No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2018

C.G. (a minor), Petitioner

v.

STATE OF NEW JERSEY, Respondent.

PETITION FOR A WRIT OF *CERTIORARI* TO
THE NEW JERSEY SUPERIOR COURT
APPELLATE DIVISION

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QUESTION PRESENTED

Does a state law that completely bans jury trials for juveniles charged with crimes violate the federal constitutional rights to a jury trial, due process of law, or equal protection?

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The New Jersey Superior Court Appellate Division's unpublished opinion in this matter is included as Appendix A.

JURISDICTION

This petition for a writ of certiorari has been filed within 90 days of the filing of the N.J. Supreme Court's order denying a petition for certification, dated September 24, 2018. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VI of the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment XIV, Section 1 of the United States Constitution:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Union County Juvenile Complaint No. FJ-20-202-17, filed September 27, 2016, charged fifteen-year-old C.G. with an act of first-degree aggravated sexual assault, pursuant to N.J.S.A. 2C:14-2a(1), as well as an act of second-degree sexual assault, pursuant to N.J.S.A. 2C:14-2b.

On May 9, 2017, after a bench trial, the trial judge found C.G. delinquent as charged. On May 31, 2017, the court imposed three years of probation. C.G. was also made subject to the Megan's Law notification and registration requirements pursuant to N.J.S.A. 2C:7-1 et seq. for the rest of his life. On direct appeal, the Appellate Division affirmed. The court specifically rejected the arguments raised in this petition, and concluded that "the ban on jury trials remains constitutional." (14a)

The bench trial centered on the credibility of C.G.'s six-year-old cousin A.G., the alleged victim, and the various statements she made to her mother, the police, and others. Despite major contradictions, an unexplained admission of fabricating certain allegations, evidence that A.G. had prior sexual knowledge unusual for her age, and evidence that she harbored a grudge against C.G., a single trial judge decided to find C.G. guilty on all charges.

A.G.'s father, Y.G., testified that he was divorced from A.G.'s mother and pursuant to their custodial agreement he would generally have A.G. every other weekend. Y.G. lived in New York

City, but would often bring A.G. to his sister's apartment in Elizabeth, New Jersey. Also residing at his sister's apartment were A.G.'s cousins, C.G. (fifteen-year-old male), C.E. (eighteen-year-old male), and C.S. (nineteen-year-old female) According to Y.G., his daughter "sometimes was playing with her cousins and sometimes she was just alone, by herself." Also, living there were her sister's husband and Y.G's mother. The apartment only had two bedrooms, a bathroom, kitchen, and living room.

Y.G. testified that at some point he received a call from A.G.'s mother and learned about accusations of sexual abuse by C.G. He eventually spoke to A.G. about it and was told by her that C.G would approach her vagina and put his penis in her mouth.

Sometime prior to this, it was brought to Y.G.'s attention that his daughter was viewing inappropriate pictures of naked adults on Y.G.'s phone. Some of the pictures were of Y.G. having sexual relations with women. On another prior occasion, A.G. was sleeping in bed with Y.G. and he awoke to have A.G. on top of him moving in an inappropriate sexual way.

R.R. testified that she was the mother of A.G. and that they lived in New York City with her other child, M.D., who was ten-years-old at the time of trial. According to R.R., the babysitter told her that A.G. said she had a boyfriend and the boyfriend put things in her mouth that tasted bad. However, when

confronted with the babysitter's statement to the police that the babysitter did not hear anything, R.R. had no explanation, but said she was not surprised by what the babysitter told the police. M.D. was also present when the statement was allegedly made, but M.D. testified that the only thing he heard A.G. say was that C.G. was her boyfriend.

R.R. questioned A.G. on her own. According to R.R., A.G. told her that C.G. would place his penis in her mouth in the bathroom[1] at her aunt's apartment. A.G. reportedly stated that on one occasion the grandmother walked in the room and C.G. quickly pulled up his zipper so she could not see anything. Also, A.G. stated that she would receive candy from C.G. A.G. was taken to the hospital where she made similar statements.

While at the hospital, the doctors noticed marks on A.G.'s legs. R.R. testified that the marks came from her hitting her daughter. According to R.R., A.G. was stealing crayons and markers from school, and she stole money from R.R.'s wallet. In her statements to hospital personnel, R.R. indicated that she regularly used corporal punishment to disciple A.G. On multiple occasions, she hit A.G. with a belt. R.R. indicated that A.G. had been stealing items from school, stores, and the babysitter's home for two years. R.R. described A.G.'s conduct as oppositional and hyperactive at home. R.R. was charged with

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[1] During cross, R.R. stated that she did not remember saying anything on direct about A.G. and C.G. going into a bathroom.

criminal offenses as a result of her treatment of A.G. R.R. pled guilty and lost custody of A.G. for a time, but custody was returned.

Detective Lopez testified about taking a statement from A.G. The statement was recorded and transcribed.

A.G. testified that when she was five-years-old, her cousin, C.G., touched inside her "to-to," A.G.'s word for vagina, with his "dick." She said that she was not wearing clothes, it felt hard, and C.G. did not move around. She also said that C.G. put his "dick" in her mouth. She described C.G.'s penis as "big" and "pointing out." She said that C.G. did not move it when it was in her mouth. A.G. testified that his happened two times. She said that C.G. put his dick in her "butt hole" two times, which she again described as feeling "hard" and she stated that C.G. did not move at all. A.G. also said that C.G. touched her "to-to" with his hands. She testified that these things happened in C.G.'s room in his bed. She said that her grandmother was home in the living room.

A.G. initially admitted that she looked at naked pictures of adults on her father's phone. She looked at them more than one time, perhaps "seven" times. She showed the pictures to others, including one of her friends. When she showed the pictures to her cousin, C.S., the phone was taken away from her. As she was questioned more about the pictures, she claimed that she never saw naked pictures and her previous testimony was a lie.

A.G. believed that her cousins did not like her because "they think I'm ugly." A.G. did not like to be around her cousins when she visited the apartment. She testified that she was "mad" at her cousins for not playing with her and thinking that she was ugly. She believed it was true that she was ugly and she felt that way all the time when she was at the apartment. She walked away from them when she was mad or told on them, which happened "a lot." She would also kick the door if they excluded her. She testified that C.G. made her the angriest of all because he locked her out of the room and specifically told her that she was ugly. She believed C.G. did not want her around. C.G would kick or push her to get her away from him. A.G. testified that C.G. would make her so mad that she would tell lies about him. She initially testified that her sexual allegations against C.G. were lies. However, she immediately backtracked and claimed that she was not lying.

A.G. was questioned about the inconsistencies from her trial testimony and the statements she made at the hospital and to the police. A.G. said for the first time that C.S. was also in the room on one occasion when C.G. touched her. She testified that one of the incidents she told the police, that C.G. put paper in her "po-po," was not true. The trial court asked her why she told the police something that was not true, and A.G said that she could not explain it.

C.E. (C.G.'s brother) testified about what he witnessed when

A.G. visited the apartment. On one occasion A.G. was showing everyone pictures of naked woman on a phone. C.E. took the phone away from her and told his uncle about it. A.G. told people that she had a boyfriend, and his name was Matthew. He never saw A.G. in the bedroom with C.G. His brother did not want A.G. around and would throw her out of the room when they were hanging out or playing video games. C.E. testified that there was always an adult with A.G. in their small apartment because of her bad behavior. A.G. would often use bad language. On one occasion, he recorded a video and A.G. called her mother a "fucking tot," which means prostitute. A.G. would often lie to get the cousins in trouble when she was mad at them for excluding her or teasing her.

C.S. (C.G.'s sister) also testified about what she witnessed when A.G. visited the apartment. On one occasion A.G. was watching "porn" on her father's iPad. A.G. tried to hide it from C.S., but C.S. could see what A.G. was watching. When C.S. looked at the iPad, there was a video of her uncle having sex with a woman. Both individuals in the video were naked. On other occasions, C.S. saw A.G. looking at "strong" videos on YouTube, which are videos with "[s]oft music" and people moving "their butts and their boobs." A.G. liked to dance herself and would imitate the videos she watched. C.S. described A.G. as not having good behavior. A.G. used bad language, such as telling others to "suck my dick."

REASONS FOR GRANTING THE WRIT

THE BLANKET BAN ON JURY TRIALS FOR JUVENILES PURSUANT TO N.J.S.A. 2A:4A-40 DEPRIVED C.G. OF THE RIGHT TO A JURY TRIAL, DUE PROCESS OF LAW, AND EQUAL PROTECTION UNDER THE UNITED STATES CONSTITUTION.

"A jury trial is self-government at work in our constitutional system," and in our democratic society a jury verdict is the ultimate validation of guilt or innocence. Allstate New Jersey v. Lajara, 222 N.J. 129, 134 (2015). Nevertheless, C.G. was adjudicated delinquent, by a single trial judge, of acts of first-degree aggravated sexual assault and second-degree sexual assault based on that judge's assessment of the credibility of one witness. While C.G. received a probationary disposition, he is subject to the Megan's Law notification and registration requirements pursuant to N.J.S.A. 2C:7-1 et seq. for the rest of his life. Since New Jersey's blanket ban on jury trials, N.J.S.A. 2A:4A-40, deprived C.G. due process of law, a jury trial, and equal protection under the United States Constitution, this Court should grant the writ, invalidate that statute as unconstitutional, reverse C.G.'s adjudication, and remand the matter for a jury trial.

Two cases by this Court greatly expanded constitutional rights to juveniles. Kent v. United States, 383 U.S. 541, 86 S. Ct. 1045 (1966) held that, in the context of waiver, a juvenile has the due process rights of a hearing, effective assistance of counsel and a statement of reasons for the waiver decision.

This Court, just a year later, in the context of an adjudication hearing, held that a juvenile has the due process rights of notice, counsel, confrontation, and the privilege against self-incrimination. In re Gault, 387 U.S. 1, 87 S. Ct. 1428 (1967). The Court pointedly observed that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." Id. at 13, S. Ct. at 1436. The Court again expressed skepticism regarding the "peculiar system for juveniles, unknown to our law in any comparable context" and "that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure." Id. at 17-18, S. Ct. at 1438-1439.

However, shortly thereafter, the Court in McKeiver v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976 (1971), held, in a divided opinion, that juveniles do not have the federal constitutional right to a jury trial, despite acknowledging defects in the juvenile justice system and earlier expansion of fundamental rights to juveniles. That opinion, discussed in more detail below, has been the basis for defending the ban on jury trials for juveniles.

The Sixth Amendment of the United States Constitution provides that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State....

Nevertheless, N.J.S.A. 2A:4A-40 provides as follows:

> All defenses available to an adult charged with a crime, offense or violation shall be

> available to a juvenile charged with committing an act of delinquency.
>
> All rights guaranteed to criminal defendants by the Constitution of the United States and the Constitution of this State, except the right to indictment, and right to trial by jury and the right to bail, shall be applicable to cases arising under this act.

An earlier statute depriving juveniles of jury trials was upheld prior to McKeiver in State in the Interest of W., 106 N.J. Super. 129 (Juv. & Dom. Rel. Ct. 1969), aff'd 108 N.J. Super. 540 (App. Div. 1970), aff'd as J.W., 57 N.J. 144 (1970). The trial court in W. acknowledged that:

> The question of the constitutionality of juvenile proceedings without jury trials is hardly one which is free from doubt. Although the United States Supreme Court in In re Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967), did extend certain constitutional rights and safeguards to juveniles, the court did not determine whether a juvenile was entitled to a jury trial.
>
> The issue has received considerable attention in a number of jurisdictions with conflicting results. Juveniles are afforded a jury trial by acts of the legislatures in nearly half the states. In England all children over the age of 14 charged in the juvenile courts with what would be indictable offenses are accorded the right of trial by jury. See 46 Cornell L.Q. 387 (1961); Colo. Rev. Stat. Ann. § 22-8-2 (1953); Tex. Rev. Civ. Stat., art. 2334 (Supp. 1950); Okla. Stat. tit. 10, § 102 (1941).

W., supra, 106 N.J. Super. at 132. See also RLR v. State, 487 P.2d 27 (Alaska 1971) (Alaska Constitution guaranteed right to jury trial for juveniles charged with acts that would be a crime

subject to incarceration if committed by an adult).

In 2011, a trial court in New Jersey upheld both the New Jersey and federal constitutionality of N.J.S.A. 2A:4A-40 in State in the Interest of A.C. (I), 426 N.J. Super. 81 (Ch. Div. 2011), which was affirmed by a panel of the New Jersey Appellate Division in State in the Interest of A.C. (II), 424 N.J. Super. 252 (App. Div. 2012). The New Jersey Supreme Court has yet to address whether recent punitive developments of the Juvenile Code and the mandatory imposition of Megan's Law for juveniles changes the analysis as to the right to a jury trial in the context of an adjudication.

In A.C. (I), the juvenile was charged with acts of first-degree aggravated sexual assault and second-degree sexual assault. The trial court, in a published interlocutory decision, denied A.C. a jury trial. The court rejected A.C.'s arguments that juvenile proceedings have become more akin to the adult process; that the rehabilitative goals of the juvenile system have eroded, thereby undermining the rationale of McKeiver, supra; that the punitive exposure to a four-year custodial sentence and the mandatory Megan's Law requirements requires a jury trial; and that the Megan's Law requirements conflict with the confidentiality of the juvenile process.

The court noted that since establishment of a separate juvenile court in 1929, jury trials have been abolished for juveniles. The court acknowledged that the juvenile system has

undergone numerous changes, with an emphasis on the rehabilitation and welfare of the child. A.C. (I), supra, 426 N.J. Super. at 86-89. Despite acknowledging that the Juvenile Code in 1982 was amended to provide harsher penalties in response to concerns about public safety, the A.C. (I) court observed that most jurisdictions, including New Jersey, still embrace the rationale of the McKeiver decision, which was explained as follows:

> In McKeiver v. Pennsylvania, the United States Supreme Court addressed whether the Due Process Clause mandates that the right to a jury trial applies to juvenile delinquency adjudications. 403 U.S. at 530 (1971). The Court concluded that 'trial by jury in the juvenile court's adjudicative state is not a constitutional requirement.' Id. at 545. The Court reasoned that mandating jury trials in juvenile proceedings as a constitutional matter 'will remake the juvenile proceeding into a full adversary process and will put an effective end to what has been the idealistic prospect of an intimate, informal, protective proceeding.' Id. Further, the Court held that the 'imposition of the jury trial on the juvenile court system would not strengthen greatly, if at all, the fact finding function, and would, contrarily, provide an attrition of the juvenile court's assumed ability to function in a unique manner.' Id. at 547. The Court found that injecting a jury trial into juvenile proceedings as a matter of right would bring to the juvenile justice system 'the traditional delay, the formality, and the clamor of the adversary system and possibly, the public trial' and would ultimately equate juvenile adjudications with criminal trials. Id. at 550. The Court, while recognizing the problems and disappointments stemming from the juvenile system, found that mandating a jury trial in juvenile adjudications would not aid states in rehabilitiating juvenile offenders. In fact, the Court feared such a mandate might impede states from further experimentation seeking

> creative solutions to the problems of young offenders. Id. at 547. The Court concluded by noting that a state may, at its own discretion, mandate jury trials in juvenile proceedings as it sees fit to further the goals of the juvenile system.

A.C. (I), supra, 426 N.J. Super. at 92 (quoting A.C. v. People, 16 P.3d 240 (Colo. 2001)). The court also noted that "[o]ur own Supreme Court, although not reviewing and analyzing the issue directly, appears to be in agreement with the majority position on the issue." Ibid. (citing State ex rel. P.M.P., 200 N.J. 166 (2009) and In re J.G., 169 N.J. 304 (2001)).

The A.C. (I) court, with virtually no discussion, also rejected the juvenile's claim that the jury-trial ban violated the New Jersey State Constitution, only to note the presumption of constitutionality that is applied to every statutory provision. Id. at 93. The court, harkening back to McKeiver, also noted that the juvenile is not subject to the more arduous adult process and sentencing provisions. Id. at 94. The court simply noted that Megan's Law has generally determined to be non-punitive.[2] Id. at 95 (citing Doe v. Poritz, 142 N.J. 1 (1995), J.G., supra, 169 N.J. at 334-36). An interlocutory panel of this Court more or less agreed with the A.C. trial court only to add that:

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[2] The court, however, aptly rejected the State's argument that the juvenile has access to a jury trial by merely choosing voluntary transfer to adult court since exposure to the catastrophic impacts of adult sentencing "realistically results in no choice at all." A.C. (I), supra, 426 N.J. Super. at 95.

> As an intermediate appellate court, we are bound by the decisions of our Supreme Court in State in the Interest of J.W., 57 N.J. 144, 145-46... (1970), and In Re Registrant J.G., 169 N.J. 304, 338-39... (2001), and by the United States Supreme Court's decision in McKeiver v. Pennsylvania, 403 U.S. 528, 545, 91 S. Ct. 1976, 1988, 29 L. Ed.2d 647, 661 (1971), all of which hold that juveniles are not constitutionally entitled to a jury trial "in the juvenile's adjudicative stage." Ibid.; J.G., supra, 169 N.J. at 338....

A.C. (II), supra, 424 N.J. Super. at 254. The panel noted various scholarly articles that point out the unintended and counterproductive results of applying Megan's Law to juvenile offenders, undermining the rehabilitative prospects of the juvenile. But the panel insisted that such concerns were best left to the Legislature. Id. at 255-56. A motion for leave to appeal to our Supreme Court was not filed.

The A.C. courts failed to recognize that the 1970 decision in J.W. upholding the statutory ban on jury trials for juveniles was decided in a very different context with an emphasis on the beneficial and unique contours of juvenile law that has since been overhauled twice. See A.C. (II), supra, 426 N.J. Super. at 87-89. Moreover, there was virtually no analysis of the constitutional deprivations, nor any mention of the state constitutional guarantee of a jury trial, much less in the modern and more severe context involving an increased emphasis on punishment, accountability, and the indiscriminate application of Megan's Law to juveniles age 14 and older. Cf. In the Matter of L.M., 186 P.3d 164, 171 (Kan. 2008) (prior Kansas Supreme Court

decision that juveniles not entitled to jury trial unpersuasive since that decision did not analyze the difference between the prior and current juvenile code).

The more recent decisions by the New Jersey Supreme Court in J.G. and P.M.P. discuss the jury ban in passing, and in different contexts -- J.G. in the context of sex offender tier classification, and P.M.P. in the context of right to counsel. Those decisions do not squarely address the constitutional deprivations of the jury ban in the context of adjudications, the increased emphasis on punishment, and the indiscriminate application of the Megan's Law registration and notification requirements.

In contrast to New Jersey, the Kansas Supreme Court in L.M. overturned prior law and found that juveniles, subject to criminal charges and incarceration, are entitled to a jury trial, overturning prior precedent that relied on the McKeiver opinion. The Court noted the disagreement of the justices in McKeiver regarding the rationale of finding that juveniles are not constitutionally entitled to jury trials. L.M., supra, 186 P.3d at 166. As characterized by the L.M. Court, McKeiver, "relied on the juvenile justice system's characteristics of fairness, concern, sympathy, and paternal attention in concluding that juveniles were not entitled to a jury trial." Id. at 170. The three dissenting justices in McKeiver found that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone,"

and that "juveniles who are prosecuted for a criminal act involving a potential loss of liberty are entitled to the same protections as adults accused of a crime." Id. at 167 (quoting McKeiver, supra, 403 U.S. at 559).

In concluding that the rationale of McKeiver had become outmoded, the Kansas Supreme Court noted various changes in the Revised Kansas Juvenile Justice Code (KJJC), especially the fact that:

> under the KJJC, the focus has shifted to protecting the public, holding juveniles accountable for their behavior and choices, and making juveniles more productive and responsible members of society. See K.S.A. 2006 Supp. 38-2301. These purposes are more aligned with the legislative intent for the adult sentencing statutes, which include protecting the public by incarcerating dangerous offenders for a long period of time, holding offenders accountable by prescribing appropriate consequences for their actions, and encouraging offenders to be more productive members of society by considering their individual characteristics, circumstances, needs, and potentialities in determining their sentences. See K.S.A. 21-4601.

Id. at 168. The Court also found that much of the terminology of the current KJJC, as well as the sentencing process, had become more similar to that used in adult court, that the protective nondisclosure provisions had become more porous, and that all hearings are open to the public for juveniles 16 and older. Id. at 168-170. Consequently, the L.M. Court, despite acknowledgment of contrary results in other states, concluded that:

> These changes to the juvenile justice system

> have eroded the benevolent parens patriae character that distinguished it from the adult criminal system.... Based on our conclusion that the Kansas juvenile justice system has become more akin to an adult criminal prosecution, we hold that juveniles have a constitutional right to a jury trial under the Sixth and Fourteenth Amendments.

Id. at 170. As a result, the Court invalidated the Kansas provision that gave a juvenile court discretion in determining whether a juvenile should be granted a jury trial. Ibid.

Commentators have increasingly acknowledged the punitive aspects of the juvenile justice system and the erosion of the McKeiver rationale for denying juveniles the constitutional right to a jury trial for serious offenses. See e.g. Martin R. Gardner, Punitive Juvenile Justice and Public Trials by Jury: Sixth Amendment Applications in a Post-McKeiver World, 91 Neb. L. Rev. 1 (2012); Carl Rixey, The Ultimate Disillusionment: The Need for Jury Trials in Juvenile Adjudications, 58 Cath. U. L. Rev. 885 (2009).

Here, the unqualified ban on jury trials for juveniles pursuant to N.J.S.A. 2A:4A-40 is even more stringent than that of Kansas, which at least allowed a juvenile court the option of providing the juvenile with a jury trial. See L.M., supra, 186 P.3d at 461 (K.S.A. 2006 Supp. 38-2344(d) gave the "district court complete discretion in determining whether a juvenile should be granted a jury trial").

The New Jersey Juvenile Code was revised in 1982, and the stated purposes, almost identical to that of the revised Kansas

Code, KJJC, include:

> Consistent with the protection of the public interest, to insure that any services and sanctions for juveniles provide balanced attention to the protection of the community, the imposition of accountability for offenses committed, fostering interaction and dialogue between the offender, victim and community and the development of competencies to enable children to become responsible and productive members of the community.

N.J.S.A. 2A:4A-21f. The Senate Judiciary Committee Statement regarding the 1982 revisions, quoted at N.J.S.A. 2A:4A-20 (2011), flatly acknowledges that "[t]his bill recognizes that the public welfare and the best interests of juveniles can be served most effectively through an approach which provides for harsher penalties for juveniles who commit serious acts...." Cf. L.M., supra, 186 P.3d at 466 (revised Kansas juvenile justice code provides that the "primary goals of the juvenile justice code are to promote public safety, hold juvenile offenders accountable for their behavior and improve their ability to live more productively and responsibly....") The New Jersey Supreme Court has acknowledged that "the State's predominate mission of rehabilitation of juvenile offenders has been augmented by punishment 'as a component of the State's core mission with respect to juvenile offenders.'" P.M.P., supra, 200 N.J. at 176 (quoting State v. Presha, 163 N.J. 304, 314 (2000)).

Moreover, the revised Juvenile Code has become more aligned with that of adult court sentencing (N.J.S.A. 2C:44-1), as acknowledged by the Committee Statement:

> Section 25 [N.J.S.A. 2A:4A-44] provides for terms of incarceration for delinquent acts. Specifically, this bill established aggravating and mitigating circumstances for the court to consider in determining whether or not to incarcerate a juvenile.

The Committee Statement also noted that N.J.S.A. 2A:4A-44 provides for a presumption of incarceration for certain serious crimes, as with adults pursuant to N.J.S.A. 2C:44-1d.

The nondisclosure provisions of the Juvenile Code pursuant to N.J.S.A. 2A:4A-60 have become more porous allowing a whole host of individuals and agencies access to juvenile court information, as well as public disclosure of information including the identity of the juvenile, resulting from an adjudication for an act of first, second or third degree, unless the juvenile "demonstrates a substantial likelihood that specific and extraordinary harm would result" from the disclosure. N.J.S.A. 2A:4A-60f.

The emphasis on punishment is seen in the evolution of the waiver statute, N.J.S.A. 2A:4A-26.1, which has shifted the burden from the prosecutor to juveniles to prove that rehabilitation outweighs waiver, State v. R.G.D., 108 N.J. 1, 11 (1987).

One of the purposes of a jury trial is "protection 'against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.'" RLR, supra, 487 P.2d at 32 (quoting Duncan v. Louisiana, 391 U.S. 145, 156, 88 S. Ct. 1444, 1451 (1968)). Moreover, various evidentiary issues pertaining to evidence are, as typical, decided by the trial court sitting both

as judge and fact-finder. As acknowledged recently by the New Jersey Supreme Court in another juvenile case where the trial court erroneously considered a confession by a 14-year old juvenile who was also accused of sexual assault:

> We are hesitant to assume that any human being, even an experienced, thoughtful, and able Family Part judge--as the judge below undoubtedly was and is--can partition evidence and compartmentalize his or her decision-making so neatly, particularly when the evidence in issue is of such magnitude, the means by which the evidence was procured was so disturbing, and the judge has already rendered a determination on the ultimate question.

State ex rel. A.S., 203 N.J. 131, 152 (2010).

Furthermore, a primary reason why the New Jersey Supreme Court, in J.G., applied Megan's Law to juveniles was punitive:

> In its analysis, the [J.G.] Court considered several pertinent provisions in the Juvenile Code. About a year after Megan's Law became effective, the Code's statement of purpose, N.J.S.A. 2A:4A-21b, was amended to add as a purpose the provision of "a range of sanctions designed to promote accountability and protect the public." Id. at 320-21. The Court inferred that the amendment was intended to specifically reflect Megan's Law applicability to juveniles adjudicated delinquent of Megan's Law offenses. Id. at 321. This provision would weigh in favor of Megan's Law applicability, notwithstanding the Code's general non-disclosure provisions.

State in the Interest of J.P.F., 368 N.J. Super. 24, 35 (App. Div. 2004).

The A.C. (II) panel acknowledged that A.C. presented several scholarly articles documenting the "unintended, counterproductive

results of applying Megan's Law to juvenile offenders." A.C. (II), 424 N.J. Super. at 255-56; see, e.g., Timothy E. Wind, The Quandary of Megan's Law: When the Child Sex Offender is a Child, 37 J. Marshall L. Rev. 73 (2003); Patricia Coffey, The Public Registration of Juvenile Sex Offenders, Association for the Treatment of Sexual Abusers Forum, Vol. XIX, No. 1 (Winter 2007). According to the panel, though "[t]hese concerns may well merit the Legislature's further consideration," the courts have no business interfering in a "policy decision" made by the Legislature. A.C. (II), 424 N.J. Super. at 255-56. The panel missed the point. The academic insight regarding the effects of due process is routinely considered by courts. See e.g., Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455 (2012) (in reversing mandatory no-parole life sentence of imprisonment for juveniles, Court noted that prior decisions, limiting extreme sentences for juveniles, "rested not only on common sense... but on science and social science as well").

Moreover, as acknowledged by the panel, Megan's Law has increasingly been seen as undermining what remains of the benevolent parens patriae purposes of rehabilitation.[3] See also

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[3] There is even recent authority that lifetime imposition of such requirements is not only punitive, but cruel and unusual. See e.g. In re C.P., 967 N.E.2d 729, 744 (Ohio 2012)(the Ohio Supreme Court "conclude[d] that the social and economic effects of automatic, lifetime registration and notification, coupled with an increased chance of re-offense, do violence to the rehabilitative goals of the juvenile court process. As the court decided in Graham in regard to a life sentence without parole for juvenile offenders, we find that penological theory 'is not

Andrew J. Hughes, Haste Makes Waste: A Call to Revamp New Jersey's Megan's Law Legislation As-Applied to Juveniles, 5 Rutgers J.L. & Pub. Pol'y 408 (2008) (urging elimination of Megan's Law requirements for juveniles 15 and younger). The panel neglected, however, to recognize that such a life-altering portion of the juvenile disposition, virtually identical for adult sex offenders, underscores the fact that McKeiver is outmoded, in addition to the other punitive facets of the current Juvenile Code.

Finally, there is yet another facet to Megan's Law, that while subtle, perhaps has the most corrosive effect on juvenile rehabilitation: the fact that Megan's Law, held to be non-punitive, is generally immune to ex post facto limitations to which more conventional sentencing restrictions are subject. See Doe v. Poritz, 142 N.J. 1, 50 (1995); see e.g. N.J.S.A. 2C:7-2g (imposing life-time Megan's Law for certain offenses, including second-degree sexual assault, enacted after Poritz). Therefore, a juvenile who is subject to Megan's Law faces the prospect of litigating increased and novel constraints. State ex rel. D.A., 385 N.J. Super. 411 (App. Div.), certif. denied, 188 N.J. 355 (2006) (neither the nondisclosure provisions of the Juvenile Code nor Megan's Law prevents a judge from ordering a juvenile to inform the parents of girls that he dates about his sex offender status).

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adequate to justify' the imposition of the lifetime registration

There is simply nothing benevolent, protective or rehabilitative by the imposition of the rigorous, stigmatizing and ever-shifting lifetime requirements of Megan's Law to a 15-year old boy found guilty by one person who acts as judge, jury and sentencer. Kent's ironic observation reverberates today:

> There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.

Kent, supra, 383 U.S. at 556, 86 S. Ct. at 1054.

Since the New Jersey Juvenile Code has become more punitive, augmented by Megan's Law, and more akin to the criminal process of adult court, the decision in A.C. (II) is erroneous, and this Court should recognize that the McKeiver rationale, emphasizing the unique and benevolent parens patriae motives of juvenile justice, is outdated. Therefore, this Court should grant the writ and strike down N.J.S.A. 2A:4A-40, as violating the due process, equal protection, and jury trial guarantees of the United States Constitution.

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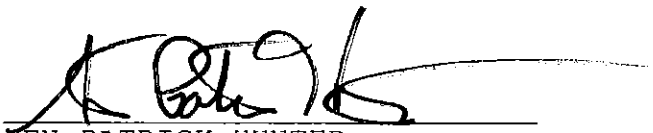
and notification requirements of R.C. 2152.86 for juveniles.")

CONCLUSION

For the reasons expressed herein, petitioner submits that a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH E. KRAKORA
Public Defender
Attorney for Defendant

BY: 
STEPHEN PATRICK HUNTER
Counsel of Record
Assistant Deputy Public Defender

Dated: December 10, 2018

RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4585-16T2

STATE OF NEW JERSEY IN THE INTEREST OF C.G., a minor.

Submitted May 22, 2018 – Decided May 31, 2018

Before Judges Mawla and DeAlmeida.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Union County, Docket No. FJ-20-0202-17.

Joseph E. Krakora, Public Defender, attorney for appellant C.G. (Stephen P. Hunter, Assistant Deputy Public Defender, of counsel and on the brief).

Michael A. Monahan, Acting Union County Prosecutor, attorney for respondent State of New Jersey (Meredith L. Balo, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

C.G. appeals from a May 31, 2017 adjudication of delinquency for acts that, if committed by an adult would constitute first-degree aggravated sexual assault and second-degree sexual assault of A.G., a minor. We affirm.

The following facts are taken from the record. On September 27, 2016, C.G. was charged under a juvenile complaint for acts which, if committed by an adult, would constitute first-degree aggravated sexual assault (count one), N.J.S.A. 2C:14-2(a)(1), and second-degree sexual assault (count two), N.J.S.A. 2C:14-2, of his younger cousin, A.G. The underlying allegations of sexual assault arose when A.G. told her babysitter she had a boyfriend. After A.G.'s mother, R.R., learned what A.G. told the babysitter, she asked A.G. what she and her boyfriend would do together. R.R. claimed A.G. stated her boyfriend was C.G., and that he made "her suck his thing . . . [a]nd that sometimes it tasted bad." R.R. then called A.G.'s father, Y.G., told him what A.G. said, and asked him to meet them at the hospital so A.G. could be examined. An investigation by the Union County prosecutor's office ensued followed by the charges against C.G.

Following a six day bench trial, C.G. was adjudicated guilty of all charges. The trial judge concluded:

> I am convinced beyond a reasonable doubt from reviewing the testimony, particularly the medical records[,] which was done within a relatively short period of time of the alleged event that [C.G.] did insert his penis in the mouth of this child. I must agree that the child has never changed her view on that. From day one, she indicated it. She indicated it at the hospital. She indicated it to her mother. She indicated it to the father. She

indicated to the detective. She never one moment changed that.

I also took in consideration the fact that when the child testified, she indicated on one occasion the juvenile was about to have taken down his pants and that for a moment, the grandmother was going into the room and [he] quickly put up [his] pants. I truly believe that the juvenile saw this and that imbedded it to her mind. There's no reason she would have invented that scenario. She . . . didn't say that he had done anything. He had just mainly at the moment just pulled down his pants. I believe she was telling the truth when that happened.

I believe that, in fact, [C.G.] did insert his . . . genitals . . . in her mouth. I do believe also that she said it tasted bad.

. . . The question is whether or not he, in fact, inserted it. I believe he at least inserted it at least one time, and that's really all I have to determine in order to adjudicate him. I don't have to find that it was two, three, four, six, seven times.

I don't even have to believe for the purposes of the act of sexual penetrat[ion] that he penetrated any other part of her body, her anus or her vagina [as] she indicated. And she said as to the vagina that she was penetrated while at the hospital. She said he put the stuff . . . in my stuff.

Clearly, even if I didn't believe that aspect, it's of no consequences because I believe he at least committed one which is sufficient to find him guilty beyond a reasonable doubt of the penetration on the first[-]degree aggravated sexual assault.

. . . .

> As far as second[-]degree sexual assault, I also find that he, in fact, inserted his finger in her vagina beyond a reasonable doubt. I find her credible to that as well.
>
> I find that it doesn't take a very long period of time for someone to commit a touching underneath clothing, and it doesn't take that much to insert a penis . . . into a mouth. There was never any testimony that he ejaculated during any of these alleged offenses. It appeared that it was a very short period of time[,] which in my view gives credence to the testimony of the child.
>
> I find that the elements of second[-]degree aggravated assault are satisfied beyond a reasonable doubt. The State must prove that he purposely committed the act of sexual contact with another person, in this case that other person being the child A.G., that he purposely committed the act of sexual contact by touching her in her vagina underneath her clothing.
>
> I also find beyond a reasonable doubt that . . . [C.G.] is [four] years older than the . . . victim in this case. I find that he . . . has done it knowingly, and . . . his conduct clearly demonstrated that at least as far as the testimony was concerned.

At the disposition hearing, the trial judge merged count two into count one, and sentenced C.G. to three years of probation in an intensive, supervised, sexual assault therapy program. In addition, the judge recommended C.G. be placed in a residential field program, complete anger management training, have no contact with the victim or with children under the age of eleven, and pay the requisite fines and penalties. As part of his sentence, C.G.

was subject to Megan's Law, N.J.S.A. 2C:7-1 to -23. This appeal followed.

C.G. argues the statutory ban on jury trials in juvenile matters, N.J.S.A. 2A:4A-40, violates his right to due process, trial by jury, and equal protection. C.G. argues Megan's Law, which was enacted after N.J.S.A. 2A:4A-40, has made juvenile cases similar to adult criminal prosecutions, thereby necessitating a juvenile's right to a jury trial rather than a single judge as decision-maker. C.G. also asserts the statutory ban on jury trials in juvenile matters violates the New Jersey Constitution. He argues judges should at least have discretion as to whether a case should proceed before a jury.

The constitutional challenges C.G. raises regarding the method of conducting juvenile trials were not raised before the trial court. Generally, appellate courts will decline to consider allegations not raised before the trial court, unless such an issue concerns substantial public interest. See State v. Robinson, 200 N.J. 1, 20-22 (2009); State v. Arthur, 184 N.J. 307, 327 (2005); Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973). However, we review the arguments raised in C.G.'s appeal because the constitutional challenge asserted potentially implicates a substantial public interest.

C.G. argues although "our Supreme Court some [forty] years ago upheld the statutory ban on jury trials for juveniles, . . . that Court has yet to address the recent punitive developments of the Juvenile Code and the mandatory imposition of Megan's Law for juveniles in the context of adjudication." C.G. concedes we previously addressed this issue in State ex rel. A.C., 424 N.J. Super. 252 (App. Div. 2012), but suggests we depart from the holding in A.C. because it was decided in a different context, and did not address the constitutional claims he raises here.

In A.C., we addressed whether N.J.S.A. 2A:4A-40 violated a juvenile's constitutional rights to a jury trial. We stated:

> As an intermediate appellate court, we are bound by the decisions of our Supreme Court in State in the Interest of J.W., 57 N.J. 144, 145-46 (1970), and In Re Registrant J.G., 169 N.J. 304, 338-39 (2001), and by the United States Supreme Court's decision in McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971), all of which hold that juveniles are not constitutionally entitled to a jury trial "in the juvenile court's adjudicative state." Ibid.
>
> [424 N.J. Super. at 254.]

We noted the "fundamental differences between th[e] State's adult and juvenile adjudication systems" have been affirmed by the New Jersey Supreme Court. Ibid. We rejected A.C.'s argument the juvenile system had become comparable to the adult criminal system. Specifically, we noted the vastly different sentencing structure

of each system. Id. at 255. We stated "choosing trial as an adult would 'up the stakes' from four years in a juvenile facility to twenty years in prison. See N.J.S.A. 2A:4A-44(d)(1)(c); N.J.S.A. 2C:43-6(a)(1). That starkly illustrates an important distinction between the adult and juvenile justice systems." Ibid.

A.C. cited J.G., 169 N.J. 321-27, in which our Supreme Court expressly addressed and reconciled the application of Megan's Law to juveniles. The Court rejected the argument that subjecting juveniles over the age of fourteen to Megan's Law violated the rehabilitative philosophy and purpose of the juvenile justice system. Id. at 334-37. See also State ex rel. J.P.F., 368 N.J. Super. 24, 33 (App. Div. 2004).

C.G. asks us to re-consider our decision in A.C., 424 N.J. Super. 252, depart from J.G., 169 N.J. 304, and instead look to In the Matter of L.M., 186 P.3d 164 (Kan. 2008) for guidance. In L.M., the Kansas Supreme Court overturned a statute, which denied juveniles a jury trial, and held:

> [B]ecause . . . the Kansas juvenile justice system has become more akin to an adult criminal prosecution, we hold that juveniles have a constitutional right to a jury trial under the Sixth and Fourteenth Amendments. As a result, K.S.A. 2006 Supp. 38-2344(d), which provides that a juvenile who pleads not guilty is entitled to a "trial to the court," and K.S.A. 2006 Supp. 38-2357, which gives the district court discretion in determining

> whether a juvenile should be granted a jury trial, are unconstitutional.
>
> [186 P.3d at 170.]

The L.M. court reasoned the rationale employed by the United States Supreme Court in McKeiver, 403 U.S. at 550, which "relied on the juvenile justice system's characteristics of fairness, concern, sympathy, and paternal attention in concluding that juveniles were not entitled to a jury trial" was no longer applicable because the Kansas juvenile justice system had become more aligned with the intent of the adult system. L.M., 186 P.3d at 170; see also State ex rel. J.P.F., 368 N.J. Super. 24, 33 (App. Div. 2004).

At the outset, we note C.G. did not seek a jury trial, or raise this issue at all before the trial judge. Notwithstanding, we find little merit to the constitutional challenges raised in this appeal. As we discussed in A.C., juveniles do not have the right to a jury trial because of the distinction between the juvenile and adult systems; and the age restraints on the application of Megan's Law to juveniles harmonizes Megan's Law with the rehabilitative intent of the juvenile system. 424 N.J. Super at 254-55.

Moreover, L.M. is not binding on us, and we previously addressed the same argument raised in L.M. and A.C., and reached

a different conclusion. In A.C., we turned away the same constitutional challenge raised by C.G. here stating "[t]hese concerns may well merit the Legislature's further consideration . . . [but are] policy decision[s] to be addressed by the Legislature." Id. at 256. Indeed, "[w]hen language employed by the Legislature is clear and unambiguous, the interpretive function of the judicial branch of the government is simple and confined. The law should be applied as written." Canada Dry Ginger Ale, Inc. v. F & A Distrib. Co., 28 N.J. 444, 458 (1958). Furthermore, "[i]t is the Legislature's responsibility to create a constitutional system." Robinson v. Cahill, 70 N.J. 155, 159 (1976).

C.G. argues the blanket ban on jury trials for juveniles pursuant to N.J.S.A. 2A:4A-40 deprived him of due process, and violates Article I, Para. 9 of the New Jersey Constitution, which states:

> The right of trial by jury shall remain inviolate; but the Legislature may authorize the trial of civil causes by a jury of six persons. The Legislature may provide that in any civil cause a verdict may be rendered by not less than five-sixths of the jury. The Legislature may authorize the trial of the issue of mental incompetency without a jury.

C.G. further argues our jurisprudence has failed to specifically address the state constitutional provision mandating jury trials,

or engage in "any meaningful analysis regarding the application of that right."

The New Jersey Code of Juvenile Justice (Code) states: "All rights guaranteed to criminal defendants by the Constitution of the United States and the Constitution of this State, except the right to indictment, the right to trial by jury and the right to bail, shall be applicable to cases arising under this act." N.J.S.A. 2A:4A-40. As we noted, the United States Supreme Court has upheld a similar statutory exception, concluding, "trial by jury in the juvenile court's adjudicative stage is not a constitutional requirement." McKeiver, 403 U.S. at 545. The Supreme Court reasoned "that the jury trial, if required as a matter of constitutional precept, will remake the juvenile proceeding into a fully adversary process and will put an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding." Ibid.

The New Jersey Supreme Court has applied a similar rationale in holding juveniles do not have the constitutional right to a jury trial. See J.G., 169 N.J. at 338; A.C., 424 N.J. Super. at 254; see also In re State ex rel. J.W., 57 N.J 144, 145-46 (1970) (declining to extend the Supreme Court's decision in In re Gault, 387 U.S. 1 (1967) and grant the right to a jury trial to every juvenile, holding: "We will not on our own introduce into the

Juvenile Court a mode of trial we believe will disserve the interests of the juvenile. Nor should we do so on the basis of a speculation that the United States Supreme Court will find that the Federal Constitution mandates that course[.]").

Moreover, there are sound policy reasons justifying the prohibition of jury trials for juveniles. As our Supreme Court has stated, "[t]he Code empowers Family Part courts handling juvenile cases to enter dispositions that comport with the Code's rehabilitative goals." State ex rel. C.V., 201 N.J. 281, 295 (2010). The Court has stated the purpose of the Code is to preserve the family unit and rehabilitate juveniles in a manner consistent with the protection of the public. Id. at 295-96; see also S. Judiciary Comm. Statement to Assem., No. 641 at 1 (1982).

Very recently, the Court reiterated the policy undergirding the Code when it struck down the Megan's Law requirement for "categorical lifetime registration and notification requirements" for juvenile offenders pursuant to N.J.S.A. 2C:7-2(g) on due process grounds. In re State ex rel. C.K., ____ N.J. ___, ____ (2018) (slip op.). In doing so, the Court again noted the differences between the juvenile and adult systems:

> Our laws and jurisprudence recognize that juveniles are different from adults – that juveniles are not fully formed, that they are still developing and maturing, that their mistakes and wrongdoing are often the result

of factors related to their youth, and therefore they are more amenable to rehabilitation and more worthy of redemption. Our juvenile justice system is a testament to society's judgment that children bear a special status, and therefore a unique approach must be taken in dealing with juvenile offenders, both in measuring culpability and setting an appropriate disposition. Indeed, the United States Supreme Court has explained that juvenile courts were created "to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment." Kent v. United States, 383 U.S. 541, 554 (1966).

Among the purposes of the Juvenile Code, N.J.S.A. 2A:4A-20 to -92, is "to remove from children committing delinquent acts certain statutory consequences of criminal behavior, and to substitute therefor an adequate program of supervision, care and rehabilitation, and a range of sanctions designed to promote accountability and protect the public." N.J.S.A. 2A:4A-21(b). Although rehabilitation, historically, has been the primary focus of the juvenile justice system, a second purpose — increasingly so in recent times — is protection of the public. See State in Interest of K.O., 217 N.J. 83, 92-93 (2014); see also J.G., 169 N.J. at 320-21 (noting that soon after enactment of Megan's Law, Legislature amended Juvenile Code's statement of purpose to include "a range of sanctions designed to promote accountability and protect the public" (quoting N.J.S.A. 2A:4A-21)); State in Interest of M.C., 384 N.J. Super. 116, 128 (App. Div. 2006) (noting that rehabilitation and protection of society are among considerations family court must weigh).

Nevertheless, rehabilitation and reformation of the juvenile remain a hallmark of the

> juvenile system, as evidenced by the twenty enumerated dispositions available to the family court in sentencing a juvenile adjudicated delinquent. See N.J.S.A. 2A:4A-43(b); State in Interest of C.V., 201 N.J. 281, 295 (2010). The range of dispositional options signifies that a "'one size fits all' approach" does not apply in the juvenile justice system. C.V., 201 N.J. at 296 (citing State of New Jersey, Office of the Child Advocate, Reinvesting in New Jersey Youth: Building on Successful Juvenile Detention Reform 16 (2009)). The juvenile system's flexibility in selecting an appropriate disposition for a young offender allows the family court to take into account "the complex, diverse, and changing needs of youth" and to address "the unique emotional, behavioral, physical, and educational problems of each juvenile before the court." Id. at 296.
>
> [Id. at 39-41 (emphasis added).]

Given the express policy underlying the Code, we reject C.G.'s argument the Code may be likened to the adult criminal justice process. C.G.'s argument N.J.S.A. 2A:4A-40 violates the New Jersey Constitution ignores our precedent, which expressly found the introduction of jury trials to be the catalyzing element converting a juvenile matter into an adult criminal prosecution. Mandating a jury trial in juvenile matters would not only nullify the rehabilitative and reformative purpose of the Code, it would deprive the juvenile system of its "flexibility" to achieve its policy goals. For these reasons, we reject C.G.'s constitutional challenges to N.J.S.A. 2A:4A-40.

Finally, C.G. argues juveniles should, at a minimum, have the right to request a jury trial, and trial judges should "have the discretion of providing jury trials . . . to juveniles who are charged with criminal acts of first, second[,] or third degree, which presumptively expose[] them to a year or more of incarceration." As we noted, this argument would require us to engraft language onto the statute that does not exist, and instead should be addressed by the Legislature. A.C., 424 N.J. Super. at 256. For these reasons, and because we conclude the ban on jury trials remains constitutional, we decline to further address this argument.

Affirmed.

SUPREME COURT OF NEW JERSEY
C-69 September Term 2018
081290

State of New Jersey in the
Interest of C.G., a minor.

(C.G. – Petitioner)

O R D E R

A petition for certification of the judgment in A-004585-16 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 20th day of September, 2018.

CLERK OF THE SUPREME COURT