INTRODUCTION

This case is about a relatively straightforward issue of statutory interpretation. It is not a case where there is real doubt as to the clear legal right and duty of the Appellee to appoint counsel for Mr. McQueen during his review hearing. Appellee has attempted to obfuscate the logical statutory conclusion with its preferred narrow result to deny counsel. Mr. McQueen urges this Court to see through the flaws in Appellee's arguments and affirm his statutory right to appointed counsel, when properly requested, to assert competence and challenge the continued need for guardianship.

When read together with R.C. 2111.02, the only logical statutory interpretation is to provide a right to appointed counsel in R.C. 2111.49(C) review hearings. While both parties agree that statutory construction requires giving effect to the statutory language, Appellee actually asks this Court to ignore part of the statute in order to give another narrow clause undue weight. Mr. McQueen is asking this Court to enforce his limited statutory right to challenge the continued need for guardianship, with the assistance of counsel. Enforcement of that right does not have a significant impact on probate courts throughout the State of Ohio and is in accord with other states' statutory schemes. Appellant is asking this Court to make a statutory ruling where the Eighth District Court of Appeals inappropriately failed to do so. Finally, this Court has consistently found that mandamus is an appropriate remedy in right to counsel cases and should do so here.

A. When read together with R.C. 2111.02, the only logical statutory interpretation is to provide a right to appointed counsel in R.C. 2111.49(C) review hearings.

Appellee would have this Court selectively and too narrowly read from the statutory scheme to reach its preferred result of limiting the right to appointed counsel to initial guardianship appointment hearings only. It would have this Court delete the full effect of the "in

accordance with" language of R.C. 2111.49(C) and ignore the first sentence in R.C. 2111.02(C) to reach this selective result. Appellee's contention rests almost entirely on the specific prefatory language in R.C. 2111.02(C)(7), which states "if the hearing concerns the appointment of a guardian ... for an alleged incompetent." Appellee asserts that this language precludes a finding that an indigent ward possesses a right to appointed counsel in a review hearing pursuant to R.C. 2111.49(C). However, a proper reading reveals the fatal flaw in Appellee's reasoning.

The principal concern in construing a statute is the intent of the General Assembly. *Bergman v. Monarch Constr. Co.*, 124 Ohio St.3d 543, 2010-Ohio-622, 925 N.E.2d 116, ¶ 9. Mr. McQueen agrees with Appellee that this Court must "look to the language of the statute itself" to discern the intent of the General Assembly. *Columbus City School Dist. Bd. of Ed. V. Wilkins*, 101 Ohio St.3d 112, 2004-Ohio-296, 802 N.E.2d 637, ¶ 26. As Appellee has cited, it is incumbent upon the Court to "give effect to the words used, not to delete words used or to insert words not used and to read those words and phrases in context according to the rules of grammar and common usage." *Bergman*, at ¶ 10 (internal quotations omitted). The General Assembly also codified rules of construction, specifying that when "enacting a statute, it is presumed that ***[t]he entire statute is intended to be effective, *** [a] just and reasonable result is intended, *** [and a] result feasible of execution is intended." R.C. 1.47(B)-(D). Analyzing R.C. 2111.02 and R.C. 2111.49 in light of these canons of statutory interpretation is exactly what Mr. McQueen asks this Court to do. Yet, to reach the result for which Appellee selectively argues, this Court would necessarily have to delete and ignore express statutory language.

1. Contrary to rules of statutory construction requiring that all statutory language be given effect, Appellee asks this Court to ignore a key sentence to give another narrower clause undue meaning and weight.

Appellee claims that "a careful reading" of R.C. 2111.02 and R.C. 2111.49 reveals that appointed counsel is only expressly applicable if the hearing concerns "the initial appointment of a guardian." Appellee Brief, p. 13. A proper reading of the statute rebuts this contention, as R.C. 2111.02(C) states:

> (C) **Prior to the appointment of a guardian** or limited guardian under division (A) or (B)(1) of this section, the court shall conduct a hearing on the matter of the appointment. The hearing shall be conducted *in accordance with* all of the following:
>
> ...
>
> (7) **If the hearing concerns the appointment of a guardian** or limited guardian **for an alleged incompetent**, the alleged incompetent has all of the following rights: . . .
>
> (d) If he is indigent, upon his request:
>
> (i) The right to have counsel . . .[.] (Emphasis added.)

Appellee's argument relies almost completely on the prefatory clause of (C)(7) "if the hearing concerns the appointment of a guardian." This reading conveniently fails to acknowledge that similar prefatory language also exists at the beginning of R.C. 2111.02(C), which sets out a comprehensive scheme for hearings for "the appointment of a guardian." The *first* sentence of R.C. 2111.02(C) uses substantially similar prefatory language to (C)(7). It uses "[p]rior to the appointment of a guardian" as prefatory language for the entire panoply of due process protections which follow in (C)(1) through (7).

Rather than read the statute as a whole with an understanding that all of it applies to hearings for "the appointment of a guardian," Appellee would begin reading R.C. 2111.02(C) selectively *after* the first sentence in that section. At the same time, after ignoring or deleting the

first sentence in section (C), Appellee's central argument for why subsection (C)(7) limits the right to counsel in a review hearing, is based solely on the fact that (C)(7) also refers to "the *appointment* of a guardian." (Emphasis added). While Appellee concedes that at least some portion of R.C. 2111.02 must apply in R.C. 2111.49(C) review hearings, he argues that (C)(7) cannot because of this prefatory language. Appellee's Brief, p. 13. But this is not logically consistent, because if Appellee's argument regarding the prefatory language in (C)(7) were accurate, then the result would be that no portions of R.C. 2111.02 could apply to a review hearing even though the legislature expressly stated that an R.C. 2111.49(C) review hearing must be held "in accordance with" R.C. 2111.02. In other words, taken to its full conclusion, Appellee's reasoning leads to an all or nothing interpretation in which a probate court would be effectively barred from holding an R.C. 2111.49(C) review hearing "in accordance with R.C. 2111.02."

The absurdity of this result is profound. Appellee reaches this result by focusing solely on the "initial appointment of a guardian" language in subsection (C)(7). Yet if that clause meant what Appellee suggests – that the due process rights in (C)(7) cannot be incorporated by reference into an R.C. 2111.49(C) review hearing because it refers to the initial *appointment* of a guardian, but other rights within R.C. 2111.02, which also expressly apply "to the *appointment* of a guardian" can – then the language in R.C. 2111.49(C) would not be given full effect. To reach this result, the Court would have to also ignore the prefatory language of R.C. 2111.02, which makes clear that this statute is setting up an array of requirements for hearings on the "appointment of a guardian." Indeed, if subsection (C)(7) were read to limit its application to an initial hearing, its prefatory clause would be entirely unnecessary and redundant *within that statute itself*, as every R.C. 2111.02 hearing occurs "prior to" the appointment of a guardian.

Appellee wants this Court to close off the right to appointed counsel by rendering the "in accordance with" language in R.C. 2111.49(C) completely ineffectual. Appellee's position is based on the frayed conclusion that the General Assembly attempted to foreclose the right to appointed counsel in an R.C. 2111.49(C) review hearing by misinterpreting the prefatory clause of R.C. 2111.02(C)(7), and ignoring the prefatory sentence of the entire R.C. 2111.02. This is not a reasonable interpretation of legislative intent. Indeed, it violates clear rules of statutory construction that preclude deleting words or phrases and require that all statutory language be given effect. In contrast, Mr. McQueen's arguments regarding the legislative meaning for the "in accordance with" requirement in R.C. 2111.49(C) deletes nothing and instead allows the Court to read *all* of the statutory text.

2. R.C. 2111.02(C)(7) must be interpreted to distinguish cases involving minors from those involving adult incompetents who are entitled to counsel.

Only under Mr. McQueen's interpretation can this Court "give effect to the words used" as required by the applicable principles of statutory construction. As such this confirms Mr. McQueen's argument that the language of R.C. 2111.02(C)(7) must be read to distinguish the type of ward affected, e.g. a minor versus an adult alleged incompetent, rather than as a limitation on a right to appointed counsel to only a hearing for the "appointment of a guardian" even where R.C. 2111.49(C) expressly requires that the review hearing be conducted "in accordance with" R.C. 2111.02.

The only logical construction of R.C. 2111.02(C) which gives full effect to the "in accordance with" language of an R.C. 2111.49(C) review hearing is to provide all of the due process protections owed to an *adult incompetent*. As the guardianship appointment statute in Chapter 2111, R.C. 2111.02 addresses a variety of initial guardianship-related issues, and applies to appointment of a guardian for both alleged incompetents and minors. Since R.C. 2111.02

deals with both alleged incompetents and minors, the General Assembly had to specify within R.C. 2111.02 if a particular subsection only dealt with an alleged incompetent. That is what it did in subsection (C)(7).

To be consistent within R.C. 2111.02(C) itself, the prefatory language of R.C. 2111.02(C)(7) must be read as limiting the type of party to which it applies, e.g. an adult alleged incompetent. Appellee's reading makes R.C. 2111.02(C)'s prefatory clause *redundant* within that statute itself. Read as Appellee would suggest, there is simply no need for the prefatory language in (C)(7) to limit the right to counsel to an initial hearing only because the *entire statute* deals with initial guardianship appointment only. Interpreted as Appellee suggests, the language would be mere surplusage because all R.C. 2111.02 hearings occur "[p]rior to the appointment of a guardian." Yet Appellee's argument relies on this reading that renders language in R.C. 2111.02 redundant and that gives incomplete effect to R.C. 2111.49(C)'s intent when it stated that review hearings must be held "in accordance with" the requirements of R.C. 2111.02.

Only a full reading of the interaction between the prefatory language of R.C. 2111.02 and subsection (C)(7), as Mr. McQueen has argued, gives full effect to both prefatory clauses and to R.C. 2111.49(C)'s "in accordance with" language. His reading effectuates the will of the General Assembly to distinguish the added protections which are afforded to an adult but not a minor during an initial appointment hearing. These same protections must be extended to an adult incompetent in an R.C. 2111.49(C) review hearing conducted "in accordance with" R.C. 2111.02(C).

3. It is necessary to recite who bears the burden of proof in an R.C. 2111.49(C) review hearing and *Corless* does not change this result.

The Court of Appeals posited the additional question of whether the language of R.C. 2111.49(C), which placed the burden of proof by clear and convincing evidence upon the person

seeking to re-impose the guardianship, created some doubt as to whether the General Assembly intended to provide all of the rights given during an initial hearing. Court of Appeals Decision, para. 10. Mr. McQueen has shown in his merit brief that the language stating who bears the burden of proof was actually necessary; otherwise a court may find the burden is *on the ward*. *See*, Appellant's Merit Brief, pp. 10-12.

In response, Appellee cites one case which was decided before enactment of Ohio's guardianship scheme and involved an initial appointment hearing, not an R.C. 2111.49(C) review hearing. Appellee suggests that *Corless* supports its position that it was unnecessary for the General Assembly to state the burden of proof in R.C. 2111.49(C) because "the law required proof of the individual's incompetency by clear and convincing evidence even before R.C. 2111.02 expressly required it." Appellee Brief, p. 15, *citing In re Guardianship of Corless*, 2 Ohio App. 3d 92, 96, 440 N.E. 2d 1203 (12th Dist. 1981). Appellee's citation does nothing to counter the General Assembly's need to make clear that the guardian would carry the burden of proof in an R.C. 2111.49(C) review hearing.

Corless is inapposite in this case because it dealt only with the "degree of proof required" in an initial guardianship appointment hearing. In *Corless*, the court states that due to the drastic nature of the consequences to a proposed ward, it "feels that the degree of proof required should be clear and convincing evidence." *Corless* at 96. However, this simply has no bearing on whether the General Assembly would later make this right clear in statute and apply it both to an initial appointment and later review hearing. First, R.C. 2111.02(C) simply codifies what the Court said in *Corless*, thereby removing any doubt as to what the law requires in such a case. This is a commonplace occurrence. *See*, *United Technologies Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, 100-01 (1st Cir. 1994) (stating that a principal goal of a new statutory

amendment was to "clarify and confirm" the right); *Dowdell v. City of Apopka, Florida*, 698 F.2d 1181, 1191 (11th Cir. 1983) ("For purposes relevant here, the Act did no more and no less than codify the case law..."); *In re Sutton*, 10 B.R. 737, 739 (Bankr. E.D. Va. 1981) ("The purpose of this section is to codify prior case law and to clarify certain ambiguities resulting from legislative silence on the subject.").

Second, *Corless* concerns only an application for an *initial* guardianship appointment. By contrast, 2111.49(C) concerns a specific type of review hearing: one where a ward is asserting competence such that guardianship is no longer necessary. As *Corless* did not touch on who bore the burden of proof in such a case, clarifying that the burden of proving incompetence would be upon the applicant for guardianship in a review hearing remained essential. Indeed, in some respects the rationale expressed in *Corless* regarding the drastic consequences to the ward (especially where a ward such as Mr. McQueen has already been legally incapacitated and held in a secured facility against his will on the authority of his guardian) provides further support for Mr. McQueen's arguments that a right to counsel should be granted in review hearings. *Corless* at 96. In any event, *Corless* did not change the fact that the General Assembly clarified who bore the burden of proof in a review hearing where the movant is the ward, not the applicant or guardian as in an initial appointment hearing. 42 Ohio Jurisprudence 3d, Evidence and Witnesses, Sec. 87 (2012)("As a general rule, the burden of proof in any cause is upon the party asserting the affirmative of an issue as determined by the pleadings or by the nature of the case."); *see also*, Appellant's Merit Brief, p. 11.

C. Mr. McQueen is asking this Court to enforce his limited statutory right to counsel during a R.C. 2111.49(C) review hearing, not transform the nature of guardianship proceedings.

Mr. McQueen is seeking the enforcement of his limited statutory right to counsel during an R.C. 2111.49(C) review hearing. However, Appellee implies that Mr. McQueen is seeking a judicially created fiat. Appellee Brief pp. 5, 22. Appellee offers the unremarkable assertion that the creation of the legal duty that a relator seeks to enforce is the function of the legislative branch, not of the judiciary. *State ex rel. Tindira v. Ohio Police & Fire Pension Fund*, 130 Ohio St.3d 62, 2011-Ohio-4677, 955 N.E.2d 963; *State ex rel. Lecklider v. School Emps. Retirement Sys.*, 104 Ohio St.3d 271, 2004-Ohio-6586, 819 N.E.2d 289. With this, Mr. McQueen has no quarrel. However, the cases from which this rule is taken do not preclude this Court from enforcing the statutory right to counsel during an R.C. 2111.49(C) review hearing.

For example, *Tindira* presents a case in which a former police officer sought a writ of mandamus ordering the board of trustees for the Ohio Police and Fire Pension Fund (OP&F) to vacate its order denying his application for disability benefits, in part because OP&F had failed to state reasons for the denial. In holding that the legal duty appellant sought to enforce did not exist and that the court was not authorized to create such a duty, the court noted that public employee pension systems and their boards have no duty to state the basis for their decision "when no statute or duly adopted administrative rule requires it." *Tindira* at ¶ 30-31. Along similar lines, in *Lecklider* the court stated that "nothing in [the] statute or regulations suggest[ed]" that the duty the appellant sought to enforce existed in the regulations. *Lecklider* at 274.

In Mr. McQueen's case, however, the statutory scheme under R.C. 2111.49(C) and R.C. 2111.02 does more than "suggest," it "requires" that Appellee provide counsel for his review hearing. The General Assembly is free to require that "higher standards be adopted than those minimally tolerable under the Constitution." *Lassiter v. Dept. of Social Serv.*, 452 U.S. 18, 33 (1981). When the General Assembly *does* set its own standard, that standard is what must be applied. Mr. McQueen is not asking the Court to create the legal duty that he seeks to enforce. The Ohio General Assembly has already done so.

D. R.C. 2111.49(C) provides a statutorily limited conditional right to challenge the continued need for guardianship, with the assistance of counsel, and that right does not adversely impact probate courts.

Appellee seeks to confuse and blend the separate functions of a periodic review under R.C. 2111.49(A) with a review *hearing* conducted pursuant to R.C. 2111.49(C). Further, Appellee incorrectly asserts that Mr. McQueen has contended that wards should have "a continuing right [to appointed counsel] extended into perpetuity for all subsequent guardianship court proceedings." Appellee's Brief, p. 12. This is not, and has never been, Mr. McQueen's position. An indigent ward's right to an R.C. 2111.49(C) review hearing concerning the continued necessity of guardianship, with appointed counsel, is narrowly tailored by the statute to afford due process rights. It is an extension of the statutory scheme which Appellee concedes applies to an initial hearing. The probate court simply presses the reset button and treats the R.C. 2111.49(C) guardianship proceeding in a similar manner as it would for an initial appointment hearing.

This is separate and distinct from the guardian's reporting required in a periodic review under R.C. 2111.49(A) and (B). Periodic review of the guardianship under R.C. 2111.49(A) is a biennial paper reporting provided by the guardian to the probate court. The guardian's report updates the probate court of the ward's location, care, and condition. The guardian provides a statement by a licensed professional regarding the continued need for guardianship. R.C. 2111.49(A)(1)(h)(i). Based on the information provided by the guardian in the periodic review, the probate court makes a determination as to the continued need for guardianship. R.C. 2111.49(A)(2). If after reviewing the guardian's report the probate court deems it necessary to intervene in the guardianship, it can take action *sua sponte* to modify the guardianship. R.C. 2111.49(B). However, there is no requirement that an actual hearing be conducted for a periodic review. There is no requirement that the professional statement be done by an independent expert evaluator. There are also no specifically enumerated ward's rights such as appointed

counsel, in the context of a periodic review. In fact, a ward may seldom even be aware that such a periodic review is occurring.

In contrast, R.C. 2111.49(C) requires the probate court to hold a formal hearing to evaluate the continued necessity of the guardianship "in accordance with R.C. 2111.02." A review hearing conducted pursuant to R.C. 2111.49(C) gives a ward, the ward's attorney, or an interested party the opportunity to formally challenge the conclusions of the probate court regarding the continued need for guardianship. This could include challenges to the conclusions made under an R.C. 2111.49(A) periodic review or force the production of additional evidence of the continued necessity of guardianship.

This right to a hearing under R.C. 2111.49(C) is limited in several respects. The ward, ward's attorney, or interested party must specifically request *in writing* that a review hearing concerning the continued necessity of the guardianship be conducted. In order to shift the burden of proof to the guardian, the ward must affirmatively allege competence. The request for a hearing must be made at least 120 days after the guardianship originally issued. The probate court is only required to honor one such request for a review hearing per calendar year. In addition, there is no requirement in R.C. 2111.49(C) that the ward ever be affirmatively alerted of the right to a review hearing. These limitations serve to temper any concern that a review hearing under R.C. 2111.49(C) is too burdensome on a probate court.

Likewise, the appointment of counsel for an R.C. 2111.49(C) review hearing conducted "in accordance with" R.C. 2111.02 is not too onerous for the probate court. It is not, as Appellee describes in its slippery slope argument, an automatic "continuing duty" to appoint counsel at the ward's beck and call. Appellee's Merit Brief, pp. 1, 16. Rather, it is a limited right to have counsel in order to help challenge the continued need for guardianship. The General Assembly has already imposed significant limitations on the circumstances in which an indigent ward may be appointed counsel for a review hearing under R.C. 2111.49(C) such that it occurs rather infrequently.

While an R.C. 2111.49(C) review hearing may only deal with a small number of guardianship circumstances, the probate court has alternative tools available to address issues concerning a guardianship which do not require the appointment of counsel. The probate court has broad authority to conduct a hearing or address guardianship matters informally under its powers as superior guardian of the ward. In these types of hearings, the General Assembly has been silent with regard to heightened due process protections. R.C. 2111.50; *see also, In re Elliot*, 8th Dist. No. CA91-01-002, 1991 Ohio App. LEXIS 6048, *5-6 (Dec. 16, 1991)(Court must determine the best interest of the ward in a hearing regarding instructions to the guardian).

Probate courts also have a specific fund created by the General Assembly to cover the cost of guardianship-related expenses, and other probate courts already appoint counsel for review hearings that are requested pursuant to R.C. 2111.49(C). The county indigent guardianship fund collects fees from certain probate proceedings and orders probate courts to expend those funds "only for payment of any cost, fee, charge, or expense associated with the establishment, opening, maintenance, or termination of a guardianship for an indigent ward." R.C. 2111.51. Whether a review hearing involves the maintenance or termination of a guardianship, payment of attorney's fees to appointed counsel who assisted a ward in challenging the continued necessity of a guardianship is a proper expense under the fund's statutory language.

A number of courts throughout Ohio have already provided R.C. 2111.02 due process protections, including appointed counsel, to indigent wards who requested a review hearing under R.C. 2111.49(C) regarding the continued necessity of the guardianship. For example, the following counties have all appointed counsel for R.C. 2111.49(C) review hearings when requested: Franklin, Medina, Summit, Jefferson, and Logan.[1] CITE Exhibits. The geographic diversity of these counties shows that both urban and rural counties have met their statutory

[1] The Court of Appeals noted that probate courts have discretion to appoint counsel using their authority as the superior guardian, even where not required by law. Court of Appeals Decision, para. 8; R.C. 2111.50; R.C. 2111.51. These examples, whether issued because the courts felt required to do so or in their discretion, demonstrate the feasibility of appointing counsel for review hearings, unlike Appellee's arguments to the contrary.

obligation to appoint counsel in R.C. 2111.49(C) review hearings. Further, the specific practice of appointing counsel by these other courts in the context of an R.C. 2111.49(C) review hearing argues against any suggestion that appointing counsel is an unreasonable burden on the probate courts.

E. Mr. McQueen's right to counsel is soundly supported by the Uniform Probate Code, other states' statutes, and case law, and Appellee's effort to distinguish such support should be rejected.

As asserted by the Amici Curiae, many states have enacted statutory provisions similar to the Ohio statutes which establish a right to appointed counsel in the initial guardianship hearing and then reaffirm the same right in the guardianship review hearing by an incorporating reference. These other states likely modeled their statutes on the Uniform Probate Code (UPC), which adopted a similar structure. Appellee acknowledges that the statutory structure for the appointment of counsel in the initial determination of guardianship is identical in both the UPC and the Ohio statute (R.C. 2111.02 and UPC 5-305). But Appellee ignores the plain language of UPC 5-318 which provides, just as the Ohio statute, the continuation of that right in a hearing to evaluate the termination of guardianship by incorporating the procedural safeguards established in the appointment hearing. R.C. 2111.49(C) and UPC 5-318.

The comments to UPC 5-318 make explicit that the procedural safeguards in the termination hearing include the right to appointed counsel. *See*, Brief of Amicus Curiae, p. 10. Both cases cited by Amici Curiae support this proposition. *See*, *In re Guardianship of Williams*, 159 N.H. 318, 986 A.2d 559 (2009) (Finding right to counsel in guardianship termination proceedings by incorporation through statute requiring "a hearing similar to that provided for" in the initial appointment statute); *Greer v. Prof'l. Fiduciary, Inc.*, 792 N.W. 2d 120 (Minn. Ct. App. 2011) (Incorporating right to counsel in guardianship termination proceeding by reference to statute requiring the court to "follow the same procedures to safeguard the rights of the ward as apply to a petition for guardianship"). Appellee attempts to discredit these cases by stating that they do not rely upon an explicit statutory right to counsel in guardianship termination

hearings. But Appellee misses the point. These cases applied the right to counsel during subsequent termination proceedings based upon reference to the initial appointment statute, which is precisely what Mr. McQueen is asking this Court to do. In interpreting their respective state statutes based on the UPC, *In re Guardianship of Williams* and *Greer* support reading the Ohio review statute similarly to require appointment of counsel so that the review hearing is held "in accordance with" the rights attaching to an initial hearing.

F. This Court has a duty to decide the statutory question presented by this case and has consistently found that mandamus is an appropriate remedy in right to counsel cases.

The Eighth District Court of Appeals inappropriately failed to decide the statutory construction issue before this Court. Appellee, however, has mischaracterized the Court of Appeals decision below, asserting that instead of finding a lack of *clarity* in the statute, the Court of Appeals denied the writ "because the law did not provide the right claimed by Appellant." Appellee's Brief, p. 5, n. 2. This is incorrect. The Court of Appeals stated that Mr. McQueen had "not established the *clear* legal right and the *clear* legal duty enforceable in mandamus" with the observation that "both sides offer strong arguments for their positions." COA Decision, para. 12,11 (emphasis not added). In so ruling, the Court of Appeals specifically limited its decision to the mandamus context and implicitly invited Mr. McQueen to bring the issue on appeal. COA Decision, para. 13. The Court of Appeals' actions clearly do not support Appellee's contention that the Court determined that the "statutes did not confer a right to have counsel appointed subsequent to the initial guardianship appointment hearing." Appellant's Brief, pp. 17-18.

More to the point, regardless of the professed difficulty in interpreting the statute, a court has a duty to interpret the statute and issue a ruling. *State ex rel. Fattlar v. Boyle*, 83 Ohio St.3d 123, 125, 698 N.E.2d 987 (1998); *State ex rel. Melvin v. Sweeney*, 154 Ohio St. 223, 226, 94 N.E.2d 785 (1950); *State ex rel. Summit Cty. Republican Party Exec. Comm. v. Brunner*, 118

Ohio St.3d 515, 2008-Ohio-2824, 890 N.E.2d 888, ¶ 83 (Concurring opinion) (Affirming duty of court in mandamus action to interpret interplay of statutory provisions). The Court of Appeals should have done so below, and where it has failed to do so, this Court should interpret the law and find a clear legal duty and right of appointed counsel in this case.

In addition, it is well established that mandamus is warranted where there has been a denial of appointed counsel, regardless of whether that right flows from a statutory or Constitutional origin. *State ex rel. Asberry, 82 Ohio St.3d at 46-47*, *State*

ex rel. Cody v. Toner, 8 Ohio St.3d 22, 23, 456 N.E.2d 813 (1983)*, State ex reI. Butler v. Demis,* 66 Ohio St.2d 123, 124, 420 N.E.2d 116 (1981)*,* and *In re Fisher,* 39 Ohio St.2d 71, 82, 313 N.E.2d 851 (1974). Appellee misses the point of Mr. McQueen's citation to these statutory and constitutional right to counsel cases. They are offered for the simple proposition that if a right to counsel exists, and it is denied, then mandamus is *the* appropriate remedy to enforce that right.

If this Court determines that R.C. 2111.02 and R.C. 2111.49(C), when read *in pari materia*, create a clear legal right and a duty upon the Appellee to appoint counsel for Mr. McQueen, then mandamus is the appropriate remedy. Instead of conceding this truth, as did Judge Payne in the *Asberry* case, Appellee instead asks this Court to discount its own precedent and conclude that the right to appointed counsel is somehow less important in this case. *Asberry* at 49; *see also*, Appellee's Merit Brief p. 18-19.

Asberry demonstrates that mandamus is *the* appropriate remedy. *Asberry* at 46-47. Though *Asberry's* statutory construction ruling has been later overwritten as a matter of legislative enactment, its holding regarding the appropriateness of mandamus remains undisturbed. Similarly, the Constitutional cases cited by Mr. McQueen also show that this Court

has made no distinction in the type of right to counsel when examining whether mandamus is the appropriate remedy. *See*, *Cody v. Toner, Butler v. Demis,* and *In re Fisher*. Read together, these cases all demonstrate the appropriateness of the application of mandamus where there has been a denial of a right to counsel. *Ids.*

Despite this long history of applying mandamus as the appropriate remedy in a right to counsel case, Appellee attempts to use the *Spangler* decision to suggest that since the proceeding is "nonadversarial," mandamus would not be appropriate, (Appellee merit brief, p. 19). The decision in Spangler in no way addresses the issues before this Court here, and Mr. McQueen's argument for a statutory right to appointed counsel in an R.C. 2111.49(C) review hearing is not in conflict with *Spangler*. *Spangler* did not involve a right to appointed counsel, or an R.C. 2111.49(C) review hearing. Further, even were this Court to consider the review hearing to be "nonadversarial," the nature of the proceeding does not lessen the appropriateness of mandamus where a party is entitled to appointment of counsel by statute.

This Court has consistently granted the extraordinary remedy of mandamus where that right has been violated. Finding that Mr. McQueen has such a right, it should do so here.

I. CONCLUSION

For the foregoing reasons, having shown his entitlement to writ of mandamus, Mr. McQueen respectfully requests that this Court grant his requested relief with costs to be paid by Appellee.