

No. 19-8180

IN THE
SUPREME COURT OF THE UNITED STATES

M. H.,

Petitioner,

v.

INDIANA DEPARTMENT OF
CHILD SERVICES

Respondent.

On Petition for Writ of Certiorari
To The Indiana Supreme Court

Petition for Rehearing

NATHAN D. HOGGATT
Counsel of Record
NDH LEGAL
327 EAST WAYNE STREET, STE. 100
FORT WAYNE, IN 46802
(260) 755-2183

TABLE OF CONTENTS

Table of Authorities.....	ii
Petition for Rehearing.....	1
Grounds for Rehearing.....	1
Conclusion.	4
Certificate of Counsel.....	5

TABLE OF AUTHORITIES

Cases

<i>Bleeke v. Lemmon</i> , 6 N.E.3d 907 (Ind. 2014)	2
<i>Hubbard v. State</i> , 742 N.E.2d 919 (Ind. 2001)	3
<i>R.S. v. Ind. Dep't of Child Servs.</i> , 987 N.E.2d 155 (Ind. Ct. App. 2013)	4

Other

Rule 44	1, 5
---------------	------

PETITION FOR REHEARING

Pursuant to Rule 44.2 of the Rules of the United States Supreme Court, M.H. respectfully petitions for rehearing of this Court's June 1, 2020 Order denying his Petition for a Writ of Certiorari.

GROUND FOR REHEARING

Rule 44.2 of the Rules of the Supreme Court of the United States allows petitioners to file petitions for rehearing of the denial of a Petition for Writ of Certiorari and permits rehearing on the basis of "intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented." First, this matter became moot/nonjusticiable when the Indiana Department of Children Services dismissed the original CHINS proceedings when step-daughter that made allegations reached the age of majority. Second, the DCS' mandate that Appellant complete the infamous SOMM program as a part of its participation plan for reunification with his younger, biological children was patently disingenuous under these specific facts. And last, the science relied upon in this SOMM program has been almost categorically been rejected as unsound or unreliable under our modern rules of evidence. Notwithstanding these patent canons, the State of Indiana terminated Appellant's parental rights to all his biological children (although no allegations of abuse).

1. Moot/Nonjusticiable Issue

2. The SOMM program

The "SOMM program was established in 1999 as a statewide program aimed

at reducing the recidivism of offenders convicted of sex crimes.” *Bleeke v. Lemmon*, 6 N.E.3d 907, 923 (Ind. 2014). The DOC has contracted with Liberty Behavioral Health Corp. to run the program, which involves cognitive behavioral therapy for sex offenders. The SOMM program has three phases.

Phase I is a mandatory consent and assessment phase used to identify the offender’s risk level, which is conducted while the offender is incarcerated, usually upon arrival to the DOC . *Bleeke*, 6 N.E.3d at 923–24. Participation in the SOMM program requires the offender’s consent, though refusal to sign the consent form or refusal to participate constitutes a violation of the DOC’s disciplinary code and subjects the offender to a disciplinary proceeding in which he may lose credit time. *Bleeke*, 6 N.E.3d at 924. The consent form requires the offender to acknowledge that he will be required to discuss and take responsibilities for past acts of sexual violence and abuse that he committed and notifies the offender that he may be subject to a polygraph examination. The consent form also notifies the offender that what the offender discloses may be shared with the Parole Board or other authorities.

Offenders transitioned to Phase II of the program undergo a management and treatment program based on their risk of recidivism. *Bleeke*, 6 N.E.3d at 924. Phase II requires that offenders participate in a set number of hours of psychoeducation. Offenders in Phase II are required to sign a treatment agreement, in which they acknowledge that they will actively participate and demonstrate a satisfactory understanding of treatment concepts and there are several workbooks that the offender must complete. Many of the treatment activities are held in a group setting.

According to the complaint, Phase II does not begin until two years prior to the offender's release date.

Phase III of the SOMM program begins when an offender is released onto parole. Phase III is also mandatory and involves supervision and treatment within the community, along with polygraph examinations.

Here, in this particular case, Appellant Father has allegedly been the subject of three Indiana county prosecuting attorney's office. Yet, Father has never even been charged with any crime.

3. Polygraphs Non-Admissible Evidence

It is well settled that polygraph examinations are notoriously unreliable. *See, e.g., Hubbard v. State*, 742 N.E.2d 919, 923 (Ind. 2001) (“ ‘Although the degree of reliability of polygraph evidence may depend upon a variety of identifiable factors, there is simply no way to know in a particular case whether a polygraph examiner's conclusion is accurate, because certain doubts and uncertainties plague even the best polygraph exams.’ ”) (quoting *United States v. Scheffer*, 523 U.S. 303, 312 (1998)). Father's refusal to take a polygraph examination was, therefore, justified.

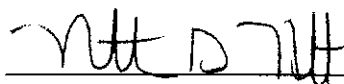
However, the Father was in fact referred to an agency that “required” polygraph examination(s) as part of his parental participation plan. Thus, DCS's assertion that Father's continued denial and initial refusal, buttressed by the polygraph's ultimate purported findings of deception demonstrates that he is

incapable of providing a safe home for his younger, biological children is unfounded.

In addition, it is well established that “a CHINS adjudication may not be based solely on conditions that no longer exist. The trial court should also consider the parents' situation at the time the case is heard.” *R.S. v. Ind. Dep’t of Child Servs.*, 987 N.E.2d 155, 159 (Ind. Ct. App. 2013). Here, as the CASA's testimony illustrates clearly, DCS has been focused solely on Father; and not really about the purported conditions of the home that existed at the time of the children's removal from Father/Mother's custody. DCS presented no evidence to demonstrate any conditions existing at the time of the final permanency hearing to justify the permanent removal of the children.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the petition for writ of certiorari, petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petition for writ of certiorari, and review the judgment below.



NATHAN D. HOGGATT

Counsel of Record

NDH LEGAL

327 EAST WAYNE STREET, STE. 100

FORT WAYNE, IN 46802

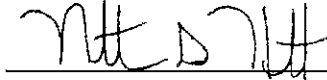
(260) 755-2183

INDIANA BAR NUMBER 26412-02

U.S. SUPREME BAR NUMBER 312049

CERTIFICATE OF COUNSEL

I hereby certify that this Petition for Rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Supreme Court Rule 44.2.

A handwritten signature in black ink, appearing to read "NATHAN D. HOGGATT", written over a horizontal line.

NATHAN D. HOGGATT