IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

JAMES R. WELCOME, Appellant, v. ROBERT L. WILKIE, Secretary of Veterans Affairs, Appellee.	)	Vet.App. No. 18-4601

APPELLANT'S RESPONSE IN OPPOSITION TO THE SECRETARY'S MOTION TO STRIKE

Pursuant to U.S. Vet.App. R. 27(b), the Appellant, James R. Welcome, responds to the Secretary's Motion to Strike and respectfully requests that the Court deny the Secretary's Motion.

First, the Secretary's insinuation that Appellant's notification was deficient for failing to explain to the Court how the information provided could "affect its decision" ignores that the thrust of the Court's decision in *Solze* is counsel's "duty to *notify* the Court" of additional information. *See Solze v. Shinseki*, 26 Vet.App. 299, 301-302 (2013) (emphasis added). This is not the time to offer argument, nor is it prudent for counsel to be so brash as to explain to the Court why it should find the information important. *See id*. at 302-303 (citing *Fusari v. Steinberg*, 419 U.S.

379, (1975) (Burger, C.J., concurring)); *see*, *e.g.*, U.S. Vet.App. R. 30(b) (explaining the Notice of Supplemental Authority "shall state *without argument* the reasons for the supplemental citation(s)"). Rather, as the Supreme Court has stated, it is enough that counsel is inclined to believe that the information "may conceivably affect an outcome" and provides the information. *Fusari v. Steinberg*, 419 U.S. 379, 391 (1975) (C.J. Burger, concurring); *see In re Ravin*, 29 Vet.App. 95, 105 (2017).

Second, this Court made clear that the duty of candor "would be meaningless" if it "were restricted to the litigation record" when it accepted the Committee on Admission and Practice's analysis and recommendation in *In re Ravin*. *In re Ravin*, 29 Vet.App. at 105. There, a grievance claim was filed against the Respondent, arguing that he had failed to comply with the duty of candor to the Court when he failed to notify the Court that a decision had been made that might impact the Court's decision to reconsider. *Id.* at 96. Defending himself, the Respondent argued that "it would have been improper for him to refer . . . to any evidence not of record before the Board" and that was why he had not provided the Court with the information. *Id.* at 103.

The Committee, and by virtue of accepting the recommendation, the Court, disagreed. *Id.* at 105. It determined that the Court has called on parties to comply with "the spirit of Model Rule 3.3 – that all parties must be candid with the Court

about *any developments* that *could conceivably affect* its jurisdiction *or its decision*," and therefore that the Respondent had failed to comply with when it did not provide notice to the Court of the decision. *Id.* (emphasis added).

Third, the Secretary's assertion that *Solze* notification is limited to information which will "affect the Court's *ability* to render a decision," i.e., its jurisdiction, reads *Solze* too narrowly. Secretary's Motion at 3 (emphasis added); *cf. In re Ravin*, 29 Vet.App. at 97; *Robinson v. McDonald*, 28 Vet.App. 178 (2016). This interpretation not only reads out the language "affect its decision," but it also diminishes the Court's discretion to determine "what questions may be taken up and resolved for the first time on appeal." *Singleton v. Wulff*, 428 U.S. 106, 121 (1976).

Finally, the Secretary contradicts himself, taking a position here that is contrary to his own prior acts. In a recent case, the Secretary himself provided the Court with exactly the type of information that Mr. Welcome provided – information that would not affect the Court's jurisdiction, but could "otherwise affect its decision" – and offered it to the Court in a manner similar to Mr. Welcome's notice. *See Franklin v. Wilkie*, 2020 WL 2781742, *3, *6 (Vet.App. May 29, 2020); *see also Franklin v. Wilkie*, CAVC Docket No. 19-2513, Appellee *Solze* notice (filed March 17, 2020).

While the appellant objected to the Secretary's action, stating as the

Secretary does here that the Court could not consider information outside of the Record Before the Agency, the Court held that it has the authority to "go beyond the record to determine if a Board error was harmless to the claimant." *Franklin*, 2020 WL at *6 (citing *Vogan v. Shinseki*, 24 Vet.App. 159, 163-64 (2010)). Additionally, the Secretary's proferred extra-record evidence aided judicial efficiency, as a remand became unnecessary once the Court had the information. *Id.*

WHEREFORE, the Appellant respectfully requests that the Court deny the Secretary's Motion to Strike and consider Appellant's *Solze* notice as offered – counsel's attempt to comply with her duty to notify the Court of information that could potentially affect the Court's decision, nothing more, nothing less.

Respectfully submitted,

/s/ Jennifer A. Zajac

Jennifer A. Zajac
Appellant's Counsel
Paralyzed Veterans of America
3941 Shenandoah Dr.
Oceanside, CA 92056
760-639-0765
jenniferz@pva.org

July 1, 2020
Date