IN THE SUPREME COURT
OF THE
COMMONWEALTH OF PENNSYLVANIA

No. _____ Allocatur Docket 2022

ANN M. ROGERS,
Respondent

v.

ROBERT P. BAUCHWITZ,
Petitioner

PETITION FOR ALLOWANCE OF APPEAL

From the Judgment of the Superior Court of Pennsylvania at No. 1499 MDA,
February 4, 2022, Affirming the Order of October 9, 2020,
as Amended October 15, 2020 in the Court of Common Pleas,
Dauphin County, Pennsylvania,
Docket numbers: 2017-CV-6699-DV and 01336-DR-17

Robert P. Bauchwitz
23 Harlech Drive
Wilmington, DE 19807
dir_amr@luxsci.net
Telephone: (717) 395-6313

PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES AND RULES:

MISCELLANEOUS

ABBREVIATIONS

Appellant's Brief (ABr)

Appellee's Brief (EBr)

Appellant's Reply Brief (ARBr)

Reproduced Record (R.)

Superior Court or its memorandum decision (Panel)

PAA Supplemental Text Links

(SupCtComplete)
http://healthsci.org/SupCtPAA
(quitamforSupCt)
healthsci.org/qui_tam_USexrelBauchwitz_v_Holloman_Kmiec_Cornell_TJU

Reference To Opinions Delivered In The Courts Below

The opinion issued by the Superior Court of Pennsylvania on February 4, 2022, is attached as Appendix A. The trial court's order is attached as Appendix B. The trial court's opinion, which the Superior Court affirmed, is attached as Appendix C. The trial court's amended order, is attached as Appendix D. The Divorce Decree is attached as Appendix E.

Questions Presented For Review

1. Should the Supreme Court accept review of this case because its extensive evidentiary abuses of discretion and errors of law significantly harm the public interest in economic justice in divorce?

2. Should the Supreme Court accept review of this case demonstrating conclusively that the credibility claims of a divorce master should not be given special consideration over the evidence of record, in order to overrule case law cited by the courts below to support any evidentiarily unjustified preeminence of the master's claims?

3. Has a divorce master so falsified the evidentiary record, and the courts above supported such falsification by reckless disregard for the evidence, as to warrant consideration of procedures to better protect litigants and the reputation of the courts by institution of professional standards of timely and independent oversight?

Statement of the Case

Background

This is an appeal from a Superior Court of Pennsylvania decision of February 4, 2022, affirming an amended order of the Dauphin County Family Court concerning a divorce action between Wife Ann M. Rogers, M.D. of Hershey, PA, and Robert P. Bauchwitz M.D., Ph.D., now of Wilmington, DE.

The circumstances of the unexpected separation and divorce were as follows: On August 28, 2017, Wife abandoned her twenty-seven-year marriage to Husband (Petitioner) without notice. Prior to Wife's leaving for her parental home in Santa Rosa, CA, upon the passing of her father, Charles T. Rogers, on August 17, 2017, there had been no "incipient" sense by either party of an impending separation or divorce. (R.0895a; R.1263a.) However, of remaining relevance to factors affecting alimony, in the months prior to August 17, 2017, Wife had engaged in two significant acts of violence against Husband[1]. (R.1790a-1800a) Shortly before the abrupt separation, Wife acknowledged Husband's value to her career (R.0313a, 0892a, 1203a), as well as to his not only being a good father, but also to being a "best friend" (R.1692a). There also arose in the weeks prior to the

[1] Which she claimed were due to mismedication for mental health issues.

sudden separation, cross-charges of abuse between Wife and her father, Charles T. Rogers of Santa Rosa, CA. (R.1372a). This in turn led to three arguments between Husband and Wife regarding what she asserted were considerations by her and her mother, Phyllis Corwin Rogers of Santa Rosa, CA, to withdraw important medications taken by her recently disabled father, despite his making it clear that he wished to live. Husband has consistently argued throughout this case that it is the actions of Wife and her mother following the demise of Charles T. Rogers, and the implications for Husband's own safety, that is the central precipitating factor in this divorce. Nonetheless, the divorce master, Cindy S. Conley, the trial court judge Edward M. Marsico, and now the Superior Court of Pennsylvania (in a memorandum decision authored by Daniel D. McCaffery), have persisted in asserting the "irrelevance" of such fault, without addressing evidence or basis in law.

Financially, Wife has for many years been a very high-income surgeon at the Penn State Milton S. Hershey Medical Center in Hershey, PA, where her last reported income of record was ($468,416.00 in 2019 plus $11,549 in schedule C after-expenses income (R.0420a;0439a). Until late 2007, Husband was an M.D., Ph.D. biomedical researcher at a Columbia University affiliated institution in New York City, whose career had been acknowledged by both spouses as seriously disrupted by his acting as a *qui tam* relator in a federal False Claims Act scientific

fraud case. The divorce master wrote: "Wife admitted that because Husband brought a whistleblower lawsuit against his former employer, he most likely would not be able to obtain employment in the research area" (R.0429a). The *qui tam* case has figured prominently in this divorce case, not only for reasons of its impact on Husband's earning capacity, but also for issues of credibility and improper *sua sponte* judicial investigation.

Husband's peak, full year W-2 wage earnings as a biomedical scientist averaged $67,664 (ABr.p.9) with a base income of $50,000/yr (R.1978a) and the remainder variably supplemented by grant funding. Husband testified to various factors that he had come to believe might have been affecting his employability beyond the involvement in a *qui tam* suit against a former employer, including his lack of experience for high-paying jobs outside of his field, his advanced age (almost 59 years old at the time the master's report was issued), his need for accommodations for medical limitations on work (severe osteoporosis with several back fractures), and his decade prior to separation of being self-employed without any salary income. (R.0968a-0970a).

The divorce master noted in her report: "Wife's income is **more than six times Husband's earning capacity**. … Wife is able to meet her reasonable monthly needs **and still have a significant amount of discretionary funds**

remaining … **Husband is not able to meet his reasonable needs from his earning capacity**." (R.0451a) (font emphasis added).

The master also wrote: "**With his earning capacity alone, Husband will not be able to maintain an upper class standard of living**. This **favors an award of alimony** to Husband." (R.0459a) Ultimately, the master would not award any alimony, but did award 10% of Wife's share of the $3 million marital estate to Husband (R 0315a).

Husband filed exception to a one-time award of 10% of the marital estate as insufficient to achieve economic justice, an important goal in the outcome of divorces in the Commonwealth of Pennsylvania law. Husband argued in his appeal that such a distribution as awarded by the master would not come close to allowing Husband to maintain anything like the marital standard of living he had during almost all of the marriage.

Husband further appealed the trial court's upholding the master's claims on the basis that his earning capacity was not determined with full and realistic basis in evidence. (ABr.p.20 et. seq.) It was also of issue that the master reduced the actual marital living expenses by 35%, which further greatly impacted Husband but not Wife (ARBr.p.7).

Finally, and more generally, Husband's appeal raised numerous issues of evidentiary rulings and credibility assessments by the master, which he asserted

"substantively impacted Husband's rights", and furthermore, that "the master's rulings had little or no record support". (e.g. ABr.p.57).

These concerns of pervasive abuses of discretion with respect to evidentiary insufficiency and errors of law are likely of even greater public import than those of economic justice in this case. Husband will provide evidence throughout the Reasons for Allowance of Appeal, below, by which he expects to demonstrate that law which purports to give any preeminence to the claims or "observations" of a master beyond the evidence should be overruled. Evidentiary reviews of this case by the trial and Superior Courts have also raised major concerns about quality control and oversight affecting the court's basic functions.

Standards of review

The standards of review raised by Husband in his Appellant's Brief ("ABr") were abuse of discretion and failures to present credible evidence of record. (*Teodorski v. Teodorski,* 857 A.2d 194 (Pa. Super.Ct. 2004). (ABr.p.30).

As Husband noted in his Appellant's brief, the preceding case law is consistent with more general definitions of abuse of discretion:

"1. An adjudicator's failure to exercise sound, reasonable, and legal decision-making. 2. An appellate court's standard for reviewing a decision

that is asserted to be grossly unsound, unreasonable, illegal, **or unsupported by the evidence**." (*Black's Law Dictionary, Ninth Ed*., p.11).

Reasons for Allowance of Appeal

A. The Supreme Court should accept review because extensive evidentiary abuses of discretion and errors of law in this case will significantly harm the public interest in economic justice in divorce.

In its memorandum, the Superior Court ("Panel") stated that they found no relief due to Husband because he had ***"ignored" discussion*** by the master and trial court on factors involved in equitable distribution and alimony. (Panel pp.20-21). Therefore, as these underly an examination of the questions raised on appeal regarding economic justice, Husband starts with an examination of what was actually in his appeal briefs.[2] Search terms for Husband's briefs in the following

[2] Because of the extensive nature of the rebuttals necessary to properly make an evidentiarily sound response to the Panel's memorandum, and the word limitations on this petition, Husband will here, and at some additional points, only provide illustrative, rather than comprehensive, responses from the record cited in his appeal. To view a more complete response, including extensive quotations of record and law, see: SupCt_PAA_Complete_1499MDA2020.pdf at healthsci.org/SupCtPAA. (Court officers will have access to the appellate briefs and reproduced records cited.)

list are preceded by carats (>). A list of abbreviations is provided in a table at the start of this document.

For 23 Pa. C.S.A. § 3701. Alimony. (b) Factors relevant:[3]

(1) "The **relative earnings and earning capacities** of the parties":

> earning capacity (e.g. ABr.pp.11-12, 16, 19-24, 27-30, 32-34; and on 9 more pages of the appellant's brief, as well as ARBr.pp.3-5, 8, and 10).

(2) "The **ages and the physical** … conditions of the parties":

> physical ABr.pp.10, 24, 29, 31, 33, and 36; ARBr.p.8 > medical limitations ABr.pp.10, 21, 24, 27, 33. There were additional statements that used the terms "medical condition" or "medical issues".

(8) "The **standard of living of the parties established during the marriage**".[4]

> "standard of living". This term appears on 9 pages of ABr, including in an entire section titled: "The marital couple had a very high

[3] Husband contends that it was not incumbent on him to discuss factors not challenged upon appeal.

[4] For citations to factors (5), (6) and (12), and some additional commentary, see the link cited above.

standard of living as properly assessed by income rather than actual or feigned frugality" (ABr.pp.17-19).

(14) "**marital misconduct**":

> marital misconduct, e.g. ABr.pp.50-52.

(15) "The **Federal, State and local tax ramifications** of the alimony award":

> tax: ABr.pp.42-49, 57; ARBr.pp.5-6, 13.

Therefore, the Panel's claims are ***false*** in that Husband ***extensively*** discussed the equitable distribution and alimony factors in his appeals briefs.

Husband also clearly noted the basic premise that alimony and equitable distribution are "**fungible**". For example, Husband's appeal asked: "Did the trial court and/or the master abuse their discretion in refusing to award the Husband ongoing **alimony and/or a larger distribution of marital assets** …" (ABr.p.5,p.14,p.15)

Husband's appeal does not exclude the possibility that no alimony would be appropriate *if* there were sufficient equitable distribution to maintain his marital standard of living (and actual "lifestyle", rather than that claimed by the master using vague, undefined terminology, e.g. "middle class", and expenses that she cut by 35% to non-credible levels).

In questioning Husband's calculations, and in particular his focus on 10% of the marital estate for use as supplemental income until 67 years of age - *in place of alimony* - the Panel seems to have failed to comprehend the import of a point made by the master:

> "With respect to assets, the master noted that "Husband's income until retirement should be focused on first meeting his needs **so that he does not have to raid his retirement accounts until retirement**." (R.0445a).

For the purposes of this analysis, Husband takes the master's position, supported by the trial court, that retirement funds were intended for use only beginning at the age of 67, except presumably for any funds that she has termed "a greater distribution", i.e. within the additional 10% of the marital estate." (ABr.p.42).

Assessment of economic justice

As the Panel noted, economic justice is legislatively addressed by: "the provisions of [23 Pa.C.S. § 3502(a)] and the avowed objectives of the Divorce Code, that is, **to effectuate economic justice** between the parties and insure a fair and just determination of their property rights." (Panel p.12)

While there are thirteen explicit factors to weight in determining equitable distribution of assets (§ 3502(a)), this Court has noted that:

> "**We look at the distribution as a whole**, in light of a trial court's overall application of the factors enumerated at [Section] 3502(a)." *Misitano v. Misitano*, 568 WDA 2020, at *6 (Pa. Super.Ct. Oct. 28, 2021)

With respect to alimony, the Panel quoted from *Teodorski*, 857 A.2d at 200 regarding 23 Pa.C.S. § 3502(a)(1)-(11):

> "Alimony "is based upon **reasonable needs** in accordance with the ***lifestyle*** **and** **standard of living** established by the parties during the marriage, as well as the payor's ability to pay." (Panel p.14)

As Husband noted in his appeal,

> "The **standard of living** to which [a spouse] is entitled is one reasonably supportable by the **income** and station in life of the parties, **irrespective of the frugal inclinations** of the [the other spouse]." *Edelstein v. Edelstein*, 399 Pa.Super.536, 542, 582 A.2d 1074, 1077 (1990)."

The trial court similarly affirmed *Edelstein* (*supra*) in its October 9, 2020 opinion:

"**Spousal incomes** are what establishes **a standard of living** throughout a marriage". (R.0818a)."

The Panel, however, merely quoted the master via the trial court on marital standard of living:

"[W]ith an earning capacity of $72,000[ ] annually, Husband could maintain a ***middle-class standard of living***. . . . Wife's earning capacity would allow her to easily surpass the ***standard of living*** the parties became accustomed to during their marriage. … Trial Ct. Op., 10/9/20, at 6-7." (Panel p.9)

The preceding claim was appealed as an error of law. It is not true that Wife's marital standard of living would change after divorce, as **she would maintain the marital income**.[5] She would ***not*** "easily surpass" her marital standard of living in terms of marital income, regardless of whether her lifestyle might change. Much more importantly, it is manifestly untrue to assert that Husband would be "***maintaining***" his marital standard of living, or anything close to it, since even if he could achieve his purported earning capacity, it would be 6-fold (600%) less than his MSOL had been adjudged in this action. (ABr.p.11)

[5] Husband was self-employed for reasons discussed with respect to earning capacity and did not have wage income since 2010. (ABr.pp.7-12)

Husband contends it is an abuse of discretion to base a decision requiring evidentiary assessment upon the use of terms such as "middle class" without having specified any economic definition.[6]

Nevertheless, even the master noted with respect to the parties' **standard of living**:

> "The parties established an ***upper middle class*** standard of living during the marriage. Given Wife's superior income, she will have no problem maintaining and perhaps even exceeding the marital standard of living. With his earning capacity alone, Husband will not be able to maintain an upper class standard of living. **This favors an award of alimony to Husband**." (R.0461a) (emphasis added)." (ABr.p.12).

While disagreeing with yet another undefined description of standard of living, Husband agrees that an alimony award is appropriate. However, instead of alimony, the master would go on to claim that an award of an extra 10% of the marital assets to Husband would be sufficient to permit no award of alimony.

[6] See SupCtComplete for a fuller discussion of these issues based on related statements made by the master, as quoted by the trial and Superior Courts. These points may be added to a brief if allocatur is granted.

In looking at the distribution as a whole (*Misitano*, *supra*), Husband provides here a simplified summary of calculations using gross incomes. (For a more detailed presentation taking net incomes and tax into account as presented in his appeal, see ABr.pp.41-50[7].)

As noted above, the master intended the extra 10% of asset distribution to supplement Husband's income until he began to draw retirement income. The master's report was released in March of 2019, eight years and two months prior to Husband's turning 67 years of age in May of 2027. Therefore, the basic premise was that an additional asset distribution of about $300,000, divided over 98 months ($3125/mo) plus the earning capacity adjudged of $6000/mo ($72,000/yr), totaling $9125/mo gross income *before taxes***,** would provide a similar standard of living as Husband had enjoyed during the marriage at $36,409/month gross income. (ABr.p.16).

The asset supplement therefore takes the 6-fold difference in income without the additional distribution to just under 4-fold (387% difference per year). Leaving aside the significant questions of earning capacity (see following), Husband asserts that this outcome manifestly does not effectuate economic justice.

[7] And in Husband's "Application for Correction of Appellant's Advance Brief", 1499 MDA 2020, filed 7/11/21.

In other words, the question can be asked: has Husband been afforded economic justice by losing at least $26,921/month from his gross marital income/standard of living, **representing a 4-fold decline of income?** Husband asserts that this cannot possibly be the case.

Earning capacity

With respect to earning capacity, the Panel's assessment was as follows, with Husband's responses shown following at the points indicated by capital letters in brackets:

> "Husband denies that his ***Harvard medical education*** **[A]** "would be determinative of employment," arguing, for example, that he **lacks the "clinical medical knowledge . . . required to review charts [B]** as a paralegal" and "does not have the financial training or background to work as an insurance fraud examiner." *Id.* at 31, 33-34. Finally, **Husband challenges the master's and trial court's "theory that [he] lacked" motivation to obtain full-time employmen**t. *Id.* at 38. He concludes **the trial court's findings lack support in the record**. **[C]** ***We disagree***. While Husband extensively discusses employment **in or pertaining to the medical field [D]**, he ***wholly ignores*** that he pursued and obtained a

paralegal certificate in 2010 and a certified fraud examiner certificate in 2016. **[E]** ***See*** Master's Report at 7.

At the time of the hearings, Husband had possessed these credentials for, respectively, approximately nine and three years. **[F]**

The trial court found "there was ***no medical evidence*** offered to suggest Husband was prohibited from obtaining employment as a Certified Fraud Examiner, a paralegal, or employment that utilizes his medical education." **[G]** Trial Ct. Op., 10/9/20, at 11. Husband ***does not refute*** this rationale. **[H]** For all the foregoing reasons, we conclude no relief is due on Husband's claims that he was assessed an improper earning capacity." (Panel pp.18-19) (With font emphasis added.)

[A] The Panel does not explicitly affirm that Husband's "impressive" Harvard education would be determinative of employment given the negative employment factors Husband enumerated. (ABr.p.31) However, the statement is INCORRECT in that Husband does NOT have a Harvard "**medical**" education. He has an undergraduate degree from Harvard in biochemistry and molecular biology.

[B] CORRECT. See [A] preceding and (ABr.p.33), which notes that Wife, a clinician, makes income from reviewing medical charts for law firms. It was also noted that these **paralegal positions** would be ***entry level*** (outside Husband's prior

field of employment) and that the resulting incomes were not relevant to his presumptive earning capacity. (e.g. R.1999a) Nevertheless, Husband has in fact applied for such positions, including through one recruiting firm, and has not received any interviews. (R.1206a)

[C] **The transcript of the hearing and other evidence of record is in no way consistent with the claims of the master**, as repeated by the Superior Court. For example, from the master's hearing:

> "[Husband's attorney on direct]: Q. After the entity [Husband's business] crash landed [after Wife left the marriage], […] **did you undertake any efforts to obtain replacement employment**?
>
> [Husband] A. […] I started looking around and came up with this company, JFC [a temporary agency in Harrisburg, PA], and a number of others. So **I ended up going to seven different recruiting firms** and I did --
>
> Q. You went to recruiting firms, seven recruiting firms?
>
> A. Seven recruiting firms, but […] **I really had ten different recruiters working with me at seven firms**." R.0962a-0963a [Font emphasis added.]

Referring to Husband's applications for **full-time** employment with the federal **Food and Drug Administration** (**FDA**), a position that falls within a

category potentially relevant to certified fraud examiners (C.F.E.s) for purposes of this case:

"A. … there were some opportunities in the Harrisburg area, what they called the Harrisburg resident [p]ost, I believe is the term. And I made some applications. […] But **I did get rejected from all of the applications**."

"Q. Were there other jobs that you sought out that you never heard back from?

A. [] Many."(R.0964a-R0965a)

Already at the 2017 Support Conference Husband was recorded as saying he was looking for full-time employment. As the Conference Officer recorded in her official report:

"**He [Husband] is seeking a full time job** & has experience as a Fraud Examiner in which he states the staring salary is $44,000/year gross." (ABr.p.20).

The preceding testimony is also very important because the Superior Court's memorandum, **published on the Internet**, at two points emphasized a claim by the master in her report that: "***Husband made it clear*** at the hearing that ***he does not***

feel he has any ***obligation*** to find fulltime lucrative employment[.]' (Panel pp.5,10.)

The preceding is similar to a claim Husband appealed in which the master asserted "The ***fact*** that Husband has ***not taken the initiative*** to find full-time employment when he has the ***obvious*** ability to do so, should not be a reason to award him a greater portion of the marital assets." (ABr.pp.34-35)

Husband therefore refers to the evidence presented above by way of refuting this claim by the master, and the Panel's support for it.

Finally, Husband notes that the master's statements are very hard to believe on the face of it, namely, that ***a defendant would arrogantly claim that he did not feel he had to find lucrative employment.***

[D] Husband's testimony and documentary evidence primarily dealt with his negatively impacted employability in his career field of biomedical research.

[E] FALSE. Husband did not ignore discussion of either the paralegal (see [C]) or C.F.E. (ABr.p.21)

[F] IRRELEVANT. Husband testified that he never had any intention to pursue employment based on these certifications. His testimony was that they were intended to be for professional development in furtherance of his business. (R.1036a-1037a)

[G] FALSE. Husband testified that in fact he was **rejected** from employment in C.F.E. related areas precisely **because he did not meet physical eligibility requirements, i.e. because of his medical limitations**. (See [D], preceding). More importantly, it is a **misrepresentation** of Husband's testimony and other parts of the record to imply that it was only, or even primarily, for medical reasons that Husband was not getting interviews for positions related to fraud investigation or as a paralegal. (R.1885-1886)

[H] FALSE. Husband asserts that this "medical evidence" claim never needed to be "refuted" as it is an improper straw man argument. It omits several other important reasons Husband cited for not getting interviews in such areas. (See the preceding refutations which either quote or cite to the record.) To be clear, this is not a case about a man with a Harvard undergraduate degree and medical limitations who says he cannot get lucrative employment outside his former career field. The Panel recited the other factors at issue, **but at no point has anyone from the master or any court above argued that** "[his] involvement in [the whistleblower] suit against a former employer, [a] decade without earnings history, his lack of experience of high-paying jobs outside of his field, [and] his advanced age" **would NOT clearly impact the ability to obtain high income, full-time, lucrative employment**. (See offer of proof from one of Husband's vocational experts at R.1885-1886). Husband asserts that it was an abuse of discretion to not

give explicit weight, at least by documentation of reasoning, to those negative factors.[8]

Based on all the above refutations of record, Husband asserts that the Panel's conclusions themselves concerning his earning capacity represent evidentiary abuses of discretion that should not be sustained.

Also of note, the Panel's **conclusory misrepresentations, that Husband "wholly ignored" things or did not feel obligation to work, etc., as published on the Internet,** will quite obviously not help Husband get too many paralegal or fraud examination jobs, and certainly not more lucrative employment that would come close to Husband's purported earning capacity. (See correctability of the record, below.)

Waiver for having failed to present "new" evidence

With respect to the Panel's finding some "waiver" of Husband's appealing the earning capacity finding of the master:

> "Husband ***does not deny*** that instead of presenting any ***new*** evidence pertaining to his job searches or earning capacity, ***he merely referred to documents submitted two years earlier*** *to the domestic relations office*.

[8] As noted in his brief, discretion is summarized in many fields, including the judiciary, as law/rules/standards applied to credible evidence using rational thought/reasoning.

Husband offers no explanation *why he did not present any evidence to the divorce master*, for her independent recommendations to the trial court as to equitable distribution and alimony.

Accordingly, any argument that the master should have considered other evidence is waived. *See* Pa.R.A.P.302(a) ("Issues not raised in the trial court are waived and cannot be raised for the first time on appeal.").”

The evidence of record refutes these claims by the Panel. The record before the master clearly indicated that Husband had presented considerable **new** evidence at the master's hearing in 2019, i.e. since the limited discussion at the Support Conference in 2017. For example, see the references and quoted testimony provided above regarding employment in the “medical fields”, fraud examination, and paralegal areas. **Husband's report of the rejections of his applications to the Food and Drug Administration alone constitute new evidence** that was not presented at the Support Conference.

With respect to any implication from what the Panel wrote that there would be any requirement of a *de novo* hearing that would be waived, Husband notes that Husband's attorneys both felt that such testimony **could be presented at the master's hearing** rather than a *de novo* hearing. (R.1999a).

From an email of October 7, 2019 from Husband's Attorney Darren J. Holst to Husband and co-counsel Ira Weinstock (R.1999a):

> "As I said before we do NOT need to put on an expert in support of our alimony claim. The other side is calling no experts, and you are competent to testify ... Your medical condition is but one component of the alimony claim. Along with that is the fact that the doors are closed to you for the main career for which you trained and that you are 59; no one is going to hire you. If you pursued you[r] paralegal training you will make far less than the previous earning capacity. Moreover, even with a $72k earning capacity there is still a need for alimony when your spouse will continue to earn in excess of $400k until she decides [to] retire."

With respect to Husband's appeal of earning capacity, he is not questioning whether the master heard his "new" testimony about employment searches and related matters. Rather, Husband had an entire section of his appeal brief entitled "**Earning capacity was not determined by adequate documentation or with full and realistic basis in evidence**" (ABr.pp.20-36; cited as if reproduced here in full.)

The real question goes to evidentiary sufficiency of the claims being appealed. Husband argued that for factors relied upon by the master, such as

Husband's "impressive" Harvard education being determinative of high-income employability, or his purported lack of motivation, there was no credible evidence of record to support her claims. (ABr.pp.31-35) Therefore, there was an abuse of discretion, as credible evidence is required for proper discretion. Husband also cited an error of law in determining earning capacity, which requires making a "realistic" assessment, not a "theoretical" one without other evidentiary support. (*Perlberger v. Perlberger*, 426 Pa. Super. 245, 626 A. 2d 1186 (1993).

Even the trial court acknowledged that the negative factors cited by Husband might have impacted his ability to obtain lucrative employment.

> "while certain circumstances might have prevented Husband from obtaining *lucrative* employment during the marriage, he is not precluded from earning ***any*** wages." (R.0820a)

However, Husband noted in his appeal that it was:

> "not true that either Husband or the recruiting firms failed to obtain ***any*** jobs. They did obtain work for Husband. ***The master noted that*** Husband had worked as a substitute teacher (R.0439a), and Husband testified to also

working in clerical roles (R.0945a, 0964a).[9] Husband also noted in filings to the trial court that he had worked as direct care staff (R.1205a).

Furthermore, Husband noted:

> "it does matter whether [Husband] can get ***lucrative*** employment. Earning capacity is not merely a matter of all or none, job or no job. Husband concedes that the data show he can be employed in temporary, part-time positions in teaching, clerical roles, and even in limited (non-physical) caregiving. Earning capacity determinations require more." (ABr.p.36)[10]

The real issue in this case is obtaining **sufficient income** from whatever source, e.g. employment, investments, or alimony, to be able to maintain some semblance of the **marital standard of living** into which Husband invested a great deal.

Fault alimony factor

[9] This also constitutes further sign that new evidence was discussed with the master as reflected in her report. The master did not get such information from the Support Conference held two years prior, since Husband had none of those positions at that time.

[10] In 2021 Husband obtained a part-time position as an adjunct lecturer comparable in pay to that he had in 2010, i.e. about $3500/course, with no benefits.

Husband next addresses the Panel's treatment of one 3701(b) alimony factor upon which he filed an appeal: marital misconduct, (used synonymously here with "**fault**" relevant to the separation and divorce). (See 23 Pa. § 3701(b)(14)). These issues will also go to credibility assessments.

Regarding fault generally, Husband outlined in his appeal brief that:

"1) Of great importance, there is no question from testimony that Wife Ann M. Rogers, M.D., was the initiator and sole employer of physical violence and assault against Husband after 2002, i.e. specifically in 2016 and 2017. (Summarized at R.1783a-1787a). Those dates are obviously of material relevance to a separation occurring in 2017.

2) Acts of physical violence are relevant for fault considerations under Pennsylvania law with respect to alimony." ...

3) The fault Husband asserts as directly responsible for the separation had to do with what had happened to his father-in-law upon his passing on August 17, 2017 [the last day that Husband and Wife lived together]." (ABr.pp.50-51). A timeline of the circumstances of the unexpected separation and divorce as influenced by the death of Husband's father-in-law: Wife and her mother were in conflict with her father two months before his passing; Wife then made what Husband took to be threats to his father-in-law's life and objected; his father-in-law passed away; Wife

spontaneously made assurance to Husband that her father would be tested to assure others that his medications had not been withheld; Wife left the marital home to be with her mother; Wife never again returned to live with Husband. (R.1372-1373a) Husband believes that **these facts constitute prima facie evidence of a causal connection** that should be explored by allowing discovery.

4) Husband has argued throughout the case, including in his appeal, that fate of Husband's father-in-law directly pertained to Husband's interpretation of his safety in remaining with Wife. Regardless, as Husband noted in his appeal: "since the divorce court may have not wished to wade into potential criminal matters, then Husband [suggested] that it could have taken adverse inference from Wife's failures to make response on this topic when such questions were posed. Wife did not even assert privilege with respect to documents requested in discovery, nor did she attempt to counter any of Husband's claims on the matter."

(5) Husband, by contrast, 1) disputed the credibility of Wife's images, asserting that they appeared manipulated - an area with which he has had professional experience, or were not interpretable (the 2002 images); 2) they were also not temporally relevant, the last having been taken fifteen years prior to separation; and 3) the identity of the assailant was not established with respect to the images, which itself has significant implications. Wife's counsel could have cross-

examined Husband about the images, but did not do so.[11] Nevertheless, Husband did raise objections to the images as exceptions. (R.0728a)

With respect to economic justice, the fault factor of 3701(b) changes the pure fungibility of assets and alimony, as this factor is not relevant to equitable distribution. Alimony is particularly important in this case for which the financial implications to Husband of such fault are manifestly massive.

Therefore, as raised in his exceptions and briefs citing to the same, Husband asks that the Supreme Court determine whether errors of law were made by the lower courts in having **ignored the temporal irrelevance of images** unconnected to the time period of separation compared to assaults by Wife shortly before it, and in not providing law in support of judgment that the prima facie testimony (and other evidence/adverse inference) regarding the fate of father-in-law was "irrelevant", either for pursuit in discovery or consideration of alimony.

Fighting, threats, and credibility

Husband addresses the **credibility of Wife's testimony about "fighting", including as it pertained to economic issues**, which in turn has significant implications for the master's ability to assess credibility.

[11] Husband suspects because Wife's counsel had heard from Husband's counsel that Husband intended to raise the aforementioned objections.

Husband notes that upon appeal he wrote: "Importantly, when pressed, Wife never presented any **detail** about arguments or fights. (R.1936a)" (ABr.p.54.).

For example, following the mutual decision to drop working as a low-paid, part-time adjunct lecturer in 2010, in early 2011 another set of discussions occurred. Husband testified that he had raised in three discussions on the topic with Wife, the possibility of his becoming a **clinical psychiatrist**, but that Wife responded that it would be arduous at Husband's age, that he would not be out of his residency until his late 50s, and that we [the marital couple] did not need another clinical income. (R.1940a). From the hearing transcript:

> Wife: "And one of the things ***we*** had discussed was his going back to do a residency to be trained to be a **psychiatrist** or a neuroscience doctor. And that was -- ***that idea was abandoned***." (T.p.35)

Husband asserted that it was notable that Wife does not specify that ***she*** wanted Husband to become a psychiatrist or why the idea was abandoned. Despite Wife's having made generic claims during testimony of fighting about Husband's getting income outside his former field after the *qui tam* case (R.0876a), she never mentions such fighting when **the specific, mutually acknowledged income**

interactions occurred.[12] Why isn't Wife stating that she kept insisting that Husband become a psychiatrist, but he refused, upon which someone resorted to violence? Or that there were sharp words? Or any disagreement at all? One of the purposes of cross-examination is to increase the cognitive load on those who attempt to lie, by increasing the level of detail for the witness to address. It can be very important to give it more weight than general, prepared comments provided on direct examination.

Yet the following is what master Conley wrote about Wife's claims of having "fought" with Husband about his not bringing income to the family (who were nevertheless able to drive luxury cars, live in a 52nd floor Manhattan penthouse apartment, spend tens of thousands of dollars on vacations, send their children to the most expensive private schools and universities, and save millions in retirement funds):

> "Wife testified credibly and honestly, even when her credible testimony was at times not in her best interests … She also testified that although she wanted Husband to pursue a career path and financially contribute to the family, she funded Husband's qui tam lawsuit against Cornell University and Husband's business endeavors ***for years***."

[12] These considerations are known as "discourse analysis" in the investigative fields. There was no evidence from this case that C.F.E. Husband could discern that master Conley had any training to evaluate testimony in this way.

As often the case in this divorce, no weight was given to the copious documentary record that indicated that Wife had been considerably more involved in Husband's business than by merely helping support it financially. (R.1241a-1250a)

Wife's **false claims about purported threats and violence** continued into the divorce case. As Husband further specified in his reply brief in challenging the credibility of Wife and master, "Perhaps by way of countering Husband's concerns about material failures of required [financial] disclosure, Wife and her counsel thereafter accused Husband, in a pretrial statement, of having **threatened her life** while Husband and Wife were at the marital home to divide property. (R.0172a). This **highly material false claim** was made despite Husband's having hired a security agent to be present with himself and Wife at the home. (R.0765a-0768a)." (ARBr.p.18).

From the "Defendant's Response to Factual Claims within Plaintiff's Pretrial Statement", a very prominent document in this case because it responded to the seriously false claims by Wife that Husband had threatened her life while at the marital home just months earlier:

"It is denied that Wife feels threatened by Husband and it is denied that Wife feels unsafe around Husband. At no time during the May 25, 2019 meeting did Wife express any fear or concern about Husband. On the contrary, Wife caused alarm in the security officer that had been hired by Husband to mediate the meeting due to her sudden change in temper and unjustified cursing." (R.0184a)

Yet rather than resolve such an important and current example of purported marital threats and violence, the master instead wrote:

"the master notes that in addition to filing his own 1920.33(b) Pretrial Statement, Husband [filed] a response to Wife's 1920.33(b) Pretrial Statement. Pa.R.Civ.P. 1920.33(b) *does not envision* a response to Pretrial Statements. In fact, when both parties file pretrial statements that are diametrically different in their positions, ***the pretrial statements are enough for the fact-finder to understand that the parties are not in agreement*** ... A response to the other parties' pretrial statement is ***simply redundant and unnecessary***." (R.0468a)

Husband argues that it is not enough to simply "understand" that positions are diametrically opposed. The false allegation against Husband, unanswered,

could easily have been cited as further evidence that he was abusive to Wife. But, when the evidence is that Wife was abusive or untruthful, the master sees things as going both ways. These selective blind-eye responses say as much about the master's appropriateness for her position as a purportedly neutral adjudicator, as it says about Wife's pattern of dishonest behavior.

From false allegation arises a coercive "POA" and a due process violation

"Most remarkably, immediately after the master's divorce hearing ("trial") of October 17, 2019, the master announced that she had decided that she wanted to have Husband issue a power of attorney (POA) to Wife to sell the home without his direct involvement. This outcome had been requested initially by Wife's counsel in their pretrial statement based on Husband's purported threat (R.0172a).

Master Conley repeatedly asked if Husband would agree to provide a POA to Wife, and Husband repeatedly resisted, providing the same concerns about such a decision not being in his interests, especially with respect to an "as is" sale. (R.0476a, 0261a.)" Husband was placed under serious pressure to sign this POA to Wife by the master; eventually he signed it, but then revoked it when he felt that Wife had acted unethically in not allowing the real estate agent who had prepared the house for sale to get paid. (For details see ARBr.pp.20-23). Husband's revocation led to a filing of a petition of contempt by the opposing party.

(R.0371a). The master would go on to assert that Husband's resistance in this situation had raised costs in the case, and she awarded fees to Wife, **without any hearing or other due process**. (R.0477a)." (ARBR.pp.21-22) There was never **citation to any law that Husband had violated that would prevent his revoking a POA in the Commonwealth of Pennsylvania**." (R.1313a)

As a result of the preceding, Husband posed the following question in his appeal: "the Superior Court is specifically asked to review and **issue a ruling,** pursuant to part III of the Statement of Matters Complained of on Appeal, as to whether a litigant in a Pennsylvania divorce case can be ordered to sign a document presented as a "power of attorney", under state law as cited in the POA (20 Pa. C.S. CH. 56), and if so, whether the litigant could be acting in contempt of court by attempting to revoke such a "power of attorney".

The only response from the Panel in its memorandum was the following: Husband argues that although the subsequent revocation of this POA appears in the certified record, the POA itself does not. **To the extent Appellant desires this Court to consider the document in our review, we shall."**

As Husband finds no other responsive text in the Panel memorandum concerning a POA, he now asks the Supreme Court to resolve this issue.

B. The Supreme Court should accept review in order to overrule case law cited in the courts below which purport to give special consideration to claims of credibility by a divorce master that is at variance with the evidence of record.

The law as cited by the Superior Court

In this case, the Superior Court panel raised an issue of major importance to this petition, namely, the elevated credence that the law implies is to be given to observations and other determinations of the master, simply because she is "present". The Panel wrote:

> "Throughout her report, the divorce master set forth credibility determinations with respect to both parties, regarding particular issues. **On appeal, Husband challenges the master's statements** that "Husband testified that he oversaw the parties' investments to a very detailed and exhaustive knowledge of the parties' finances[,]" and that "***by his own admission***[,] Husband was largely in charge of the parties' finances[.]" ... No relief is due. ***We reiterate*** that a master's report and recommendation "is to be given the ***fullest consideration***, particularly on the question of ***credibility of witnesses***, because the master has the opportunity to observe and assess the behavior and demeanor of the parties." ***Carney***, 167 A.3d at

131. The points raised by Husband relate to ***one isolated issue*** — the extent of Husband's knowledge of Wife's finances — the weight of which would not require reversal of the master's and trial court's extensive findings into the other matters presented in this case." (Panel pp.22-23)

Even if it had been "only" one such issue, what the master seems to have done is to have repeatedly fabricated a **false admission.** Husband believes this is a very serious charge and should not be lightly dismissed.[13]

As this Court summarized in *Jayne*, "fullest consideration" must be subservient to the evidence:

> "While we recognize that in determining issues of credibility the Master's findings must be given the *fullest consideration*, we **emphasize** that **the record must support the Master's conclusions and the findings upon which those conclusions are based**. *Schuback, supra* at 412 Pa.Super. 233, 603 A.2d 194." Jayne v. Jayne, 663 A.2d 169 (Pa. Super. Ct. 1995)

Husband contends that using language such as "fullest consideration" will continue to allow courts to give a presumption of accuracy and credibility to

[13] What if she had claimed to have obtained such an "admission" as a police officer or detective?

masters that is not based on assessment of their actual performance. Husband's case is replete with evidentiary failures which were not corrected either at the trial or Superior Court levels, despite his notice on exceptions and appeals. As this petition demonstrates, the master's falsifications of the record were far from "one isolated issue". The following list provides some text from the material presented in earlier sections of this petition that may be used to search for the complete discussions above. As Husband detailed from the record, "The transcript of the hearing and other evidence of record is in no way consistent with the claims of the master":

(1) "*Husband* ***made it clear*** at the hearing that ***he does not feel*** he has any ***obligation*** to find fulltime lucrative employment". (See pp.19-20)

(2) "As often the case in this divorce, no weight was given to the copious documentary record that indicated that Wife had been considerably more involved in Husband's business than by merely helping support it financially". (See pp.31-32)

(3) "Wife's **false claims about purported threats and violence** continued into the divorce case" Yet the master did not address it. (See pp.32-33)

(4) "she awarded fees to Wife**, without any hearing or other due process".** (See pp.34-35).

The master also embarked on an impermissible *sua sponte* judicial investigation which she termed a "judicial notice", into Husband's involvement in a *qui tam* case.[14] She used her one-sided, error-laden, due process-violating, 1200-word entry into the record, to "find" that Husband had "embellished" his role in the case, and that such behavior as ascribed by her had purportedly diminished Husband's credibility. (ARBr.pp.24-26).

The involvement of a *qui tam* case in this divorce matter raises many important issues that cannot be further detailed in this petition due to space restrictions. However, additional information can be found at http://healthsci.org/SupCtPAA and healthsci.org/qui_tam_USexrelBauchwitz_v_Holloman_Kmiec_Cornell_TJU.

Further to the master's credibility, Husband specified in his appeal: "It is also very troubling that the master, by seeming yet again to testify on Wife's behalf, (R.1783a-1784a), **dismissed police reports that Husband had filed** concerning additional serious assaults by Wife against him at times very relevant to the marital separation. (R.1790a-1800a)." (ARBr p.29).

[14] "The court may judicially notice a fact that is **not subject to reasonable dispute"**. (225 Pa. Code § 201)**.**

Wife had testified that she was “aware that he filed something a year and a half afterwards” without ever having testified that she actually *knew* that Husband had *not* reported to the police earlier. Yet prior to that hearing, the following had been made of record:

> **“**It is denied that Husband was physically and mentally abusive to Wife during the marriage. In fact, during the marriage, it was Wife who was physically and mentally abusive to Husband. **Husband made a report to the Derry Township Police on August 28, 2017**, and subsequently made two associated Voluntary Statements about matters detailed in the August 28 report: one regarding an August 9, 2016 assault (19-0003480) and one regarding a July 3, 2017 assault (19-0003591).” (DEFENDANT'S RESPONSE TO FACTUAL CLAIMS WITHIN PLAINTIFF'S PRETRIAL STATEMENT; R.0184a)

Nevertheless, citing Wife's testimony, master Conley concluded in her report of March 13, 2020 that:

> "Wife's testimony made it ***clear*** that Husband’s report **was made** after the parties' separation leading Wife to surmise that the report was made to bolster Husband's position in the divorce action."

At issue is the transformation of Wife's actual testimony by the divorce master, Cindy S. Conley, into a markedly different claim. It was Conley who, Husband asserts, fabricated "clarity" from the statement.

There were more issues appealed involving abuses of discretion, legal error, bias, and irrational inferences involving master Conley, as detailed in Husband's appellate briefs, which are cited as if reproduced here in full. These persistent behaviors, which are not unusual in the general population, are nevertheless wholly inappropriate in a legal setting. The issues cited with this master provide evidence that individuals seemingly prone to such performance can be found operating as officers of the court, and, most importantly from this case, that the system of judicial oversight is not fit for the task of proper oversight of such individuals.

Therefore, at a minimum, it is essential not to provide *a priori* bias towards the observations of a court officer whose work product is so poorly overseen. Consequently, Husband asks that the Supreme Court overturn the idea that any observer, in particular a divorce master, should be given any special consideration in her credibility determinations. In contrast to what was seen in this case, it is the evidence itself which must always be given full and complete consideration. Therefore, if better evidence is required, Husband strongly recommends that recordings of all interactions with court officers be mandated, including video recordings of conferences and hearings.

C. The Supreme Court should accept review because the extensive departures from accepted judicial practices in this case, including a pervasive and reckless disregard for the evidence at several levels of adjudication, expose severe and systemic flaws in a litigant's ability to receive a fair hearing in the Commonwealth's courts, and call for exercise of the Pennsylvania Supreme Court's supervisory authority under Constitution of the Commonwealth of Pennsylvania Art. V, § 10, to prescribe professional standards of oversight (e.g. GAGAS) providing for independent and timely support to court officers and litigants.

In the sections above, Husband raised several concerns about the failure of the Superior Court to consider the evidence of record which Husband had cited in his appeal. For example, the details of the following issues can be found by search using the text within the quotes:

(1) "no relief due to Husband because he had ***"ignored" discussion***" (See pp.8-9)

(2) "Husband challenges the master's and trial court's "theory that [he] lacked" motivation" (See pp.16,18)

(3) "***<u>Husband made it clear</u>*** at the hearing that ***he does not feel*** he has any ***<u>obligation</u>*** to find fulltime lucrative employment" (See pp.19-20)

(4) "Husband ***<u>does not deny</u>*** that instead of presenting any *<u>new</u>* evidence (See pp.22-23)

(5) Even resistance to correcting seemingly mundane (yet relevant) errors made by the master persisted despite repeated notice from Husband to the trial and appellate courts, e.g., the correction-resistant claims that the Acura and Volvo vehicles driven by the married couple were not "luxury" cars.

While the above list is not comprehensive as to the serious deficiencies of the Superior Court's memorandum decision, there is one additional example worth illustrating, as it **also goes to Husband's appeal to continue financial discovery**, to which the Panel responded:

"Husband **<u>does not refute</u>** the master's summary that the parties **resolved** the issues of the alleged missing retirement asset. He is entitled to no relief." (Panel p.24)

By quoting Husband, the Panel might have understood:

"despite Husband's continued efforts to obtain from Wife several financial documents, including **<u>1099 forms</u>**, per discovery directive of March 21,

2019, as well as unredacted, unaltered and complete documents requested in discovery, specifically Wife's Capital One and Northwest Bank accounts ..., **Wife persistently failed to provide the requested materials**." (ABr.p.62)."

Therefore, the text makes clear that **Husband was not again seeking the same financial documents** he had already obtained earlier in discovery.

It was only on the very day that the master rejected Husband's motion for additional discovery that Wife disclosed required 1099-INT forms. Clearly, Husband's concerns were justified:

"the record shows that it was Wife who resisted providing **required** information" (ABr.p.63) … "Specifically, on October 14, 2019, [] Wife's counsel ... wrote: "Simultaneously with the filing of this answer, **Wife's counsel is providing copies of Wife's Capital One 1099s for the 2017 and 2018 tax year to Husband's counsel**." (ABr.p.64).

The preceding is **clear evidence** that **Wife did not comply with discovery directives**. Nevertheless, the Master apparently accepted Wife's claims that the purportedly credibly testifying Wife had yet again made "mistakes"'. (ABr.p.64). As Husband noted in his appeal, "by denying Husband's discovery in the face of such ***admission*** that the opposing party had indeed **violated discovery orders**,

Husband was not provided reasonable opportunity to directly examine documents and perform considered discovery." (ABr.65).

Yet the Superior Court ***never mentions this key 1099 finding whatsoever***.

As Husband further noted:

"Indeed, the overriding concern is that **Wife had made so many false statements and errors about financial matters** already in the case that the need for investigation had been elevated. It was to this **increased need for heightened examination** that Husband's accountant addressed his efforts."

"Husband asserts it was not reasonable for the master to repeatedly take Wife's claims of error at face value, despite the associated delays caused by Wife. But when Husband, in response conducted a broad, time-consuming financial investigation, the master quickly ruled against him." (ABr.p.65).

With respect to this discovery issue, the Panel did not properly evaluate the evidentiary record. While the Superior Court made yet another of its "does not refute" claims against Husband, these are meaningless since the actual basis for appeal was misrepresented.

More generally, this case shows that instead of providing oversight by examining the evidentiary foundation for abuse of discretion claims, the two courts

involved in this case almost always repeated the masters claims as if they were the primary evidence, not the evidence of record being appealed.

Also of note, the Panel's **conclusory misrepresentations are <u>published on the Internet.</u>** Unfortunately, what the Superior Court has written could severely injure Husband's reputation and employability, even compared to the effect of the *qui tam* case. Indeed, the memorandum so **defames Husband or places him in a false light**[15] that Husband does not believe he could possibly gain the employment these court officials claim must follow from his "impressive" Harvard education.[16]

Consequently, Husband believes that RETRACTION of the Superior Court's memorandum decision is warranted.

For reasons of space limitations imposed on this petition, Husband cannot here present a detailed proposal of specific oversight options. Nevertheless, the evidence presented should be sufficient to indicate that the premise of this reason to allow appeal is of substantial importance to the people of the Commonwealth of Pennsylvania. Should allocatur be granted, Husband will discuss professional standards in other fields which might greatly improve the performance of these courts and thereby the public's confidence in them.

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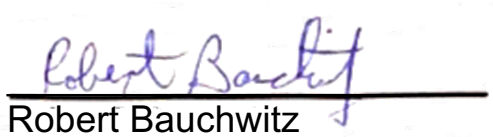
[15] By way of another important example, the Panel wrote that Wife had "failed" to go to the police with her decades old "images", but did not mention Husband ***had*** made police reports about assaults by Wife, which by omission might suggest he had no basis for such complaints.

[16] What law firm would "work around" this?

Respectfully submitted,

By: 

Robert Bauchwitz
Petitioner *Pro Se*

23 Harlech Drive
Wilmington, DE 19807
717-298-7578 (Phone)
DIR_AMR@LUXSCI.net

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SUPREME COURT OF PENNSYLVANIA

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellant's Petition consists of ___8,994____ words, excluding the title page, table of contents, and table of citations, and this complies with the requirements of Pennsylvania Rule of Appellate Procedure 210 Pa. Code § 1115(f) that principal briefs shall not exceed 9,000 words.

By: _____
Robert Bauchwitz
Petitioner *Pro Se*

Robert Bauchwitz
23 Harlech Drive
Wilmington, DE 19807
717-298-7578 (Phone)
DIR_AMR@LUXSCI.net

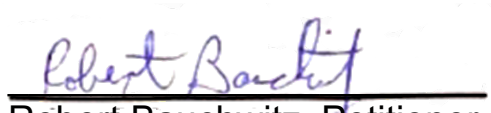
DATED: March __7_, 2022

SUPREME COURT OF PENNSYLVANIA

CERTIFICATE OF SERVICE

I, Robert Bauchwitz, Petitioner, hereby certify that on __March 7, _____, 2022 I filed an electronic copy of the Petition for Allowance of Appeal via PACFile which electronically sends a copy of the same to the following counsel of record:

James R. Demmel, Esquire
1544 Bridge Street
New Cumberland, PA 17070
(717) 695-0705
jdemmel@demmellawoffice.com



Robert Bauchwitz, Petitioner *pro se*