

**[Cite as *In re McCreary*, 2007-Ohio-3488.]**

**IN THE COURT OF CLAIMS OF OHIO**

## VICTIMS OF CRIME DIVISION

[www.cco.state.oh.us](http://www.cco.state.oh.us)

|                            |   |                               |
|----------------------------|---|-------------------------------|
| IN RE: AUBREY J. MC CREARY | : | Case No. V2006-20917          |
| SHARON D. CROWELL          | : | Case No. V2006-20992          |
| JAMES H. MC CREARY         | : | Commissioners:                |
| JODAWNA MC CREARY          | : | Lloyd Pierre-Louis, Presiding |
| DWAN L. BRAY               | : | Thomas H. Bainbridge          |
| Applicants                 | : | Gregory P. Barwell            |
|                            | : | <u>OPINION OF A THREE-</u>    |
|                            | : | <u>COMMISSIONER PANEL</u>     |
|                            | : |                               |
|                            | : |                               |
|                            | : |                               |
|                            | : |                               |
|                            | : |                               |

{¶¶1} The applicants filed a reparations application seeking reimbursement of expenses incurred with respect to the October 6, 2005 homicide of Aubrey McCreary (“victim” or “decedent”) by Leonard Evans. On June 1, 2006, the Attorney General denied the claim pursuant to R.C. 2743.60(F) contending that the victim had been engaging in substantial contributory misconduct, an illegal drug deal, when he was shot and killed. On June 29, 2006, the applicants filed a request for reconsideration. On September 12, 2006, the Attorney General denied the claim once again. On October 12, 2006, the applicants filed a notice of appeal to the Attorney General’s September 12, 2006 Final Decision. The applicants contend the victim was in the neighborhood to

purchase cigarettes from a nearby store. On March 7, 2007 at 11:10 A.M., this matter was heard before this panel of three commissioners.

{¶2} Sharon Crowell (“Mrs. Crowell”), applicants’ counsel, and an Assistant Attorney General attended the hearing and presented testimony, exhibits, and oral argument for the panel’s consideration. Mrs. Crowell testified that the victim was her son and that on the evening of October 5, 2005, she and a few family members celebrated the victim’s birthday at Outback Steakhouse. Mrs. Crowell testified that the party concluded around 8:45 P.M. and that her son left the restaurant with the intent to visit his sister. Mrs. Crowell explained that her son and his cousin, Leslie Criswell, (“Mr. Criswell”) stopped at a store the family frequented which was located on Vine Street (approximately five minutes from his sister’s home) and that her son purchased cigarettes and an iced tea. Mrs. Crowell testified that she was unaware of her son ever having used drugs and explained that her son had attended a private high school, was active in church, participated in sports, and was a volunteer tutor at the family’s daycare business.

{¶3} Detective Keith Witherell (“Detective Witherell”) testified that he assisted in the investigation of the victim’s death shortly after midnight on October 6, 2005. Detective Witherell stated that on October 5, 2005 he was working the night shift when he received a call about a shooting on Vine Street. Detective Witherell explained that the area of the shooting was well-known for drugs and crime. Detective Witherell stated that he was informed by Mr. Criswell shortly after the shooting that he and the victim

had gone to Vine Street to purchase marijuana in celebration of the victim's birthday. Detective Witherell acknowledged that Mr. Criswell denied such at the offender's criminal trial. Detective Witherell stated that the decedent was discovered with what the police reported as marijuana in one hand and money in his other hand. Detective Witherell acknowledged that the substance found in the decedent's hand was never tested or confirmed to have been marijuana.

{¶4} Revised Code 2743.51(M) states:

(M) "Contributory misconduct" means any conduct of the claimant or of the victim through whom the claimant claims an award of reparations that is unlawful or intentionally tortious and that, without regard to the conduct's proximity in time or space to the criminally injurious conduct, has a causal relationship to the criminally injurious conduct that is the basis of the claim.

Revised Code 2743.60(F) states in pertinent part:

(F) In determining whether to make an award of reparations pursuant to this section, the Attorney General or panel of commissioners shall consider whether there was contributory misconduct by the victim or the claimant. The Attorney General, a panel of commissioners, or a judge of the court of claims shall reduce an award of reparations or deny a claim for an award of reparations to the extent it is determined to be reasonable because of the contributory misconduct of the claimant or the victim.

{¶5} With respect to the exclusionary criteria of R.C. 2743.60, the Attorney General bears the burden of proof by a preponderance of the evidence. *In re Williams*, V77-0739jud (3-26-79); and *In re Brown*, V78-3638jud (12-13-79). According to R.C.

2743.51(M) and relevant case law, there are three elements that must be established before a prima facie case of contributory misconduct can be met: (1) specific, unlawful or intentionally tortious conduct by the victim or applicant;<sup>1</sup> 2) a causal relationship between that conduct and the criminally injurious conduct; and 3) foreseeability of the likelihood of the criminally injurious conduct occurring if the victim or applicant engaged in such conduct.<sup>2</sup> Furthermore, in order to deny an award pursuant to R.C. 2743.60(F), the Attorney General must prove that the victim's or applicant's contributory misconduct was substantial.<sup>3</sup>

{¶6} Contributory misconduct determinations depend upon the particular facts and circumstances of each case and thereby warrant a case-by-case analysis. *In re Williams*, V2001-32691tc (10-11-02). In evaluating the existence and level of contributory misconduct under R.C. 2743.60(F) for this case, this panel considered the following nonexclusive list of considerations:<sup>4</sup>

- {¶7} 1. Age and corresponding mental capacity of the victim/applicant;
- {¶8} 2. The victim/applicant's familiarity/relationship with the offender;
- {¶9} 3. The victim/applicant's mens rea;

---

<sup>1</sup>See *In re McGary II*, V91-83761jud (11-16-94).

<sup>2</sup>See *In re Ewing* (1987), 33 Ohio Misc. 2d 48.

<sup>3</sup>See *In re Spaulding* (1991), 63 Ohio Misc. 2d 39.

<sup>4</sup>We note that review of the above listed considerations is not required for every R.C. 2743.60(F) case. The list is merely a guide when reviewing contributory misconduct issues.

{¶10} 4. Whether the victim/applicant suffered from diminished capacity due to intoxication or other mitigating factor;

{¶11} 5. Whether the victim/applicant suffered a disproportionate level of harm compared to the victim/applicant's level of misconduct;

{¶12} 6. Whether the victim/applicant's degree of misconduct was a de minimus or substantial violation of the law; and

{¶13} 7. Whether granting a reparations award violates the public policy of the Victims of Crime Act.

{¶14} The victim was 21 years old at the time of the incident and there is no evidence that suggests he suffered from any long-term or permanent mental impairment. According to information in the file, the victim and offender did not have a prior relationship or familiarity with one another. The victim's mens rea is unknown, but we also believe the decedent and his cousin were also in the vicinity to purchase marijuana in celebration of his 21st birthday. However due to the offender's excessive use of force, the victim suffered a disproportionate level of harm compared to the level of his misconduct. The victim's degree of misconduct was lesser, since possession of marijuana in this case would have been merely a misdemeanor violation while the offender's conduct (murder) was significant and felonious in nature. Further, our decision to grant an award does not violate the program's public policy, because by reducing it, we acknowledge the victim's contributory misconduct.

{¶15} When the victim attempted to purchase marijuana from the offender, he engaged in specific unlawful conduct. The victim's specific unlawful conduct was a cause of his death, because but for the victim's conduct he probably would not have been shot. The victim should have known that he was likely to be assaulted or killed by the offender during an illegal drug purchase. Even though we find that the victim engaged in contributory misconduct, we nevertheless find that the victim did not engage in substantial contributory misconduct because the victim's misconduct was lesser compared to the offender's misconduct; the offender escalated the incident by shooting and killing the victim.

{¶16} Based on the above factors and analysis, we find the victim's misconduct warrants a reduction of the award by 30 percent under R.C. 2743.60(F). Therefore, the September 12, 2006 decision of the Attorney General shall be reversed and the claim shall be remanded to the Attorney General for economic loss calculations and decision that is consistent with the panel's findings.

---

LLOYD PIERRE-LOUIS  
Presiding Commissioner

---

THOMAS H. BAINBRIDGE  
Commissioner

Case No. V2006-20917  
Case No. V2006-20992

-1-

ORDER

**Commissioner Gregory P. Barwell, dissenting:**

Consistent with the majority determination in this matter, I agree that Mr. McCreary, the victim in this matter, engaged in contributory misconduct pursuant to the dictates of R.C. 2743.51(M). I believe, however, that Mr. McCreary's contributory misconduct was substantial. Accordingly, I would deny the applicants' claim in its entirety.

Detective Witherell testified that he assisted in the investigation of the victim's death. Detective Witherell explained that the area of the shooting was well-known for drugs and crime. Detective Witherell stated that he was informed by Mr. Criswell shortly after the shooting that he and the victim had gone to Vine Street to purchase marijuana in celebration of the victim's birthday. Detective Witherell stated that Mr. McCreary was discovered with what the police reported as marijuana in one hand and money in his other hand.

When the victim attempted to purchase marijuana from the offender, he engaged in specific unlawful conduct. The victim's specific unlawful conduct was the direct cause of his death, because but for the victim's conduct he would not have been shot. The victim should have known that he was likely to be assaulted or killed by the offender during an illegal drug purchase.

Based upon the totality of the circumstances of this case, I reasonably believe that the victim had been engaging in substantial contributory misconduct, an illegal drug transaction, just prior to being shot and killed. I believe the victim's cousin accurately

reported to police that he and the victim had been in the area to purchase marijuana. Moreover, I also note that the victim had been arrested on September 16, 2005 for possession of marijuana and his blood tested positive for marijuana on the coroner's toxicology report. Even though I empathize with the applicants over the their loss, I am unable to join the majority in granting an award. Therefore, the September 12, 2006 decision of the Attorney General should be affirmed.

---

GREGORY P. BARWELL  
Commissioner

**IN THE COURT OF CLAIMS OF OHIO**

**VICTIMS OF CRIME DIVISION**

www.cco.state.oh.us

|                            |   |                               |
|----------------------------|---|-------------------------------|
| IN RE: AUBREY J. MC CREARY | : | Case No. V2006-20917          |
| SHARON D. CROWELL          | : | Case No. V2006-20992          |
| JAMES H. MC CREARY         | : | Commissioners:                |
| JODAWNA MC CREARY          | : | Lloyd Pierre-Louis, Presiding |
| DWAN L. BRAY               | : | Thomas H. Bainbridge          |
|                            | : | Gregory P. Barwell            |
| Applicants                 | : | <u>ORDER OF A THREE-</u>      |
|                            | : | <u>COMMISSIONER PANEL</u>     |
|                            | : |                               |
|                            | : |                               |
|                            | : |                               |
|                            | : |                               |
|                            | : |                               |

IT IS THEREFORE ORDERED THAT

- 1) The September 12, 2006 decision of the Attorney General is REVERSED and judgment is rendered in favor of the applicants;
- 2) All future awards shall be reduced by 30 percent;
- 3) This claim is remanded to the Attorney General for economic loss calculations and decision that is consistent with the panel's decision;
- 4) This order is entered without prejudice to the applicants' right to file a supplemental compensation application, within five years of this order, pursuant to R.C. 2743.68;

Case No. V2006-20917  
Case No. V2006-20992

-1-

ORDER

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

---

LLOYD PIERRE-LOUIS  
Presiding Commissioner

---

THOMAS H. BAINBRIDGE  
Commissioner

ID #A6-dld-tad-032607

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

Filed 6-15-2007  
Jr. Vol. 2265, Pgs. 59-60  
To S.C. Reporter 7-6-2007

Case No. V2006-20917  
Case No. V2006-20992

-1-

ORDER