No. 15-847

In the Supreme Court of the United States

HUGO GERMAN CAMPOVERDE RIVERA, PETITIONER

v.

LORETTA E. LYNCH, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
DONALD E. KEENER
JESI J. CARLSON
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Section 1231(a)(5) of Title 8 of the United States Code, a provision enacted in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, Tit. III, § 305(a)(3), 110 Stat. 3009-599, allows for automatic reinstatement of an alien's prior deportation order following the alien's illegal reentry. The first question presented is whether Section 1231(a)(5) applied to petitioner, who illegally reentered the United States after IIRIRA's effective date, notwithstanding the fact that petitioner's former employer filed an application for a labor certification on his behalf in 1996.

2. Whether petitioner was entitled to counsel under Section 6 of the Administrative Procedure Act, 5 U.S.C. 555, in connection with the automatic reinstatement of his prior deportation order pursuant to 8 U.S.C. 1231(a)(5) and 8 C.F.R. 241.8.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 3a-6a) is not published in the *Federal Reporter* but is reprinted at 607 Fed. Appx. 228.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 2015. A petition for rehearing was denied on October 2, 2015 (Pet. App. 2a-3a). The petition for a writ of certiorari was filed on December 29, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In 1996, Congress amended the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, to expedite the removal of certain aliens from the United States by enacting Section 305(a)(3) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, Tit.

III, 110 Stat. 3009-599 (8 U.S.C. 1231(a)(5)). That provision of IIRIRA, which provides for reinstatement of a prior order of removal, became effective on April 1, 1997. See § 309(a), 110 Stat. 3009-625.

As relevant here, Congress enlarged the class of illegal reentrants whose removal orders may be reinstated, limited the possible relief from removal available to them, and streamlined the removal of aliens who illegally reenter the United States after being deported or removed by authorizing the reinstatement of an earlier removal order without the need for additional administrative proceedings. See IIRIRA § 305(a)(3). When an alien who has previously been removed, or who departed voluntarily under an order of removal, illegally reenters the United States, the Department of Homeland Security (DHS) may simply execute the prior order again, without any right to a new hearing before an immigration judge.[1] See *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30 (2006); 8 C.F.R. 241.8. In those circumstances, "the prior order of removal is reinstated from its original date," and it "is not subject to being reopened or reviewed." 8 U.S.C. 1231(a)(5).

Before the enactment of IIRIRA, an alien who illegally reentered might still be permitted to petition for discretionary relief from removal, see 8 U.S.C. 1252(e) and (f) (1994), including by filing an application for adjustment of status, see *Lattab* v. *Ashcroft*, 384 F.3d 8, 12-13 (1st Cir. 2004). Section 305(a)(3) of IIRIRA eliminated an illegal reentrant's eligibility for any discretionary relief from removal, including adjust-

[1] Under the former provision, an alien had a right to a hearing before an immigration judge during reinstatement proceedings. See 8 C.F.R. 242.23 (1997).

ment of status to that of a lawful permanent resident. 8 U.S.C. 1231(a)(5) (alien who illegally reenters the United States after removal or voluntary departure "is not eligible and may not apply for any relief").

b. Section 1255(a) of Title 8 of the United States Code provides that "[t]he status of an alien who was inspected and admitted or paroled into the United States" may be adjusted to that of a lawful permanent resident. A person who was not inspected and therefore neither "admitted [n]or paroled into the United States" is generally ineligible for adjustment of status. 8 U.S.C. 1255(a).

Section 1255(i) provides an exception to that rule: DHS may grant adjustment of status to "certain aliens "physically present in the United States" who "entered the United States without inspection." 8 U.S.C. 1255(i). Section 1255(i), as amended in 2000, has expired except for those aliens who have been "grandfathered."[2] A "grandfathered" alien is one who entered the United States without inspection and, as relevant to this case, was the beneficiary of a labor certification properly filed on or before April 30, 2001. 8 U.S.C. 1255(i)(1); 8 C.F.R. 245.10(a)(1)(i). Section 1255(i)(2)(A) requires an alien to be "eligible to receive an immigrant visa" and to be "admissible" for permanent residence to qualify for adjustment of status. 8 U.S.C. 1255(i)(2)(A).

2. Petitioner, a citizen of Ecuador, first entered the United States on or about May 16, 1994, without

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[2] The 2000 amendment extended the date for filing a qualifying petition or labor certification application from January 14, 1998, until April 30, 2001. Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, § 1(a)(4), 114 Stat. 2763 [LIFE Act Amendments of 2000, App. D, Tit. XV, § 1502(a)(1), 114 Stat. 2763A-324].

inspection. Pet. 3. On May 24, 1994, petitioner was granted the privilege of voluntary departure and, in the alternative, was ordered to be deported if he failed to comply with the conditions of voluntary departure.[3] Pet. App. 4a. Under the terms of his voluntary departure, petitioner was required to depart the United States on or before June 24, 1994. Administrative Record (A.R.) 18. When petitioner failed to voluntarily depart the United States in 1994, his voluntary departure order became a deportation order. See 8 C.F.R. 243.5 (1995).

On June 10, 1996, a labor certification application was filed on petitioner's behalf by his previous employer. That application was approved on June 28, 1999.[4] Pet. 4. On September 30, 1996, petitioner departed the United States—more than two years after the expiration of his permissible voluntary departure period—which served to execute his deportation order. *Ibid.* In August 1997, petitioner returned to the United States without inspection. *Ibid.*

Petitioner did not seek to adjust his status to that of a lawful permanent resident until 2011—14 years later—and he did so as the spouse of a United States

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[3] Because petitioner failed to depart by the required date, under the statute in effect in 1994, he became ineligible for adjustment of status for five years after the scheduled date of departure or the date of unlawful reentry. See 8 U.S.C. 1252b(e)(2)(A) (1994). After April 1, 1997, that period of ineligibility was increased to ten years. See 8 U.S.C. 1229c(d)(1)(B); IIRIRA § 309(a).

[4] Although petitioner asserts (Pet. 6) that the labor certification was approved in June 1996, the application for a labor certification was not approved until June 28, 1999. C.A. Supp. App. 7; *ibid.* (noting June 10, 1996, as date that application was accepted for processing and the operative date for purposes of Section 1255(i)); see 8 U.S.C. 1255(i)(1).

citizen. Pet. 5-6. The adjustment application was denied on September 12, 2012. Pet. 6.

Petitioner was taken into immigration custody on April 7, 2014. A.R. 11, 17-18. On April 21, 2014, petitioner's counsel submitted a letter arguing that petitioner was not subject to Section 1231(a)(5)'s reinstatement provision. Pet. 6; see C.A. Supp. App. 4-6. On April 22, 2014, DHS issued a notice of intent to reinstate petitioner's previous deportation order under 8 U.S.C. 1231(a)(5), on the ground that petitioner had illegally reentered the United States after deportation. Pet. App. 7a-9a. On April 24, 2014, the deportation officer presented the basis for this determination to petitioner. *Id.* at 8a.

3. Petitioner sought review of his reinstated deportation order in the court of appeals, contending that IIRIRA and Section 1231(a)(5) did not apply to him because his former employer's labor certification "grandfathered" him into eligibility for adjustment of status under 8 U.S.C. 1255(i). Pet. C.A. Br. 10-18. The court of appeals denied the petition for review, holding that application of Section 1231(a)(5) to petitioner did not produce a retroactive effect because petitioner reentered the country illegally after IIRIRA's effective date. Pet. App. 4a-6a. The court rejected petitioner's assertion that his employer's application for a labor certification "grandfathered" petitioner under the pre-IIRIRA reinstatement provision, noting that petitioner failed to offer any support for his position that a labor certification would exempt him from the operation of IIRIRA's reinstatement provision. *Id.* at 5a-6a; see Pet. C.A. Br. 11-12. The court also rejected petitioner's argument that he was impermissibly denied a right to counsel during his

reinstatement proceedings, concluding that petitioner had no statutory or due process right to a hearing before an immigration judge (IJ) nor a right to counsel in such proceedings. Pet. App. 6a.

ARGUMENT

The court of appeals correctly concluded that the INA's current reinstatement provision, 8 U.S.C. 1231(a)(5), applied to petitioner because he reentered the country illegally *after* its April 1, 1997 effective date. Pet. App. 5a; see IIRIRA §§ 305(a)(3), 309(a). The fact that petitioner's prior employer filed an application for a labor certification on his behalf in 1996 does not affect Section 1231(a)(5)'s applicability. At that time, petitioner was ineligible for adjustment of status because he had failed to comply with the voluntary departure order. In any event, petitioner took no affirmative step to seek relief before IIRIRA went into effect; rather, he filed his application for adjustment of status to that of lawful permanent resident in 2011, well-after the statute's effective date. Pet. 5-6. The court of appeals correctly concluded that Section 1231(a)(5)'s reinstatement provision applied to petitioner under those circumstances.

Petitioner also contends (Pet. 18-21) that he had a right to counsel during his reinstatement proceeding under Section 6 of the Administrative Procedure Act (APA), 5 U.S.C. 555. Section 6 of the APA does not apply to reinstatement proceedings conducted under 8 U.S.C. 1231(a)(5), nor did the INA entitle petitioner to counsel. At any rate, petitioner's counsel did participate in the proceeding by submitting a letter to DHS on petitioner's behalf. Pet. 6. Petitioner identifies no prejudice from counsel's absence on April 24, 2014,

when petitioner was advised of the basis for the reinstatement determination.

The unpublished decision of the court of appeals does not conflict with any decision of this Court or of another court of appeals on either question presented. The petition for a writ of certiorari should therefore be denied.

1. a. No impermissible retroactive effect is caused by applying IIRIRA's reinstatement provision, 8 U.S.C. 1231(a)(5), to petitioner—an alien who departed under an order of deportation before that provision's effective date, but who reentered afterward. That conclusion follows from this Court's decision in *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30 (2006), which held that Section 1231(a)(5) is applicable even to aliens who were removed and illegally reentered the United States before the statute's effective date. *Id.* at 44. The Court observed that, in such circumstances, application of IIRIRA is not retroactive because it is "the alien's choice to continue his illegal presence, after illegal reentry, and after the effective date of the new law, that subjects him to the new and less generous legal regime, not a past act that he is helpless to undo up to the moment the Government finds him out." *Ibid.* Petitioner could have similarly avoided the application of the statute. After IIRIRA became effective in 1997, he could have refrained from unlawfully returning to the United States.

Every court of appeals to address this issue has similarly recognized that Section 1231(a)(5) does not have a retroactive effect when applied to aliens who illegally reenter the United States in violation of an existing removal order after the statute's effective date. See, *e.g.*, *De Sandoval* v. *United States Attorney*

Gen., 440 F.3d 1276, 1283-1284 (11th Cir. 2006); *Warner* v. *Ashcroft*, 381 F.3d 534, 538 (6th Cir. 2004); *Lopez* v. *Heinauer*, 332 F.3d 507, 512 (8th Cir. 2003); *Avila-Macias* v. *Ashcroft*, 328 F.3d 108, 114 (3d Cir. 2003); *Gallo–Alvarez* v. *Ashcroft*, 266 F.3d 1123, 1129 (9th Cir. 2001).

b. Petitioner nonetheless argues (Pet. 12-13) that it "would be impermissibly retroactive" to apply Section 1231(a)(5)'s reinstatement provision to him because that would "destroy[] the grandfathering under [Section 1255(i)] that [petitioner] achieved" when his former employer filed an application for a labor certification. Petitioner is incorrect. The applicability of IIRIRA and Section 1231(a)(5) is unaffected by the application for a labor certification, filed on his behalf, in 1996.

First, when his former employer filed the application for the labor certification in 1996, petitioner had already been ordered to voluntarily depart no later than June 24, 1994. A.R. 18. Because he failed to comply with his voluntary departure order, the voluntary departure order became a deportation order, see 8 C.F.R. 243.5 (1995), and petitioner became ineligible for adjustment of status for five years from the date his period of voluntary departure expired. 8 U.S.C. 1252b(e)(2)(A) and (5)(C) (1994).[5] Petitioner eventually left the United States on September 30, 1996, after the voluntary departure period expired. Pet. App. 4a. The labor certification was not approved until 1999, after IIRIRA's effective date. See C.A. Supp. App. 7.

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[5] The ineligibility period was later extended to ten years, see 8 U.S.C. 1229c(d)(1)(B), but the governing law is the former 8 U.S.C. 1252b(e)(2)(A)(1994). *Barrios* v. *Attorney Gen.*, 399 F.3d 272, 274-275 (3d Cir. 2005).

Next, any entry without inspection, including an unlawful reentry, also makes an alien ineligible for adjustment of status. See 8 U.S.C. 1255(a). Section 1255(i) does allow certain aliens who enter the United States without inspection to seek adjustment of status, but petitioner's unlawful reentry rendered him inadmissible under 8 U.S.C. 1182(a)(9)(C)(i)(II), as an alien who was ordered removed but reentered the United States without being admitted. For that reason, petitioner is ineligible for adjustment of status under 8 U.S.C. 1255(i), which requires an alien to be "eligible to receive an immigrant visa" and be "admissible" for permanent residence to qualify for adjustment of status. 8 U.S.C. 1255(i)(2)(A); see, *e.g.*, *Delgado* v. *Mukasey*, 516 F.3d 65, 72, 74 (2d Cir. 2008) (holding that an alien who illegally reenters, and is therefore inadmissible pursuant to 8 U.S.C. 1182(a)(9)(C)(i)(II), is not eligible for adjustment of status pursuant to Sections 1231(a)(5) and 1255(i)), cert. denied, 555 U.S. 887 (2008); *Lino* v. *Gonzales*, 467 F.3d 1077, 1079 (7th Cir. 2006) ("[The reinstatement provision] plainly precludes a previously removed alien who has since illegally reentered the United States from adjusting her status under [Section 1255(i)]."); see also *De Sandoval*, 440 F.3d at 1284-1285 (same); *Lattab* v. *Ashcroft*, 384 F.3d 8, 21 (1st Cir. 2004) (same); *Warner*, 381 F.3d at 540 (same). In effect, at all relevant times, petitioner has been either ineligible to adjust his status, inadmissible, or both.

Finally, petitioner's assertion (Pet. 13) that 8 U.S.C. 1255(i) conflicts with 8 U.S.C. 1231(a)(5)'s bar to relief is without merit. As the Eleventh Circuit recognized in *De Sandoval*, there is no conflict be-

tween the plain language of Section 1231(a)(5) and that of Section 1255(i). 440 F.3d at 1284-1285. Section 1231(a)(5) strips illegal reentrants of the ability to apply for adjustment of status, but aliens who have never before been removed from the United States are still able to apply for adjustment of status under Section 1255(i). *Ibid.* The fact that Section 1231(a)(5) prohibits a subset of aliens—those who illegally reentered the United States—from applying for adjustment of status under Section 1255(i) does not create a conflict between those provisions. *Id.* at 1285.

It was petitioner's decisions to violate his voluntary departure terms and then to illegally reenter the United States *after* the enactment of IIRIRA that rendered him ineligible to adjust his status under the grandfathering provisions of Section 1255(i), at the relevant time. For these reasons, the court of appeals was correct in concluding that the application of Section 1231(a)(5) to petitioner had no impermissible retroactive effect. Consistent with the decisions of this Court and other courts of appeals, it correctly rejected petitioner's arguments.

c. Petitioner further contends (Pet. 9-12) that the courts of appeals have described differently the circumstances under which it would be impermissibly retroactive to apply IIRIRA to an alien who had taken affirmative steps to secure relief from removal before IIRIRA's effective date. The cases cited by petitioner—which involve aliens who, unlike petitioner, affirmatively applied for relief prior to IIRIRA's effective date—pose no conflict with the decision of the court of appeals. Rather, it was petitioner's employer who sought a labor certification on his behalf in 1996, before petitioner left the United States. Peti-

tioner not only failed to take any affirmative step to adjust his status before IIRIRA went into effect, but he was also ineligible to do so because he remained in the United States after the voluntary departure deadline.

This Court in *Fernandez-Vargas* observed that it would be impermissibly retroactive for IIRIRA to impose "new consequences of past acts" or to "cancel[] vested rights." 548 U.S. at 44 n.10; see also *Immigration & Naturalization Serv.* v. *St. Cyr*, 533 U.S. 289, 321 (2001) ("A statute has retroactive effect when it 'takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past.'") (quoting *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 269 (1994)). *Fernandez-Vargas* found that an alien had no vested right in the mere ability to adjust status under Section 1255, because such a claim to relief is merely "contingent" on the alien taking "some action" to "avail[] himself" of such relief. 548 U.S. at 44 n.10.

The labor certification application filed by petitioner's former employer, at most, could have amounted to the type of contingent opportunity to apply for relief that does not constitute a "vested right[]" under prior law. *Ferndandez-Vargas*, 548 U.S. at 44 n.10. But petitioner could not even make that contingent claim for relief because he was *ineligible* for adjustment of status at the time the labor certification was filed. See Pt. 1.b, *supra*.

Fernandez-Vargas and other decisions on which petitioner relies (several of which, in any event, predate *Fernandez-Vargas*) all involved aliens who reentered the United States *before* the effective date of the

current reinstatement provision (8 U.S.C. 1231(a)(5)) and, in most instances, either had an approved visa petition and/or had applied for adjustment of status, some form of immigration relief, or protection under the INA. See, *e.g.*, *Ixcot* v. *Holder*, 646 F.3d 1202, 1206-1213 (9th Cir. 2011) (application for asylum three years before IIRIRA was enacted); *Valdez-Sanchez* v. *Gonzales*, 485 F.3d 1084, 1090-1091 (10th Cir. 2007) (petitioner applied for and was granted application for adjustment of status, making him a conditional lawful permanent resident before IIRIRA went into effect); *Faiz-Mohammed* v. *Ashcroft*, 395 F.3d 799, 809-810 (7th Cir. 2005) (application for adjustment of status filed before IIRIRA's effective date); *Sarmiento Cisneros* v. *Attorney Gen.*, 381 F.3d 1277, 1282-1285 (11th Cir. 2004) (visa petition filed on alien's behalf and application for adjustment of status to lawful permanent resident, pre-IIRIRA); *Arevalo* v. *Ashcroft*, 344 F.3d 1, 10-15 (1st Cir. 2003) (pre-IIRIRA application for adjustment of status). Those decisions therefore are inapposite to petitioner's case and establish no conflict with the decision of the court of appeals.

2. Petitioner argues (Pet. 18-21) that he was entitled to counsel during his reinstatement proceedings under 5 U.S.C. 555, and that that right was violated because his attorney was not given an opportunity to be present during his reinstatement proceeding. The court of appeals correctly rejected that claim: petitioner's counsel did participate in the reinstatement proceedings by submitting a letter to DHS before the reinstatement order was entered, and in any event, petitioner, who was ineligible for relief, see Pt. 1a and b, *supra*, can demonstrate no prejudice from any other denial of counsel.

a. As a threshold matter, the APA's provisions do not govern administrative removal proceedings. *Marcello* v. *Bonds*, 349 U.S. 302, 306-307, 311 (1955); *id.* at 309 (holding that 8 U.S.C. 1229a(a)(3)'s predecessor is a "clear and categorical direction" that "exclude[s] the application of the [APA]" to administrative immigration proceedings); see *Ardestani* v. *Immigration & Naturalization Serv.*, 502 U.S. 129, 133-134 (1991). Moreover, the INA itself does not provide either for a hearing or the opportunity to be represented by counsel in a reinstatement proceeding under Section 1231(a)(5), which is a streamlined procedure that reinstates the former deportation or removal order.[6] For these reasons, petitioner errs in contending that the APA's guarantee of a right to appear through counsel under 5 U.S.C. 555 applies to reinstatement proceedings.

The regulation that governs reinstatement proceedings, 8 C.F.R. 241.8, does, however, provide "more than just minimal procedural protections." *Ponta-Garcia* v. *Attorney Gen. of the U.S.*, 557 F.3d 158, 163 (3d Cir. 2009). Under the regulation, the immigration officer must "consider all relevant evidence" to determine whether "(1) the alien was subject to a prior order of removal; (2) the alien is the same person as the one named in the prior order; and (3) the alien unlawfully reentered the country." *Ibid.* (citing 8 C.F.R. 241.8(a)(1)-(3)). The alien is given an

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[6] The INA similarly does not guarantee counsel in all immigration proceedings; rather, it provides the alien the opportunity to be represented by counsel, at no expense to the government, "[i]n any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings." 8 U.S.C. 1362; see 8 U.S.C. 1229a(b)(4).

opportunity to be heard, "as the immigration officer must consider 'statements made by the alien and any evidence in the alien's possession,'" and must also allow the alien to make a "written or oral statement contesting the determination." *Ibid.* Because the reinstatement determination "can only be applied to a person who was already subject to a prior order of removal with its attendant pre- and post-order protections, there is no issue of constitutional concern."[7] *Ibid.* Furthermore, judicial review is available to an alien determined to be removable following the reinstatement procedures at issue. 8 U.S.C. 1252 (providing for judicial review of final orders of removal).

b. In any event, as petitioner acknowledges (Pet. 6-7), his counsel did have an opportunity to be heard and did participate in the reinstatement proceedings by submitting a letter to DHS (specifically, U.S. Immigration and Customs Enforcement (ICE)) on April 21, 2014, before the reinstatement order was issued. The letter presented a number of legal and factual arguments, including the retroactivity argument made by petitioner to the court of appeals. C.A. Supp. App. 4-6. The letter did not request the opportunity for counsel to be present and argue the case in person. *Ibid.* Petitioner also does not state (nor does the record show) that he requested the presence of his attorney during his reinstatement proceedings and

[7] Petitioner does not challenge the adequacy of the procedural protections afforded him during his initial deportation proceedings, including the right to be represented by counsel (at no cost to the government) and the right to judicial review.

that the immigration officer refused such a request.[8] See *ibid.*

Nor was petitioner prejudiced by not having counsel present on April 24, 2014, when petitioner was simply notified of the basis for the agency's reinstatement determination. Even if counsel had had an additional opportunity to be heard, the outcome would have been unaffected. Petitioner does not dispute that he is an alien who was subject to a prior deportation order and illegally reentered the United States. And, as demonstrated above, see Pt. 1a and b, *supra*, his retroactivity argument is without merit.

Petitioner argues (Pet. 21) that it is possible that his attorney might have been able to convince DHS/ICE to exercise its prosecutorial discretion not to reinstate his deportation order. However, his attorney made that plea to the agency in his letter. C.A. Supp. App. 5-6. Petitioner suggests no reason to believe that the personal presence of his attorney on April 24, 2014, would have led to a different outcome.

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[8] In this particular case, because of the possibility that petitioner could be criminally prosecuted for illegal reentry, he was provided a "Statement of Rights" that, among other things, mentioned the right to consult with an attorney. A.R. 11.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
DONALD E. KEENER
JESI J. CARLSON
Attorneys

MAY 2016