioners incorporate by reference the same statement given by Respondents in thir Brief In Opposition as if restated in its entirety as it's correct.

TABLE OF CONTENTS

QUESTION PRESENTED.....	i
PARTIES TO THE PROCEEDING.....	ii
TABLE OF CONTENTS.....	iii
TABLE OF CONTENTS—Continued.....	iv
SUPPLEMENTAL INDEX TO APPENDICES	iv
TABLE OF AUTHORITIES	v
INTRODUCTION.....	1
STATEMENT OF THE CASE.....	2
REASONS FOR GRANTING THE WRIT.....	6
I. The Ninth Circuit erroneously failed to rule on petitioners claim that the district court abused its discretion in denying their Motion to Stay under Rule 56(d), of the Federal Rules of Civil Procedure, and upon Federal Rule of Evidence 106 due to respondent had agreed to provide a free copy of the full transcript of petitioner Kruger's deposition which has deprived them a full and fair opportunity to demonstrate there is a genuine dispute of material facts which would have denied respondents second motion for summary judgment.....	6
A. The Ninth Circuit erred in ruling on petitioners Motion to Stay based upon the record.....	6
B. The Ninth Circuit erred in ruling on petitioner's motion to stay due to Federal Rule of Evidence 106 required the district court to order defendant Atencio to provide a complete copy of the deposition transcript warrants this Court's review.....	8
C. This Court should disregard respondents argument whether in in forma pauperis inmates should be entitled to free deposition transcripts in 42 U.S.C. § 1983 prison litigation..	10
CONCLUSION.....	10

TABLE OF CONTENTS—Continued

SUPPLEMENTAL APPENDIX:

<u>Wolf, et al. v. Otter, et al., U.S. District Court Case No. 1:12-cv-00526-BLW,</u> <u>Motion for Enlargement of Time to Respond to Defendant Kempf's Second</u> <u>Motion for Summary Judgment, dated August 18, 2016.....</u>	Supp. App. G 001-4
<u>Wolf, et al. v. Otter, et al., U.S. District Court Case No. 1:12-cv-00526-BLW,</u> <u>Memorandum Decision and Order, dated June 2, 2016.....</u>	Supp. App. H 001-6
<u>Wolf, et al. v. Otter, et al., U.S. District Court Case No. 1:12-cv-00526-BLW,</u> <u>Defendant Kempf's Memorandum In Support of Motion to Modify Orders</u> <u>Re Scheduling, dated May 26, 2016.....</u>	Supp. App. I 001-6
<u>Wolf, et al. v. Otter, et al., U.S. District Court Case No. 1:12-cv-00526-BLW,</u> <u>Defendant Kempf's Motion to Modify Orders Re Scheduling,</u> <u>Dated May 26, 2016.....</u>	Supp. App. J 001-3
<u>Wolf, et al. v. Otter, et al., U.S. District Court Case No. 1:12-cv-00526-BLW,</u> <u>Memorandum Decision and Order, dated March 31, 2016.....</u>	Supp. App. K 001-35

TABLE OF AUTHORITIES

Cases

<u>Beech Aircraft Corp. v. Rainey</u> , 488 U.S. 153 (1988).....	9
<u>Tabron v. Grace</u> , 5, F.3d 147 (3rd Cir. 1993).....	7
<u>Thomas v. Ponder</u> , 611 F.3d 1144 (9th Cir 2010).....	7

CONSTITUTIONAL PROVISIONS

U.S. CONST. Amend. VIII.....	2
------------------------------	---

STATUTES

28 U.S.C. § 1915.....	6, 10
28 U.S.C. § 1915A.....	2
28 U.S.C. § 1983.....	2, 10

RULES

Fed.R.Civ.P. 32.....	8, 9
Fed.R.Civ.P. 56.....	passim
Fed.R.Evid. 106.....	passim
Fed.R.Evid. 401.....	9
Fed.R.Evid. 402.....	9

INTRODUCTION

The Ninth Circuit affirmed the district court's final judgment in an unpublished memorandum, and then later denied a rehearing or en banc review of this decision. The petitioners now seek a writ of certiorari on a single question presented--whether the Ninth Circuit erroneously failed to rule on their claim that the district court abused its discretion in denying their motion to stay a summary judgment proceeding. But, in affirming the final judgment, the Ninth Circuit incorrectly provided its Memorandum based upon the rephrased issues that were presented by the respondents than the actual issues presented on appeal by the petitioners. The Ninth Circuit erred in this regard.

The petitioners argue in the body of their petition that district court had abused its discretion in denying the motion to stay the second summary judgment on the basis Rule 56(d), F.R.Civ.P, and Federal Rule of Evidence 106 as they were assured by respondents counsel they would receive a free copy of the entire transcript of petitioner Kruger's deposition as was undisputed in their motion to stay by respondents. And, the Ninth Circuit erred by not reversing the district court on this point. The petitioners have shown a conflict with relevant decisions of this Court. They also have shown conflict among the circuits, and that the Ninth Circuit erred in its Memorandum based upon the issues that were presented by respondents opposed to the actual issues petitioners' had presented to the Court. Additionally, this case does present an unsettled constitutional and important federal questions to require the district court to order the respondents to provide a free copy of the deposition transcripts when it is an undisputed fact respondents agreed to provide it, and Federal Rule 106 requires it based upon the facts and the record.

STATEMENT OF THE CASE

1. District Court Action.¹ The underlying 42 U.S.C. § 1983 action had challenged conditions of confinement in two Idaho Prisons. (See, Pet. App. B2-3; Resp. Supp. App. 022-54.) Early on, the district court entered an Initial Reveiw Order under 28 U.S.C. § 1915A of the PLRA which limited the claims and defendants. (Resp. Supp. App. 022-54.) In one claim, the district court allowed petitioner Kruger to proceed against Director Reinke, in his official capacity, for failing to protect him from assaults by other inmates in violation of the Eighth Amendment to the United States Constitution. (Pet. App. B2-03; Resp. Supp. App. 034-35.) The district court later dismissed all remaining parties except the two petitioners and the IDOC Director. (See Resp. Supp. App. 004.)

During the course of the discovery phase of the case petitioners filed on April 14, 2015, a motion to compel discovery, which was 30-days prior to the deadline for amending the complaint. Respondents on July 31, 2015 filed their first motion for summary judgment. On March 31, 2016, the district court ruled on both, the motion to compel discovery and summary judgment, in the same Memorandum Decision and Order.² The district court narrowly ruled on the motion to compel discovery pertaining to petitioner Kruger's failure to protect claim, and also granted in part and denied in part respondent Kempf's motion for summary judgment, without prejudice, on petitioner Kruger's failure to protect claim

¹ Petitioners herein incorporate by reference their "Statement of the Case" that was set forth in their Petition for Writ of Certiorari as if restated in its entirety, and only sets forth here the Statement of the Case that particularly pertains to addressing the new points that were raised by respondents in their Brief In Opposition.

² Respondents Brief In Opposition included a Memorandum Decision and Order (Supp. App. 003-019) that is the incorrect Memorandum Decision and Order that is listed in their Brief In Opposition, Statement of the Case, at pg.2. Petitioner's submit the correct Statement of the Case and the Memorandum Decision and Order herein.

under the Eighth Amendment of the Constitution of the United States. (Pet. Supp. App. K8-9; 30-34.)

As a result of the district court's March 31, 2016, memorandum decision and order (Pet. Supp. App. K), defendant Kempf on May 26, 2016, a motion to modify orders re scheduling seeking to modify the district court's scheduling order so counsel for Kempf could conduct a Deposition on petitioner Kruger. (Pet. Supp. App. J1-3.) Kempf also submitted a memorandum in support of this motion. (Pet. Supp. App. I.) The district court on June 2, 2016, just 7-days latter without permitting petitioners to file a response, issued a memorandum decision and order granting Kempf's motion, and had determined that it did "not believe Kruger would be prejudiced simply by making himself available for deposition." (Pet. Supp. App. H5.) The distric court ordered the deposition must take place before June 30, 2016, and also denied Kempf's request for an extension of deadline to refile a motion for summary judgment of August 29, 2016, and rather believed a shorter extenstion-to and including July 29, 2016-was sufficient under the circumstances. (Id.)

In the meantime, Director Kempf deposed petitioner Kruger, which both petitioners Wolf and Kruger agreed to. (Pet. App. B1, D Ex. 81.) Defendant Kempf on July 31, 2016 moved for his second summary judgment. (Resp. Supp. App. 20.) The summary judgment proceedings in this matter were filed "under seal", and petitioner's Wolf and Kruger could only access them in the IDOC, ISCI Resource Center which limited their time they could spend their with them. Additionally, petitioner Kruger could only access the discoery documents which the district court had ordered to produce as a result of the petitioners motion to compel.

Due to petitioners Wolf and Kruger's limited access to the sealed second summary judgment proceedings, and the discovery documents the district court had ordered defendant Kempf to produce as a result of the petitioners motion to compel, petitioners filed a motion for enlargement of time to respond to defendant Kempf's second motion for summary judgment. (Pet. Supp. App. G) This motion set forth their limited access to the sealed summary judgment pleadings, and the discovery documents for Kruger which were sensitive in nature and had to remain in the ISCI Resource Center. This motion was verified under penalty of perjury as well. (Pet. Supp. App. G) Petitioners sought an additional 45 days after the Court had ruled on three pending motions. (Pet. Supp. App. G at 3, ¶ 9.)

On February 14, 2017, the district court granted petitioner's motion for enlargement of time by granting it "to the extent the Court [would] allow plaintiffs until March 1, 2017 to file a substantive response to defendant's pending summary-judgment motion." (Resp. Supp. App. 021, ¶ 3.)

Just 9-days later, February 23, 2017, petitioners filed a "substantive response" to defendant Kempf's second motion for summary judgment in the form of a motion to stay second summary judgment with supporting declarations giving detailed explanation of they were in need of the complete transcript of petitioner Kruger's Deposition. (Pet. App. D). Within the motion, petitioners set forth in the motion to stay that prior to the deposition having taken place they would be provided a copy of the entire transcript. (Pet. App. D, ¶ 3.)

Petitioner's also pointed out within their motion to stay what had transpired over 7-months since defendant Kempf had filed summary judgment, and the attempts they had made to get counsel for Kempf to live up to its promise they made to petitioner's prior to, during, and right after the deposition of Kruger had taken place. (Pet. App. D.)

Respondents response to the motion to stay not once refuted the facts set forth in petitioner motion to stay in regards to the fact counsel had promised they would receive a copy of the deposition transcript. (Pet. App. E1-7.)

Petitioners then filed a reply in regards to the motion to stay, and further expanded it based upon Federal Rule of Evidence 106 under the doctrine of "open the door" as it was undisputed by respondent that counsel only submitted portions of the transcript which took Krugers testimony out of context and without the benefit of having the entire transcript they were placed at a disadvantage in making any kind of proper response in order to show a dispute of material facts. Additionally, petitioners set forth a valid access to courts issue in that they did not even have a copy of the Federal Rules of Court in order to make any kind of proper research so as to make a response to the second motion for summary judgment. (Id. pp.3-4.)

On March 21, 2017, the district court denied petitioner's motion to stay and granted summary judgment to the IDOC Director. In part, the district court denied the motion to stay based upon demands for free copies of the deposition transcript. (Pet. App. B6-7.)

In this same order, after denying the motion to stay, the district court granted summary judgment to the Director on all remaining claims that summary judgment had previously been denied after the first summary judgment proceedings. (Pet. App. B7-15.) The district court entered the final judgment that same day. (Resp. Supp. App. 001-2.)

2. The Ninth Circuit Proceeding. The petitioners appealed from the final judgment. On June 24, 2019, without oral argument, the Ninth Circuit affirmed the final judgment in an unpublished memorandum decision that was based solely

upon the respondents Answering Brief. (Pet. App. A.) On August 12, 2019, the Ninth Circuit denied a rehearing or en banc review. (Pet. App. C.)

REASONS FOR GRANTING THE PETITIONER

1. The Ninth Circuit erroneously failed to rule on petitioners claim that the district court abused its discretion in denying their Motion to Stay under Rule 56(d), of the Federal Rules of Civil Procedure, and upon the Federal Rule of Evidence 106 due to respondent had agreed to provide a free copy of the full transcript of petitioner Kruger's deposition which has deprived them a full and fair opportunity to demonstrate there is a genuine dispute of material facts which would have denied respondents second motion for summary judgment.

- A. The Ninth Circuit erred in ruling on petitioners Motion to Stay based upon the record.

It is clear and convincing that the Ninth Circuit erred in not ruling on petitioners issue they presented regarding the fact the district court had abused its discretion in not granting the motion to stay.

Petitioners in the motion to stay had set forth clear and concise facts in regards to being given a copy of the full transcript of petitioner Kruger's deposition. (See Pet. App. D5, ¶3.) Now where within the motion to stay did the petitioners set forth they were seeking a free copy via 28 U.S.C. § 1915 as the respondent has continually implied.

Rather, petitioners were relying upon the undisputed fact they were promised prior to, durring and right after Kruger's deposition they would receive a copy of it once Kruger had reviewed it and made his necessary corrections and signed it under oath. (Id.)

The district court when ruling on defendant Kempf's motion to modify orders re scheduling (Pet. Supp. App. I & J) had made the determination "the Court does not believe Kruger would be prejudiced simply by making himself available for deposition." (Pet. Supp App. H 005) and granted defendant Kempf further discovery of conducting a deposition as he had requested. (Id.)

Here in this instance with petitioners motion to stay summary judgment that was before the district court set forth within the motion and in supporting declarations appended thereto as to why it was appropriate to stay the second summary judgment, and resolve a dispute regarding discovery that had just took place by defendant Kempf not living up to his end of his agreement to provide a free copy of the transcript of petitioner Kruger's deposition. (See, Pet. App. D) Additionally, the procedural burden placed on pro se inmates when responding to a motion for summary judgment can do so by submitting factual statements in response to summary judgment. They are not required to file affidavits, depositions, answers to interrogatories, or admissions to defeat summary judgment. the factual statements will instead be treated like an affidavit or declaration for the purposes of summary judgment. See, Thomas v. Ponder, 611 F.3d 1144 (9th Cir. 2010). Therefore, petitioners factual statements set forth in the motion to stay (Pet. App. D5-12) apply in this regard. Respondent Kempf in his response not once disputed the fact that petitioners were promised they would be given a free copy. (See, Pet. App. E.)

Petitioners demonstrated within the motion to stay that without being provided an entire copy of the deposition of petitioner Kruger it would be impossible to bring forth any form of factual disputes to show the district court.

Here, petitioners brought forth to the district court a discovery dispute that needed to be resolved based upon undisputed facts petitioner's had brought forth. See, Tabron v. Grace, 6 F.3d 147, 159 (3rd Cir 1993) ("a district court may, under some circumstances, exercise its discretion to order an opposing party to pay for or to provide copies of deposition transcripts for an indigent litigant as a condition precedent to allowing that party to take depositions.") This was exactly what the petitioner's had done in this regard when they set forth their

facts in the motion to stay when they set forth undisputed facts that they were assured a free copy of the transcript by defendants. (See, Pet. App. D at p.5 and p.16 ¶ 7.)

It is clear based upon the above and all other pleadings on file in this regard the Ninth Circuit erred in ruling on petitioners motion to stay and find the district court had abused its discretion in not granting it due to the undisputed fact that defendant had promised them free copies.

- B. The Ninth Circuit erred in ruling on petitioner's motion to stay due to Federal Rule of Evidence 106 required the district court to order defendant Atencio to provide a complete copy of the deposition transcript warrants this Court's review.

Respondent's argument in regards to Federal Rule 106 entitling petitioners to free copies of the deposition transcript not warranting this Court's review is incorrect based upon the reasons set forth above, that there lies undisputed petitioners were to be given a free copy from defendant Antencio.

Respondents have also incorrectly cited to Yee v. City of Escondido, Cal., 503 U.S. 519, 535 (1992). Rather, Yee holds "it is the petitioner himself who controls the scope of the question presented. The petitioner can generally frame the question as broadly or narrowly as he sees fit." Id. at 535.

Petitioner's have established above that the motion to stay that was filed with the district court over discovery was proper as the distict court had ruled on a discovery motion that respondent had filed (Pet. Supp. App. J & I) in where respondent sought to modify the scheduling order so as to conduct a deposition on petitioner Kruger. (Pet. Supp. App. J 002.) So for respondent to only limit its argument to Federal Rule of Evidence 106 and Rule 56(d) of the Federal Rules of Civil Procedure, and not include Rule 32(a){6) of the Federal Rules of Civil Procedure is incorrect. (See Resp. Brief in Opposition, p.1 , Fn. 4.)

Petitioner's have established their issue before the district court, Ninth Circuit, and this Court is not just one of Rule 56(d), F.R.Civ.P. and Federal Rule of Evidence 106, but one that requires the application of Rule 32(a)(6), F.R.Civ.P., for petitioner's had invoked the rules governing discovery on two (2) separate occasions in their attempt to obtain a copy of the transcript which respondent's counsel had promised to provide. (See Pet. App. D, Exhibit's 88 and 91.) Granted, petitioner's may not have mentioned Rule 32(a)(6), F.R.Civ.P., which provides that if a party uses only a part of a deposition, an adverse party is permitted to introduce any other part of the deposition that should in fairness be considered with the part already introduced.

Petitioner's have demonstrated it was a clear abuse of discretion for the district court to refuse to order the admission of additional information necessary to explain the material, the entire Kruger deposition transcript, originally offered or to put it into context. See, e.g. Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 170-72 (1988) ("[c]learly the concerns underlying Rule 106 are relevant here," but, under general rules of relevance, "when one party had made use of a portion of a document, such that misunderstanding or distortion can be averted only thorough presentation of another presentation of another portn, the material required for completeness is ipso facto relevant and therefore admissibel under Rules 401 and 402"). It was also established by petitioner's they were fully prevented from properly presenting their arquments regarding Federal Rule of Evidence 106 and any of the Federals Rules of Civil Procedure at the time of their filing the motion to stay and the reply to defendant Atencio's response for they were deprived access to he "Federal Rules of Court" or any other authorized book the IDOC's Resource Center was to have available to them at the time for the ISCI Paralegal had chose to remove the old books prior to

the new "Federal Rules of Corut" arrived. (See, Pet. App. F.)

- C. This Court should disregard respondents argument whether in forma pauperis inmates should be entitled to free deposition transcripts in 42 U.S.C. § 1983 prison litigation

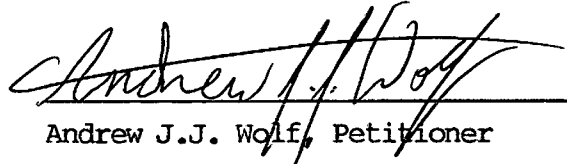
Respondents acknowledged the fact petitioner's "did not claim that free deposition transcripts in Section 1983 prison litigation are constitutionally required." (Resp. Brief In Opp. p.15) Petitioner's never applied 28 U.S.C. § 1915 as a means to obtain the deposition transcript of petitioner Kruger. Rather, they relied upon an undisputed fact that they agreed to provide a free copy to them. (Pet. App. D5.)

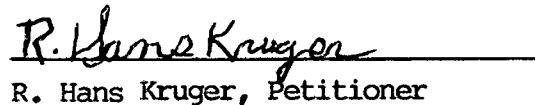
It is for these reasons that respondents last argument in their Brief In Opposition at pg. 15 fails, and petitioners were entitled to a free copy of the transcript as they had agreed to provide to them, and the district court abused its discretion in not resolving this discovery dispute that was presented in the petitioner's motion to stay.

CONCLUSION

For the reasons set forth above, and all other pleadings on file in this matter Petitioner's respectfully request this Court to grant the petition, and any further relief that justice may so permit.

DATED this 6th day of May, 2010.


Andrew J.J. Wolf, Petitioner


R. Hans Kruger, Petitioner

**Additional material
from this filing is
available in the
Clerk's Office.**