No. 19-1355

IN THE SUPREME COURT OF THE UNITED STATES

BETZAIDA P JERNIGAN

Petitioner (Pro Se)

v.

ROBERT WILKIE, SECRETARY OF VETERANS AFFAIRS

Respondent

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

Betzaida P Jernigan (Pro Se)
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QUESTIONS PRESENTED

Willful submission of false information and omission of relevant material evidence by accredited service officer(s) and advice by counsel to claimant to accept a government presumption or face counsel's withdrawal (standing contrary to Petitioner's claims) prejudiced adversely unbeknownst to Petitioner (her) claim(s) and appeal(s).

1. Is this a serious enough violation that merits judicial attention to remand in the "interest of justice"?

2. Can justice defer judicial authority to an agency (that knowingly) relies on false and adverse material evidence contrary to Petitioner's claim(s) to determine an outcome of a claim(s) and or appeal(s)?

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Appx. E: The Board of Veterans Appeals (Board) Chairman: "Ruling on Motion" Decision Date: 05/03/2018.

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The U.S Fed. Cir., 04/10/2020 Decision Case No. 19-2235 (see Appx. A), affirmed the U.S. Vet. App. final decision Case No. 18-2918, Dated: 04/12/2019 (*Jernigan v. Wilkie).*

The U.S. Vet. App., 04/12/2019 Decision Case No 18-2918, acted on a motion under Rule 35 of the Court's Rules of Practice and Procedure. Under Rule 36, Judgment: Affirmed (*Jernigan v. Wilkie*) [Case Re-opened, Clerk Amends]. See Appx. B.

The U.S. Vet. App. 03/21/2019, Case No. 18-2918 Ordered by the panel that single-judge Order remains the decision of the Court. (*Jernigan v. Wilkie*). See Appx. C.

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Petitioner's appeal for lack of jurisdiction, (Case No. 18-2918, 2019 *Jernigan v. Wilkie*). See Appx. D.

The Board's Chairman, "Ruling on Motion" Dated: 05/03/2018 failed to reconsider an allowance of benefits on fraudulent material evidence, ultimately prejudiced reversal of a final Court(s) of Appeals decision(s). See Appx. E.

The Board's Decision Dated: 06/22/2016 Archived: 07/11/2016 Citation No. 1625132. ((Board dismissed appeal failing to reconsider an allowance of benefits on fraudulent material evidence. See Appx. F.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)

Jurisdiction in the Court of First Instance

38 Chapter 72 Subchapter I § 7252 (a)(b)(c); § 7261(A)(1)(2)(3)(A)(B)(C)(D),4(b)(1)(2)(c)(d); 28 U.S.C. § 1291.

Judgment to be Reviewed

The U.S. Fed. Cir. 04/10/2020 (*Jernigan v. Wilkie*, Case No. 19-2235) Conclusion. See Appx. A.

The U.S. Vet. App. 04/12/2019 (*Jernigan v. Wilkie*, Case No. 18-2918) Judgment. See Appx. B.

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v. Wilkie) Order by a single Judge. See Appx. D.

The Board, Chairman "Ruling on Motion", Dismissal Dated: 05/03/2018. See Appx. E.

The Board's Dismissal Dated: 06/22/16 Archived: 07/11/16 Citation No. 1625132. See Appx. F.

The U.S. Fed. Cir. 521 Fed. Appx. 931 (2013) affirmed the lower court final judgment with no opinion. (Case No. 13-7016 Petitioner's filed a Brief for Writ of Certiorari *Jernigan v. Shinseki* submitted to the U.S. Supreme Court).

The U.S. Vet. App. 06/19/2012 Case No. 10-1226 Final Judgment, *Jernigan v. Shinseki.*

STATEMENT

"When reviewing for substantial evidence, we must uphold the LJ's findings unless the evidence not only supports, but compels, contrary findings." [1]

The law prohibits representative(s) from making false statements by willful commission(s) and omission(s) of material information or facts knowingly or that "ought to have known to influence the adjudication of a claim adversarial (to the claimant) after consultation with the claimant.[2]

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[1] 5 U.S.C. § 706(2)(A)(B)(C)(D)(E)(F) *Monjarez-Munoz v. INS*, 327 F.3d 892, 895 (9th Cir.), amended by 339 F.3d 1012 (9th Cir. 2003). *Ochave v. INS*, 254 F.3d 859, 862 (9th Cir.2001).

[2] 18 U.S.C. § 242

The Court of Appeals (historically) did not reach a decision in *Jernigan v. Shinseki*, U.S. Vet. App. 06/19/2012 Case No. 10-1226 (Final Judgment) in respect to Petitioner's detrimental reliance on an agency's 1995 defective notice because the Court did not find evidence that Petitioner relied to her detriment on the context of that Department of Veterans Affairs (VA or agency) notice to her detriment although, the Court asserted the agency did provide the Petitioner a formal claim Form 1-526 (now Form 21-526) with that notice in 1995. See Record Before the Agency (RBA or R.) at 15091.[3]

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[3] U.S. Vet. App. 06/19/2012, *Jernigan v. Shinseki*, Case No. 10-1226 (see footnote #2).

The Board concluded, "In August 1995, the RO mailed a VA Form 21-526 and cover letter...requesting her [the Petitioner] to complete and return the form; VA Form 21-526...)". See R. at 11952 (bottom of the page).

Since Congress left a statutory gap for the agency to fill, any administrative regulations must be upheld unless, they are arbitrary, capricious, or manifestly contrary to the statute, amended by 197 F.3d 1035 (9th Cir. 1999); *IV-6 2012 Kankamalage v. INS*, 335 F.3d 858, 862 (9th Cir. 2003).

Historically before the Board and before the Court(s) of Appeal(s), Petitioner always stated she never received a formal claim form with the 1995 notice (R. at 15091) nor in any of the Department of Veteran's Affairs (VA's)

correspondence to her or to her representative in 1995.[4]

In fact, even the agency assertions on the record, invalidated the government's presumption of regularity (in respect to) the mailing of VA forms to veteran's representatives (see R. 13643).

The Department of Veteran's Affairs admitted, "Because ... service organizations have multiple VA Forms in their possession, it is not customary to enclose VA Forms with the copies of correspondence provided to veteran appointed representatives"[5] In 1995 (and in 2001) Petitioner was represented by a

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[4] See "Motion ..." 07/10/2012 Case No. 10-1226: page (p.) 2, *Jernigan v. Shinseki*.

[5] R. at 13124, 15018, 15026,

representative (power of attorney).[6]

Without a doubt, VA representatives' asserted on the record: prescribed (former) formal claim Form 1-526 preceded VA Form 21-526[7]. And, the (Veterans) Court of Appeals asserted (in 2012): "The letter indicated that "1-526" was enclosed; Form 1-526 (now Form 21-526) was VA's formal application form"...

Additionally, the Court added: "She conceded that she received VA's August 1995 letter with Form 1-526 attached and did not dispute that she did not return the form to VA

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6 R. at 10105-10106, 11048-11049, 11098

7 R. at 10046

within one year of receiving it".[8] [9]

But, VA Form 1-526 was not defined by statute or regulation or Federal Registry or agency manuals or enforcement guidelines or policy statements in 1995 thus, lacks the force of law and do not warrant deference.

The Board of Veterans Appeals (Board), dismissed Petitioner's appeal by refusing to

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[8] *Jernigan v. Shinseki*, U.S. Vet. App. 06/19/2012 Case No. 10-1226 (Final Judgment).

[9] New relevant material evidence excluded from the lower court RBA records dated June 18, 2014 provided to the VA by the Petitioner shows Petitioner received an email from the Director, Benefits and Assistance, Florida Department of Veterans' Affairs (at the time of inquiry) saying. "I don't believe there was ever a VA Form 1-526".

consider new relevant material evidence that shows false evidence was used, adverse to Petitioner's claim(s) and in her appeal(s) contrary to what Petitioner has claimed.

The evidence shows Petitioner declined to sign a statement dated 10/29/2001[10] created by an accredited veteran's service officer (VSO) assisting Petitioner with her 1995 claims in 2001. The 10/29/2001 VSO created a statement that Petitioner declined to sign and that record was not before the Board in 2010.

Petitioner previously stated for the record that this event occurred (because Petitioner trusted the VSO would never change the effective date of Petitioner's claims

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[10] R. at 11066, 13659 (1st paragraph bottom of p. 6) VA Form 9 Dated: 9/30/2005.

after consultation to her detriment).[11] [12]

Additionally, Petitioner's (counsel) in her appeal threaten to withdraw from Petitioner's appeal unless this Petitioner would assert (for the record) that the government's presumption on the receipt of a formal claim form held as true (since there was no evidence on the record to rebut the government's presumption).

Petitioner felt compelled by counsel's advice to accept the presumption or face the

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[11] R. at 13659 (1st paragraph bottom of p. 6) VA Form 9 Dated: 9/30/2005.

[12] See 38 C.F.R. § 14.633 Termination of accreditation of agents, attorneys and representatives.

inevitable of counsel's withdrawal from her appeal (even contrary to her own claims).[13]

A representative can choose what information and evidence will be of record with the agency.

The new relevant material evidence shows that in 2001 the VSO submitted (via fax)[14] a signed cover sheet and a statement [15] to Petitioner's (1995 and 2001) organization representative[16] Dated: 10/29/2001 and at about 5:17 pm. Petitioner witnessed the VSO beginning to close the office upon Petitioner

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13 R. at 10046 (2nd paragraph)

14 R. at 11105-11106; 10051 (ref date: 10/29/2001)

15 5 U.S. Code § 556, 557(d)(1)(D)

16 R. at 11047; ABA Model Rule 8.4 (a),(c),(d),(e)

exiting the office, after consultation.[17] This evidence was not before the Board in 2010.

New, relevant material evidence shows the VSO established an effective date of claim on behalf of Petitioner's contrary to the Petitioner (claims).[18] The statement created by the VSO was not signed by this claimant

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[17] Petitioner's observation Included in the Board's (corrected) hearing transcripts, 10/21/2015 (Hearing Team: 014HRG) in Washington, D.C.,

[18] Assistant county attorney letter Dated: June 24, 2016 excluded by the agency's counsel in the RBA's, (for Case No. 18-2918 Vet. App. *Jernigan vs. Shinseki*, 2018-2019) states: "... even if the Volusia County Services Division had dated her October 2001 formal claim "July 1995" by operation of 38 U.S.C.A. 5110 the earliest effective date would have been the date is was received, i.e., October 31, 2001".

(Petitioner) after consultation and the record was not before the Board in 2010 (not until June 2014)[19] [20] [21] ((38 C.F.R. § 20.1403; 38 U.S.C. § 5109(A); 38 C.F.R. § 3.160(d)). [22]

In the U.S. Vet. App. 06/09/2012 (Case No. 10-1226, *Jernigan v. Shinseki*, p. 14) the Court states:

> "(holding that, ... the denial notice that claimants received "failed to

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[19] 38 C.F.R. 3.109(1),(2),(b); 38 U.S.C. 501, 26 FR 1569,Feb. 24, 1961

[20] R. at 10057, 10060, 11106

[21] R. at 11106

[22] 10214 Congressional Record Senate 06/7/2001 [Paragraphs 1-31] Fundamental duty of federal employees to put "loyalty to the highest moral principles and to country above loyalty to persons, party or Government departments."

> satisfy the requirements of due process, the only claimants who could have been injured by the inadequacy are those who detrimentally relied on the inadequate denial notice"); Gilbert, 45 F.3d at 1394 ("[A] plaintiff must demonstrate reliance on the allegedly defective denial notices."); Burks-Marshall, 7 F.3d at 1349 (holding that an appellant has no standing to raise a due process issue where he "has not shown that the alleged deficiency in the notice had any connection in fact with h[is] own failure to seek review of" the denial of his claim)."

Petitioner presented (her) constitutional issues to the agency on 07/13/2014 and to the Board on 10/21/2015 before presenting it for review to the U.S. Vet. App., (2018-2019).[23] [24]

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[23] 28 U.S.C. § 2072 (a)(b)(c)

[24] Section 242 of Title 18

Transcripts from the Board hearing are available Dated: 10/21/2015 (Hearing Team: 014HRG) in Washington, D.C..[25] The transcripts were reviewed and some changes suggested were corrected within the meaning of 38 C.F.R. § 20.716 ((item(s): 1, 2, 3, 6, 7, 9, 11, 12, 13, 14, 15, 16 and 17)).[26]

The hearing was also recorded by the Petitioner with permission from the presiding honorable judge Dated: 10/21/2015.

The hearing transcript nor the hearing audio recording was not before the Board in 2010.

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[25] 38 U.S.C. § 5108(A)

[26] The Board's (transcripts) corrections letter appears in the lower Court's RBA at 9580 (for Case No. 18-2918, *Jernigan v. Wilkie*, 2018-2019).

Petitioner shared with the Board's honorable judge that the last few words Petitioner heard the VSO say (when VSO began to close the office) on 10/29/2001: "You are never going to get paid back, to the date of your original claim" (after consultation), Petitioner had explained to the VSO the reasons why Petitioner could not sign the VSO's statement, Dated 10/29/2001[27]; is this not arbitrary and capricious inconsistent with the intent of Congress?

The Board dismissed Petitioners appeal while granting claimant's other claims.[28]

New, relevant material evidence (R. at 11105, 11108) Dated: 10/29/2001 was not

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27 R. at 11106

28 R. at 15096

before the Board (in 2010); (See R. at 12092 - 12105).[29]

The agency's RO asserted, that the agency issued a "Supplemental Statement of the Case"[30] addressing claimant's newly received [material] evidence (Citation Number: 1625132. Decision Date: 06/22/2016 Docket No. 04-03 446A).[31] But a "Statement of the Case" must contain a decision on each issue raised and the claimant in any case, may not be presumed to agree with any statement

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[29] 38 C.F.R. § 20.1403 "the correct facts...were not before the Board".

[30] 38 C.F.R. § 20.1000 (a),(3),(b); 38 U.S.C. § 7104(a), 57 FR 4109 Feb. 3, 1992.

[31] Not based on 38 C.F.R. § 19.29(c); 38 U.S.C. § 7105(d)(1) (1994)).

of fact contained in the "Statement of the Case" to which the claimant does not specifically express agreement."

Petitioner did not receive a "Statement of the Case" from the agency addressing the agency's position on the VSO's submission of false information and Omission of (relevant) material evidence; neither the issue relating to the ill advice of Petitioner's counsel addressed, involving the agency's (former) prescribed VA Form 1-526 preceding VA Form 21-526 (not ever in existence per the Florida, Department of Veterans Affairs) and that prejudiced Petitioner's claim(s) and appeal(s)).

Prior to dismissing Petitioner's appeal, the Board also invalidated Petitioner's appeal on the absence of Petitioner not submitting a

notice of disagreement (NOD) on a new VA form but Petitioner was not required to re-submit her appeal on a (new) VA Form 21-0958 because the new NOD form effective (VA) requirement Date is 02/24/2015 (79 FR 57659) and Petitioner submitted a continuance on her appeal (with new, relevant material evidence) June 13, 2014 to the agency thus, at the time that Petitioner submitted the appeal, it could be filed in any format, so long as it [was] in writing and can be "reasonably construed as seeking appellate review".[32] (38 C.F.R. § 20.201). ("[S]pecial wording [was] not required") 38 C.F.R. § 19.118 (1983).

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[32] (38 C.F.R. § 20.201). ("[S]pecial wording [was] not required") 38 C.F.R. § 19.118 (1983).

In 2001 Petitioner's (organization) representation was revoked by the Petitioner on 09/30/2001; Received by the agency on 11/27/2001; Acknowledged by the agency on 01/31/2002; Revoked by the agency on 09/30/2002 (see R. at 15016-15017, 11084) but Petitioner was still represented by the same organization before the agency and the Board, 10/30/2017,[33] in Washington, D.C.. (38 U.S.C. § 5109A, 38 C.F.R. § 3.160).

Petitioner always claimed that she did not receive a formal claim form in 1995, but she was compelled to accept the Board's presumption of regulatory involving the mailing of the formal claim to the Petitioner's

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[33] R. at 23-25, 2752, 14495, 14499, 14990,

address in 1995 because: "public officers perform their duties" 'correctly, fairly, in good faith, and in accordance with law and governing regulations.' .... In applying the presumption of regularity, the court will presume that, in the absence of clear evidence to the contrary, public officials have properly discharged their official duties" (28 U.S.C.§ 2072(a)(b)(c) otherwise representation will be withdrawn, is this not arbitrary and capricious inconsistent with the intent of Congress (a violation of the U.S. Constitution Amend V (substantive) and or XIV (law)?

Petitioner suffered legal wrong (38 U.S.C. § 7113 (2)(A), 38 U.S.C. § 5108 (A), (2016); 57 FR 4104 Feb 3, 1992 as amended at 84 FR 178 01/18/2019.

Representation statements contrary to claimant's claims before the Board and the Court(s) of Appeals of a benefit claim, falls outside the scope of the agency's enforcement authority and VA's accredited individuals and others because they shall not evade a rule of conduct through the actions of another, nor engage in deceitful, fraudulent, misrepresentation, misleading or dishonest submission or omission of material evidence influencing an adversarial outcome of a claim or appeal in violation of any provisions included in title 38 of the United States Code, or Code of Federal Regulations in the processing of a veteran's claim.

"VA's authority to cancel accreditation includes the authority to suspend

accreditation" [34] (72 FR 58009 effective January 10, 2008).

Petitioner disputes the dismissal of her appeal by the lower Court(s) of Appeal(s) and the Board. It can be reasonably explained why the lower Vet. Apps., Court findings assert: "there ... [was] no evidence that Ms. Jernigan relied on VA's allegedly misleading notice[35] to her detriment" because the VSO omitted the submission of the truth in regards to Petitioner's claims: That her 1995 claim was still pending; That no one informed Petitioner she must submit a formal claim form (VA 21-526); That no one provided Petitioner with a

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34 38 C.F.R. § 14.633 (a), 14.626, 14.628, 14.629(a), 14.628 (d)(1)(v), 14.633(c),(d); 38 U.S.C. 501, 5902, 5904

35 R. at 15091

formal claim form in 1995; That Petitioner was required by law to submit a formal claim form within one year after submission of her original claim(s) (in 1995); that Petitioner refused to sign the VSO statement establishing a different date of claims because her 1995 claims were still pending. Instead the VSO recourse to submit contrary statements on behalf of Petitioner's claims after consultation with the claimant. The VSO statement 10/29/2001 was not found in the agency's RBA until June 13, 2014.

The Board, the lower Court(s) and the federal circuit relied on contrary facts against Petitioner's claims in a final decision the Court asserts:

> "Ms. Jernigan's application was submitted with a letter from her authorized representative that stated, "Please accept the attached material as an original application for benefits." [R. at 2169."[36]]

The agency's enforcement on Petitioner to submit a non-existing form[37]; to follow VA's instructions to "IGNORE" to submit form(s) within a year for benefits[38] to be paid not as required by law 38 U.S.C. § 5101(a), 7105(d)(1), (1994); 57 FR 4104 Feb 3, 1995 as amended at 84 FR 178 01/18/2019 to pay an eligible veteran the entitlement of benefits,

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[36] 28 U.S.C. § 2072 (a)(b)(c); R. at 11101 (Nov. 19, 2001); R. at 15033 (Nov. 8, 2001).

[37] R. at 11041

[38] Record excluded by Counsel dated 06/18/2014: Email from Fl Director VA Benefits and Assistance. "I don't believe there was ever a VA Form 1-526".

isn't that arbitrary, capricious and inconsistent with the intent of Congress, a clear and unmistakable error[39] in violation of the United States Constitution Amend. V (Substantive law)?

This Court has deferred judicial authority to the agency relying on agency expertise and reasonableness, etc. but the Board denied Petitioner's appeal in 2010 ((38 U.S.C. § 5101(a); 38 C.F.R. § 3.151(a)) for not filing a claim on a (new) formal claim form (VA Form 21-526[40] (Norris v. West, 12 Vet. App. 413, 416 (1999) and the Court in 2012 for not finding evidence of Petitioner's prejudicial reliance upon the context (language,

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[39] R. at 13126

[40] 5 U.S.C. § 808

instruction) of the 1995 notice.[41] The law did not define what formal claim form had to be used for benefits to be paid prior to *Jernigan v. Shinseki*, U.S. Vet. App. 06/19/2012 Case No. 10-1226 (Final Judgment).

Reasonably, submission of false statements knowingly by representation prejudices adjudication on a claim or appeal especially with the willful omission or commission of information consider as relevant and factual influencing an outcome.

"The prior decision will be vacated only with respect to the issue or issues to which within the judgment of the Board the false or

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[41] 38 C.F.R. § 20.1403 "either the correct facts, as they were known at the time, were not before the Board"; R. at 15091.

fraudulent evidence was material" 38 U.S.C. 7104(a).[42]

The effective date of an award of compensation is fixed according to the [italics is added for emphasis] ["] *facts found* ["] ((38 U.S.C. § 5110(a); 38 C.F.R. § 3.157(a) (2011)). 38 U.S.C. § 5110(a) provides a factual foundation of law:

> "Unless specifically provided otherwise in this chapter, the effective date of an award based on an original claim, a claim reopened after final adjudication, or a claim for increase, of compensation, dependency and indemnity compensation, or pension, shall be fixed in accordance with the facts found, but shall not be

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[42] 38 C.F.R. § 20.1403 "either the correct facts, as they were known at the time, were not before the Board...".

> earlier than the date of receipt of application therefore"

The Secretary can't assert that two formal applications forms one (former) preceding another were sent with the 1995 notice. VA can't have it both ways; [43] a mistake has been clearly committed. The face of the 1995 notice clearly states in writing 1-526 as an enclosure not VA 21-526.

In 1995 VA defined "Claim–Application" as "a formal or informal communication in writing requesting a determination of entitlement or evidencing a belief in entitlement, to a benefit." 38 C.F.R. § 3.1(p) (1995).

And,

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[43] R. at 11950, 12097-12098, 12099

> "If new material evidence presented would compel a reasonable fact finder to reach a contrary result, agency deference requires a review....The district Court's decision to exclude extra-record evidence when reviewing an agency's decision is reviewed for an abuse of discretion."[44]

See 5 U.S.C. § 706(2)(A); *Monjarez-Munoz v. INS,* 327 F.3d 892, 895 (9th Cir.), amended by 339 F.3d 1012 (9th Cir. 2003). *Ochave v. INS*, 254 F.3d 859, 862 (9th

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[44] *Tri-Valley CAREs* v. *U.S. Dep't of Energy*, 671 F.3d 1113, 1124 (9th Cir. 2012); *Northwest Envtl. Advocates v. Nat'l Marine Fisheries Serv.*, 460 F.3d 1125, 1133 (9th Cir. 2006); *Partridge v. Reich*, 141 F.3d 920, 923 (9th Cir. 1998); *Southwest Ctr. for Biological Diversity v. United States Forest Serv.*, 100 F.3d 1443, 1447 (9th Cir. 1996).

Cir.2001) ("When reviewing for substantial evidence, we must uphold the IJ's findings unless the evidence not only supports, but compels, contrary findings."

And,

> Under 38 C.F.R. § 3.154 "VA may accept as a claim for benefits under 38 U.S.C. § 1151 . . . any communication in writing indicating an intent to file a claim . . . under the laws governing entitlement to veterans' benefits for disability or death due to VA hospital care, medical or surgical treatment, examination, training and rehabilitation services, or compensated work therapy program, whether such communication is contained in a formal claim . . . or in any other document.".

And,

> "The Court acknowledge[d] that there may be instances in which VA has acted on informal claims and granted benefits

> without a formal application ever being filed". We hold that it is. If VA opts in some cases to treat informal claims as de facto applications, that is consistent with a veteran-friendly mandate and should be encouraged when possible (such as when a veteran is otherwise diligently pursuing his claim, unlike Ms. Jernigan). See Hodge v. West, 155 F.3d 1356, 1362 (Fed. Cir. 1998) (stating that "[t]his court and the Supreme Court both have long recognized that the character of the veterans' benefits statutes is strongly and uniquely pro-claimant" and describing "the historically non-adversarial system of awarding benefits to veterans"); Trilles v. West, 13 Vet. App. 314, 326 (2000) (en banc) (describing "the VA pro-claimant non adversarial claims adjudication process"). If VA opts not to, however, the statute and regulation do not permit the Court to force VA to do so."

And,

> When Congress leaves a statutory gap for the agency to fill, any administrative

> regulations must be upheld unless they are [not in existence] arbitrary, capricious, or manifestly contrary to the statute, amended by 197 F.3d 1035 (9th Cir. 1999); IV-6 2012 *Kankamalage* v. INS, 335 F.3d 858, 862 (9th Cir. 2003).

ARGUMENT

Is it the intent of Congress to defer judicial authority to an agency to the extent, that an applicant's claim is denied and an appeal is dismissed depriving a property interest without remedy when new, relevant material evidence shows Court's reliance on false evidence used adverse to the claimant's claims in the initial and crucial stage(s) of a claim and or appeal and the Secretary denies a claim because it enforces a requirement of a non-existing form to be filed within one year but simultaneously instructs

the veteran on a (defective) notice to "IGNORE..." to submit [the] evidence requested below ... and on the effective requirement date for the non-existing form that it enforces receipt thereof (within a year of an informal claim) not defined by statute or regulation or Federal Registry or agency manuals or enforcement guidelines or policy statements (in 1995) thus lacks the force of the law and do not warrant deference ((38 C.F.R. § 20.1403; 38 U.S.C. § 5109A; 38 C.F.R. § 3.160(d)) and still charges the veteran to know the law that does not define the formal claim.

Even considering agency procedures and cases ((38 C.F.R. § 20.1403; 38 U.S.C. § 5109A; 38 C.F.R. § 3.160(d)), prescribed VA Form 1-526 was not enforced by the agency on

any other veteran to return. Petitioner argues that, even if a formal application form is required, there is no statutory basis for the Secretary's one-year timeframe within which to return a (former) formal application form that although counsel for the Secretary asserts it was prescribed, it did not exist ((38 C.F.R. § 3.155(a)).[45]

Other formal claim terms flow but VA's (former) formal claim form, VA Form 1-526 was prescribed, preceded[46] VA 21-526 (as per five out of nine) representatives representing the Secretary of the Department of Veterans

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45 *Fleshman v. Brown*, 9 Vet. App. 548, 551 (1996).

46 R. at 10043, 10045-10046.

Affairs (and used against this Petitioner's appeal for an earlier effective date of claim back to 1995).[47]

> "Form" has several definitions, but for these purposes, the Court finds that the most appropriate definition is, "[e]stablished behavior or procedure, usu[ally] according to custom or rule." BLACK'S LAW DICTIONARY 723 (9th ed. 2004) ... See 38 U.S.C. § 7105(b)(1),(c)".

Is it not arbitrary and capricious inconsistent with the intent of Congress for the agency to enforce receipt of a prescribed formal claim that did not exist solely on *one*

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[47] 10214 Congressional Record Senate June 7, 2001 [Paragraphs 1-31] Fundamental duty of federal employees to put "loyalty to the highest moral principles and to country above loyalty to persons, party or Government departments."

claimant in violation of the U.S. Constitution Amend. V (Substantive law? [48]

CONCLUSION

Confusion rises and unstoppable error(s) continue affecting the survival of claims and appeals involving VA notices, veteran representation and VA's Forms with new effective date requirements for its use, especially when prescribed forms are not found to exist. A requirement for the receipt thereof, within time limitation is not according to the law. When Deference is owed unless the interpretation is plainly erroneous or inconsistent with regulation, Forsgren, 309

[48] 38 C.F.R. § 3.150(a), § 3.155, §3.156; U.S.C. 5 § 706(2)(A), 501, 5012(a), 5103(A)f, 5108 (1994).

F.3d 1181, 1183 (9th Cir. 2002) or "[E]ntirely failed to consider an important aspect of the problem..." or "offered an explanation "that runs counter to the evidence before the agency [the Court...must reconsider:]". [49]

> ("If new and material evidence is presented or secured with respect to a claim which has been

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[49] 38 U.S.C. § 5108(a); 38 C.F.R. § 20.1403; 20.1409(b)(c)(d); 38 Subpart O; 38 U.S.C. § 5109A; 38 C.F.R. § 3.160(d)); *Bustos v. West*, 179 F.3d 1378, 1381 (Fed. Cir. 1999); *Sierra Club v. U.S. Envtl. Prot. Agency*, 671 F.3d 955, 962 (9th Cir. 2012) explaining that interpretations found in agency manuals, enforcement guidelines, and policy statements, lack the force of law and thus do not warrant deference); *Comty. Hosp. of Monterey Peninsula v. Thompson*, 323 F.3d 782, 792 (9th Cir. 2003).

> disallowed, the Secretary shall reopen the claim and review the former disposition of that claim."); Cook v. Principi, 318 F.3d 1334, 1339 (Fed. Cir. 2002) (en banc) (holding that, once a regional office decision is final, a claimant may only attempt to overcome the 'finality of that decision in one of two ways: a request for revision of the decision based on clear and unmistakable error or a claim to reopen based upon new and material evidence); Russell v. Principi, 3 Vet. App. 310, 315 (1992).

More so, when representation may involve or evolves into adverse representation, or coercion or unethical or illegal practices.[50]

RELIEF

Petitioner's prayer:

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[50] 38 U.S.C. § 5103 (1995)

> "The One Almighty God your strength is not in numbers nor does your might depend on the powerful. Make every nation and every tribe know clearly that you are the One Almighty God, the One Almighty God of all power and might and that there is no other who shields the people of Yisrael (this house) but you alone. May the One Almighty God of our ancestors grant us favor and make our plans successful. Praise the One Almighty God who has not withdrawn his mercy from the house of Yisrael (this house). O Lord the One Almighty God of all might in this hour look graciously on the work of our hands for the exaltation, for your kingdom.[51]

This court may reverse under the arbitrary and capricious standard only if the

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[51] Prayer inspired by Ruach ha Kodesh (Holly Spirit) Yakiyn Ben of Yisrael, by: Ronny L. Jernigan 05/27/2019.

agency has relied on factors that Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to difference in view of the product of the agency expertise.[52] [53]

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[52] *Greater Yellowstone Coalition v. Lewis*, 628 F.3d 1143, 1148 (9th Cir. 2010) (as amended) (relying on *The Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (en banc), overruled on other grounds by *Winter v. Natural Res. Def. Council*, 555 U.S. 7 (2008)); *Envtl. Def. Ctr.*, 344 F.3d at 858 n.36; Brower, 257 F.3d at 1065 5 U.S.C. § 706; 28 U.S.C. § 1254(1); 38 C.F.R. § 20.1304(c); 38 C.F.R. § 3.159 (2001); 38 U.S.C § 5102, § 5103(a), § 7261(b)(2), § 7292(d)(1)(2)(3)(4); *Jernigan v. Shinseki* 134 S. Ct. 1871 (2014); *Cushman v. Shinseki*

Congress intended to incorporate the APA's approach. Pp. 8–9; (38 U.S.C. § 5013(a), 38 U.S.C. § 7261(b)(2),(3)(a),(b),(c). In all cases, when there is a finding of Board error, the Court is required to "take due account of the rule of prejudicial error." 38 U.S.C. § 7261(b)(2); *Conway v. Principi*, 353 F.3d 1369, 1374-75 (Fed. Cir. 2004). 38 U.S.C. § 5108, 5109A, 7111.

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576 F.3d 1290 (Fed. Cir. 2009); *Damrel v. Brown*, 6 Vet. App. 242, 245 (1994); *Phillips v. Brown*, 10 Vet. App. 25, 31 (1997); *Goodwin v. Peake*, 22 Vet. App. 128, 132 (2008); *Russell v. Principi*, 3 Vet. App. 310, 313-14 (1992); *Sanders v. Shinseki* 129 S. Ct. 1696 (2009); *Grottveit v. Brown*, 5 Vet. App. 91, 92 (1993).

[53] 5 U.S.C. § 706(2)(A)

To establish CUE in a final VA decision, it must be shown that VA committed a specific error in adjudicating the claim[54] and that the outcome would have been manifestly different but for the error[55]. *Cook v. Principi*, 318 F.3d 1334, 1343 (Fed. Cir. 2002)[56]. An allegation that a claimant was represented by a person later disaccredited for misconduct or incompetence, [italics added for emphasis] *by itself*, would generally not be sufficient to require re-adjudication of a claim based on conduct by the representative. However, a veteran's representative shall not make a false or misleading communication if it contains a

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54 R. at 15096-15097

55 R. at 13126

56 R. at 13126

material representation of fact or law or omits a fact necessary to make the statement considered as a whole materially misleading but, in addition to the matters of fraudulent representation the VA prescribed in 1995 a former formal claim that did not exist[57] and VA asserted Petitioner receipt of VA's response letter[58] [59] to which, prejudiced[60] Petitioner not to act in 1995 (except to discard the notice, after she relied upon the context of

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57 28 U.S. Code § 2072 (a)(b)(c)

58 R. at 15091; See *Kent v. Nicholson*, 20 Vet. App. 1, 12 (2006); *Sanders v. Nicholson*, 487 F. 3d 881 (Fed. Cir. 2007)

59 R. at 11058

60 R. at 13126 (1st paragraph); R. at 13100

the same, statement(s) 1-526 [not found][61] [62] . Per the agency's representatives VA Form 1-526 the predecessor to Form 21-526 was attached to the August 1995 notice.[63] Petitioner previously stated on the record that she did not receive the 1995 notice at her home address because she did not recall the face of the notice[64] after 6 years had passed [65] (not in Petitioner's possession after she discarded it and relied upon the context of the same in 1995 and VA's continual assertion(s)

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61 38 C.F.R. § 20.1000(a),(1),(3),(b); 38 U.S.C. §7104(a), 57 FR 4109 Feb. 3, 1992

62 *Servello vs. Derwinski*, 3 Vet. App 196, 200 (1992); Quarles v. Derwinski 3 Vet.App. 129, 137 (1992).

63 R. at 10046

64 R. at 15091; No. 18-2918 Vet. App. (07/07/2018)

65 R. at 14381

(initially) that the 1995 notice enclosed a VA 21-526 and that the notice stated that Petitioner must return VA 21-526 within one year of her claims R. at 11037, 11950, 12095-12099 ((not according to what the face of the 1995 notice (R. at 15091) actually states)).

The RBA contains over 15,000 documents but only some of the records submitted in June 2014 appear in the RBA thus, there are some records that are still missing. See R. at 10051-10063.

The Secretary can't assert that two formal applications forms (one preceding the other) were sent with the 1995 (defective) notice (R. at 15091).

VA can't have it both ways; a mistake has been clearly committed (Section 242 of

Title 18). The face of the 1995 notice clearly states in writing prescribed Form 1-526 as the enclosure(s) (R. at 15091).

For the foregoing reasons Petitioner respectfully, request this Court to grant Petitioner a Writ of Certiorari and remand. The lower Court(s) dismissed Petitioner's Appeal(s) on lack of jurisdiction (see Appx. A), *Jernigan v. Wilkie*, U.S. Fed. Cir. 04/10/2020 Case No. 19-2235.

05/11/2020

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