No. 22-1086

IN THE SUPREME COURT OF THE UNITED STATES

Tatyana Evgenievna Drevaleva

PETITIONER
vs.

Mr. Denis Richard McDonough as a Secretary of the U.S. Department of Veterans Affairs

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE 10TH CIRCUIT

PETIITION FOR REHEARING,
Rules of the U.S. Supreme Court,
Rule 44(2.)

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Petitioner Tatyana Drevaleva is filing a Petition for Rehearing of the June 20, 2023 Order of the U.S. Supreme Court that denied my Petition for Writ of Certiorari after Appeal No. 21-2139. The "grounds [of my Petition for Rehearing] shall be limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented", see Rule 44(2.)

In my Petition for Writ of Certiorari, I demonstrated by the preponderance of the evidence that during the litigation of my June 25, 2018 Complaint No. 5:18-cv-03748-LHK Defendant the United States of America had not been served with Summonses and with my June 25, 2018 Complaint No. 5:18-cv-03748-LHK in accordance with the F.R.C.P. Rule 4(i)(1)(A)(i) and (ii) and in accordance with Rule 4(i)(1)(B.)

Ground 1. Pursuant to 28 U.S.C. § 1391(e)(2), a Plaintiff or the U.S. Marshals Service have a mandatory obligation (the word "shall") to serve Defendant the U.S.A. and other Federal Defendants with Summonses and with Plaintiff's pleading in accordance with the Federal Rules of Civil Procedure meaning the F.R.C.P. Rule 4(i.)

Read 28 U.S.C. § 1391,

"(e) Actions Where Defendant Is Officer or Employee of the United States.—

(2) Service.—

The summons and complaint in such an action shall[1] be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought."

The word "shall" connotes a mandatory obligation that is impervious of any discretion, see the following precedents:

1) *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 69 (2004), "…. the Secretary shall continue to manage such lands . . . in a manner so as not to impair the suitability of such areas for preservation as wilderness.. 43 U. S. C. §1782(c)."

   "Section 1782(c) is mandatory..."

2) *Lopez v. Davis*, 531 U.S. 230 (2001), "Congress' use of the permissive "may" in § 3621(e)(2)(B) contrasts with the legislators' use of a mandatory "shall" in the very same section. Elsewhere in § 3621, Congress used "shall" to impose discretionless obligations, including the obligation to provide drug treatment when funds are available."

3) *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998), "The Panel's remand instruction comes in terms of the mandatory "shall," which normally creates an obligation impervious to judicial discretion. *Anderson v. Yungkau*, 329 U. S. 482, 485. Reading the statute whole, this Court has to give effect to this plain command, *see Estate of*

[1] "Shall" is a mandatory obligation.

Cowart v. Nicklos Drilling Co., 505 U. S. 469,476, even if that will reverse the longstanding practice under the statute and the rule, *see Metropolitan Stevedore Co. v. Rambo*, 515 U. S. 291, 300. Pp. 32-37."

Because service of Summonses and my June 25, 2018 pleading No. 5:18-cv-03748-LHK was not in accordance with the mandatory obligation (the word "shall") that was imposed by 28 U.S.C. § 1391(e)(2), and the F.R.C.P. Rule 4(i)(1)(A)(i) and (ii) and Rule 4(i)(1)(B), the November 02, 2021 Judgment (Appendix D, Part 9) is void and shall be reversed.

I am reminding that, pursuant to the December 02, 2021 Order (Appendix D, Part 11) of the U.S. District Court for the District of New Mexico, I can't submit filings in case No. 1:21-cv-00761-WJ-JFR. Additionally, pursuant to the January 13, 2022 Order of the U.S. Court of Appeals for the 10th Circuit (Appendix A, Part 2), I can't submit filings in Appeal No. 21-2139. Therefore, my only option is to petition to the U.S. Supreme Court with a request to vacate Judge Mr. Johnson's void November 02, 2021 Judgment (Appendix D. Part 9.)

Ground 2. The case laws regarding Plaintiff's mandatory obligation to serve Defendant the U.S.A. and other Federal Defendants with Summonses and with Plaintiff's pleading in accordance with 28 U.S.C. § 1391(e)(2) and the F.R.C.P. Rule 4(i.)

See Smith v. McNamara, 395 F.2d 896 (10th Cir. 1968), "For the first time on appeal the Secretary suggests the failure of jurisdiction in the Angle case for want of proper service. Public law 87-748 (1962), 28 U.S.C. § 1361, 1391 (e), which confers jurisdiction on the District Courts to entertain actions in the nature of mandamus against government officers provides for service of summons and complaint in accordance with the Federal Rules of Civil Procedure "except that delivery of the summons and complaint to [such] officer * * * may be made by certified mail [outside] the district in which the action is brought." 28 U.S.C. § 1391(e). Rule 4(d)(4) and (5), F.R.Civ.P., significantly provides that in suits against officers of the United States a copy of the summons and complaint must be delivered to the officer and to the United States, i.e. the United States Attorney and the Attorney General. *See Messenger v. United States*, 2 Cir., 231 F.2d 328; *Wallach v. Cannon*, 8 Cir., 357 F.2d 557."

See Messenger v. United States, 231 F.2d 328 (2d Cir. 1956), "We hold that both the delivery to the United States Attorney and the mailing to the Attorney General are mandatory requirements. There is nothing in the language of the Rule or its history to suggest otherwise."

See Wallach v. Cannon, 357 F.2d 557 (8th Cir. 1966), "As to the mandatoriness of the requirements of par. (5) and (4) of Rule 4(d) for obtaining service of process on the United States, on an officer, or on a suable agency thereof, *see Messenger v. United States*, 231 F.2d 328 (2 Cir. 1956)."

See Dorsey v. District of Columbia, 839 A.2d 667 (D.C. 2003), "*See McMasters v. United States*, 260 F.3d 814, 817-18 (7th Cir. 2001) ("[I]n order to properly serve the United States or its agencies, corporations or officers, plaintiff must deliver a copy of the summons and the complaint" to both the "United States Attorney's office for the district in which the action is brought" and the Attorney General.); *Turke*[2] *v. United States*, 76 F.3d 155, 157 (7th Cir. 1996) (stating that service on both the United States Attorney and Attorney General is essential because "that's what the rule says"). In the event of noncompliance, the plain language of Rule 4(m) "compels automatic dismissal," *Gross v. District of Columbia*, 734 A.2d 1077, 1086 (D.C. 1999) (quoting to *Wagshal v. Rigler*, 711 A.2d 112, 114 (D.C. 1998)), and "does not permit the court to exercise any discretion." *Gross*, 734 A.2d at 1086 (quoting *Cameron v. Washington Metro. Area Transit Auth.*, 649 A.2d 291, 293 (D.C. 1994))."

See Kurzberg v. Ashcroft, 619 F.3d 176 (2d Cir. 2010), "IV. Whether Service of Process on the United States Was Waived by Certain Defendants

The Plaintiff's argue that dismissal of their *Bivens* action against those of the defendants who did not raise the defense of improper service of process by motion or pleading was improper, because that defense was thereby waived as to those defendants. We conclude, however, that an individual defendant in a *Bivens* action is incapable of waiving service on the United States under Federal Rule of Civil Procedure 4(i), and thus incapable of waiving such a defense on its behalf.

In general, a defense of insufficient service of process is waived if the party wishing to assert it fails to do so by means of a 12(b) motion or in a responsive pleading. *See* Fed.R.Civ.P. 12(h)(1). But it should go without saying that a person without the power to waive cannot effect a waiver. *See Zedner v. United States*, 547 U.S. 489, 500-01, 126 S.Ct. 1976, 164 L.Ed.2d 749 (2006) (concluding that criminal defendant cannot waive prospective application of Speedy Trial Act because Act protects not only defendant's right to speedy trial, but also "public interest")."

See Zedner v. United States, 547 U.S. 489, 500-01, 126 S.Ct. 1976, 164 L.Ed.2d 749 (2006), "Held:

1. Because a defendant may not prospectively waive the application of the Act, petitioner's waiver "for all time" was ineffective. Pp. 500-503."

Therefore, because during the litigation of my June 25, 2018 pleading No. 5:18-cv-03748-LHK Defendant the U.S.A. was not served with a Summons and with my June 25, 2018 pleading No. 5:18-cv-03748-LHK in accordance with 28 U.S.C. § 1391(e)(2) and in accordance with the F.R.C.P. Rule 4(i)(1)(A)(i) and (ii) and in accordance with Rule 4(i)(1)(B), Assistant U.S. Attorneys Ms. Cormier and Ms. Robinson who intentionally, criminally, maliciously, and unlawfully appeared on behalf of Defendants the U.S. Department of Veterans Affairs and its Secretary didn't have a power to waive the insufficient service of process, see *Kurzberg v. Ashcroft*, 619 F.3d 176 (2d Cir. 2010) citing *Zedner v. United States*, 547 U.S. 489, 500-01, 126 S.Ct. 1976, 164 L.Ed.2d 749 (2006.)

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[2] The correct name is *Tuke v. United States*, 76 F.3d 155 (7th Cir. 1996.)

Ground 3. The F.R.C.P. Rule 4(m.)

See McMasters v. U.S., 260 F.3d 814 (7th Cir. 2001), "Under Rule 4(m), a plaintiff who has failed to effect service within the required 120 day period will be granted an extension "for service for an appropriate period" upon a showing of good cause. Fed.R.Civ.P. 4(m)."

Read the current version of the F.R.C.P. Rule 4, "(m) TIME LIMIT FOR SERVICE. If a defendant is not served within 90 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must[3] extend the time for service for an appropriate period....."

Therefore, pursuant to the F.R.C.P. Rule 4(m), Judge Alsup had a mandatory obligation (the word "must") to either:

1) extend the deadline for service of a Summons by the U.S. Marshals Service in accordance with 28 U.S.C. § 1391(e)(2), with the F.R.C.P. Rule 4(i)(1)(A)(i) and (ii), and with Rule 4(i)(1)(B), or
2) dismiss my June 25, 2018 pleading No. 3:18-cv-03748-WHA without prejudice for failure by the U.S. Marshals Service to serve Defendant the U.S.A. with Summonses and with my pleading No. 5:18-cv-03748-LHK in accordance with 28 U.S.C. § 1391(e)(2), with the F.R.C.P. Rule 4(i)(1)(A)(i) and (ii), and with Rule 4(i)(1)(B.)

Ground 4. The F.R.C.P. Rule 12(b.)

Read the F.R.C.P. Rule 12(b)(5),

"(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(5) insufficient service of process;...

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion" (emphasis added.)

Notice that the F.R.C.P. Rule 12(b) explicitly says that "No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion."

Therefore, AUSAs Ms. Cormier and Ms. Robinson didn't have any authority to waive the insufficient service of process, see the F.R.C.P. Rule 12(b) and (b)(5.)

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[3] "Must" is a mandatory obligation.

Ground 5. A District Court doesn't have jurisdiction over a Defendant unless this Defendant is properly served with a Summons and with a copy of Plaintiff's pleading in accordance with the F.R.C.P. Rule 4.

See Walden v. Fiore, 571 U.S. 277, 283 (2014), "... a federal district court's authority to assert personal jurisdiction in most cases is linked to service of process on a defendant "who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located." Fed. Rule of Civ. Proc. 4(k)(1)(A)."

See BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549, 1556 (2017), "... a basis for service of a summons on the defendant is prerequisite to the exercise of personal jurisdiction. *See Omni Capital*, 484 U.S., at 104, 108 S.Ct. 404 [*Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 106–107, 108 S.Ct. 404, 98 L.Ed.2d 415 (1987)]."

See Omni Capital v. Rudolf Wolff & Co., 484 U.S. 97 (1987), "... before a federal court may exercise personal jurisdiction over a defendant, there must be more than notice to the defendant and a constitutionally sufficient relationship between the defendant and the forum. There also must be a basis for the defendant's amenability to service of summons. Absent consent, there must be authorization for service of summons on the defendant. Pp. 484 U. S. 103-104."

Therefore, both the U.S. District Court for the Northern District of California and the U.S. District Court for the District of New Mexico were without any power to enter Judgments in favor of the Federal Defendants. These Judgments (Appendix D, Parts 3 and 9) are void and shall be vacated.

Ground 6. Because Defendant the U.S.A. was not served with a Summons and with my June 25, 2018 pleading No. 5:18-cv-03748-LHK in accordance with 28 U.S.C. § 1391(e)(2) and in accordance with the F.R.C.P. Rule 4(i)(1)(A)(i) and (ii) and Rule 4(i)(1)(B), both the July 11, 2019 Judgment and the November 02, 2021 Judgment are void and shall be vacated.

See United Student Aid Funds, Inc., v. Espinosa, 559 U.S. 260, 271-72 (2010), "A void judgment is a legal nullity. See Black's Law Dictionary 1822 (3d ed. 1933); see also id., at 1709 (9th ed. 2009). Although the term "void" describes a result, rather than the conditions that render a judgment unenforceable, it suffices to say that a void judgment is one so affected by a fundamental infirmity that the infirmity may be raised even after the judgment becomes final. See Restatement (Second) of Judgments 22 (1980); see generally id., §12. The list of such infirmities is exceedingly short; otherwise, Rule 60(b)(4)'s exception to finality would swallow the rule."

Both the July 11, 2019 and the November 02, 2021 Judgments (Appendix D, Parts 3 and 9) are void and shall be vacated.

Ground 7. I did not abuse the judicial process.

On November 02, 2021, Judge Johnson dismissed all my pending claims with prejudice as a sanction for my non-existing misconduct (Appendix D, Part 8.)

Actually, I didn't do anything negative. I strictly followed the September 17, 2021 Initial Scheduling Order of Judge Mr. Robbenhaar (Appendix D, Part 6.) I attempted in good faith to meet and confer with the Opposing Counsel who, in fact, was AUSA Ms. Robinson, not AUSA Ms. Lyman. I sincerely and in good faith prepared 247 material facts of the case and 39 legal arguments as a part of our meet and confer session. It is not my fault that AUSA Ms. Robinson intentionally, criminally, maliciously, and unlawfully refused to meet and confer, and she blocked our meet and confer session in violation of the F.R.C.P. Rule 16(f)(1.)

It is not my fault that on November 02, 2021 Judge Johnson accused me in mailing 1500 pages of our meet and confer session to the U.S. District Court for the District of New Mexico. Actually, I couldn't electronically file these 1500 pages because Judge Johnson had prohibited me to file electronically, see his September 14, 2021 Order (Appendix D. Part 4, page 90.) The only way for me was to mail these documents to the Court.

There is absolutely no my fault. The November 02, 2021 Judgment shall be vacated.

Ground 8. The November 02, 2021 Judgment (Appendix D. Part 9) is void because it was entered in favor of non-existing Defendant the U.S. Department of VA.

I am reminding that on November 18, 2020 Opinion of the U.S. Court of Appeals for the 9th Circuit in Appeal No. 19-16395 after case No. 3:18-cv-03748-WHA (Appendix C) was entered in favor of Defendant the U.S. Department of VA. Take a Judicial Notice that the November 18, 2020 Opinion of the 9th Circuit in Appeal No. 19-16395 is void because Defendant the U.S. Department of VA had been explicitly removed from the list of Defendants by the December 03, 2018 Order of Judge Alsup (Appendix D. Part 1, see page 54), "The United States Department of Veterans Affairs is hereby **DISMISSED** as a defendant."

Take a Judicial Notice that on November 18, 2020, judging Appeal No. 19-16395, the 9th Circuit remanded my Title VII claim and my Rehabilitation Act claim back to the District Court, see Appendix C, page 39, "In sum, we reverse the dismissal of Drevaleva's sex discrimination claim and failure-to accommodate claim, and remand for further proceedings as to these claims only."

Take a Judicial Notice that the proper Defendant in my Title VII Cause of Action is Secretary of the U.S. Department of VA, see 42 U.S.C. § 2000e-16(c.) Also, the Secretary is a proper Defendant in Section 501 of the Rehabilitation Act of 1973, see 29 U.S.C. § 794a(a)(1.)

Only two claims were pending in case No. 1:21-cv-00761-WJ-JFR at the U.S. District Court for the District of New Mexico – Title VII and the Rehabilitation Act.

The November 02, 2021 Judgment (Appendix D. Part 9) that was entered in favor of improper and non-existing Defendant the U.S. Department of VA is void and shall be vacated.

Conclusion. For the reasons stated above, I am very respectfully asking the U.S. Supreme Court to grant my Petition for Rehearing, to reverse the November 02, 2021 Judgment, and to remand my lawsuit No. 1:21-cxv-00761-WJ-JFR back to the District Court for a further proceeding.

I declare under the penalty of perjury and under the Federal laws that the above is true and correct. Executed at Palo Alto, CA on July 10, 2023.

Respectfully submitted,

s/ Tatyana Drevaleva,
Petitioner Pro Se
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Date: July 10, 2023.

Certificate of Compliance.

In this Petition for Rehearing, I used 2.984 words including the words in 3 Footnotes that is compliant with Rule 33(g) of Rules of the U.S. Supreme Court.

I declare under the penalty of perjury and under the Federal laws that the above is true and correct. Executed at Palo Alto, CA on July 10, 2023.

Respectfully submitted,

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