[Cite as *In re Ziehm*, 2005-Ohio-3916.]

IN THE COURT OF CLAIMS OF OHIO

VICTIMS OF CRIME DIVISION

IN RE: DANIEL S. ZIEHM	:	Case No. V2004-60393
LISA W. MILLER	:	ORDER OF A THREE-COMMISSIONER PANEL
Applicant	:	

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{¶ 1} The applicant filed a reparations application seeking reimbursement of expenses incurred in relation to the January 2000 - July 2002 instances of child abuse against her minor son, Daniel Ziehm, by his father. On October 14, 2003, the Attorney General denied the claim pursuant to R.C. 2743.52(A) contending that the applicant failed to prove that Daniel Ziehm qualified as a victim of criminally injurious conduct. On November 12, 2003, the applicant filed a request for reconsideration. On March 12, 2004, the Attorney General denied the claim pursuant to R.C. 2743.60(E), In re Miller (1996), 91 Ohio Misc. 2d 135, and In re Bradley (1998), 95 Ohio Misc. 2d 43 contending that Daniel Ziehm engaged in felonious conduct within ten years of the criminally injurious conduct, when he sexually assaulted his younger sister. On April 12, 2004, the applicant filed a notice of appeal to the Attorney General's March 12, 2004 Final Decision. Hence, this matter came to be heard before this panel of three commissioners on April 6, 2005 at 11:45 A.M.

{¶ 2} The applicant's counsel and an Assistant Attorney General attended the hearing and presented testimony and oral argument for this panel's consideration. John Rehak, L.P.C., briefly testified via telephone concerning his treatment of Daniel Ziehm. Mr. Rehak indicated that he met Daniel Ziehm in October of 2001 when he began counseling him. Mr. Rehak stated that Daniel had been charged with 27 counts of rape against his younger sister. Mr. Rehak explained that Daniel's home life was very dysfunctional and traumatic and hence Daniel developed sexual curiosity at a very early stage. Mr. Rehak stated that Daniel's acting out sexually was due to the covert abuse he suffered at the hands of his father, Stephen Ziehm. Mr. Rehak explained that Daniel began taking nude photographs and engaging in sexual intercourse with his sister as a result of the neglect and abuse inflicted upon him by his father. Mr. Rehak testified that Daniel, because of his youth, did not fully understand the consequences of his sexual actions and did not know his conduct toward his sister was criminal. However, Mr. Rehak explained that since Daniel has been in therapy, he has both aged and matured, which has significantly improved his behavior.

{¶ 3} Applicant's counsel stated that the claim should be allowed based upon the testimony proffered by John Rehak, L.P.C. Counsel argued that Daniel lacked the criminal intent in which to have committed a criminal act, due to his age and lack of maturity. Counsel argued that Daniel's behavior was purely inappropriate sexual exploration as result of the abuse he sustained. Counsel also noted that Daniel's behavior has changed for the better and that he is steadily improving.

{¶ 4} The Assistant Attorney General maintained that the claim should be denied pursuant to R.C. 2743.60(E). The Assistant Attorney General argued that the facts of this case

do not meet the In re Hollar, V94-69891tc (12-29-99) and In re Jones, V99-60256tc (8-15-00) exceptions, which were fact specific cases. The Assistant Attorney General urged the panel to examine Daniel's conduct and not his intent. The Assistant Attorney General also stated that John Rehak failed to connect Daniel's abuse and neglect by his father to Daniel's sexual misconduct toward his sister.

{¶ 5} From review of the file and with full and careful consideration given to the oral argument and testimony presented at the hearing, this panel makes the following determination. Typically, the felony exclusion provision applies to minor victims' of criminally injurious conduct who have engaged in felonious conduct within ten years of the criminally injurious conduct or during the pendency of the claim. In re Miller (1996), 91 Ohio Misc. 2d 135, and In re Bradley (1998), 95 Ohio Misc. 2d 43. However, we do not believe that R.C. 2743.60(E) was meant to dispense with the raising of recognized affirmative defenses that any criminal defendant could raise to defeat one or more elements of the offense levied against him. While the General Assembly has certainly relaxed the standard of proof to a preponderance of the evidence needed by the Attorney General to bar a claim based upon felonious conduct, we do not believe the General Assembly intended to relax the elements of the offense itself nor do we believe that the felonious conduct provision of R.C. 2743.60(E) stands for that proposition.

{¶ 6} In 1999, the panel rendered a decision in In re Hollar, V94-69891tc (12-29-99), that allowed the claim of a minor victim who had engaged in felonious conduct, that was directly symptomatic of the criminally injurious conduct committed against him. The minor victim in Hollar, supra, had been sexually abused by his adoptive father, but instead of acting out sexually he acted out by engaging in criminal damaging and petty thievery. Sometime later, the panel

upheld the Hollar decision in In re Jones, V99-60256tc (8-15-00), but noted that the Hollar decision was an exception to the felonious conduct exclusion, which calls for a case-by-case analysis of the facts surrounding the claim. The panel in Jones, supra, also stated that the youth of the victim, both at the time of the abuse and his subsequent offending conduct, were critical factors in their decision making process.

{¶ 7} Likewise, this panel upholds the tenets espoused in Hollar and Jones and finds that the following factors should be considered when determining cases such as these: 1) the age of the victim at the time of the abuse - Daniel suffered abuse and neglect from his father during most of his childhood; 2) the age of the victim at the time of the subsequent offensive conduct - Daniel began acting out sexually toward his sister at approximately age 12; 3) the age difference between the victim and the person(s) he subsequently victimized - Daniel and his sister are approximately 2 ½ years apart; 4) the nature of the relationship between the victim and the person(s) he is victimizing - the parties in this case are siblings; 5) does the victim have any mental disabilities or suffer from any disorders that would affect his behavior - Daniel is bipolar, has ADHD, and is learning disabled; 6) whether reasonable medical or psychological evidence exists, which indicates the victim's subsequent offensive conduct was directly attributable to and symptomatic of the abuse perpetrated against the victim - John Rehak, a licensed professional counselor, testified that Daniel's sexual conduct with his sister was the result of the abuse and neglect perpetrated against him by his father; 7) whether the victim was aware that his actions were criminal - John Rehak testified that Daniel was unable to appreciate the criminality of his actions; and 8) whether the victim's conduct, subsequent to treatment, has changed - John Rehak testified that Daniel's conduct since therapy has greatly improved.

{¶ 8} In this case, we find, based upon the above factors and analysis, within reasonable degree of psychological certainty, that the sexual assaults committed by Daniel against his sister were directly attributable to and symptomatic of the abuse suffered by Daniel. We found John Rehak's testimony concerning Daniel Ziehm's age, childhood, mental and emotional state, to be credible and persuasive that Daniel's rape of his sister was a result of the abuse and neglect perpetrated against him by his father. Moreover, we also note that the Attorney General failed to present any evidence to rebut John Rehak's testimony. Hence, the applicant shall be granted $1,724.93 for unreimbursed mileage expense ($74.93) and attorney fees ($1,650.00). Therefore, the March 12, 2004 decision of the Attorney General shall be reversed and the claim shall be referred to the Attorney General for payment of the award.

IT IS THEREFORE ORDERED THAT

1) The March 12, 2004 decision of the Attorney General is REVERSED to render judgment in favor of the applicant in the amount of $1,724.93;

2) This claim is referred to the Attorney General for payment of the award;

3) This order is entered without prejudice to the applicant's right to file a supplemental compensation application, within five years of this order, pursuant to R.C. 2743.68;

4) Costs are assumed by the court of claims victims of crime fund.

JAMES H. HEWITT III
Commissioner

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GREGORY P. BARWELL
Commissioner

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TIM MC CORMACK
Commissioner

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A copy of the foregoing was personally served upon the Attorney General and sent by regular mail to Franklin County Prosecuting Attorney and to:

Filed 6-3-2005
Jr. Vol. 2257, Pgs. 87-92
To S.C. Reporter 7-28-2005