



CASE AND WAIVER OF ORAL ARGUMENT

Gathitu Muriithi ("petitioner"), a native and citizen of Kenya, was found removable pursuant to section 237(a)(1)(C)(i) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1227(a)(1)(C)(i), for violating the conditions of his nonimmigrant status. Petitioner was additionally determined to be removable under INA § 237(a)(2)(E)(i), 8 U.S.C. § 1227(a)(2)(E)(i), based on his conviction for a crime of domestic violence. Petitioner conceded removability in regard to the first charge, but collaterally challenged the constitutionality of his criminal conviction. Petitioner also applied for asylum and withholding of removal under sections 208(a) and 241(b)(3) of the INA, 8 U.S.C. §§ 1158(a), 1231(b)(3), and requested relief from removal under the Convention Against Torture ("Torture Convention").¹ His appeal to the Board of Immigration Appeals ("Board") was dismissed on September 14, 2000, and the instant petition for review followed.

The Board properly concluded that petitioner's state conviction for domestic violence was a "conviction" as that term is defined in INA § 101(a)(48), 8 U.S.C. § 1101(a)(48), and could serve as a valid ground for removal. Furthermore,

¹ Article 3, United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment. G.A. Res 39/46, Annex, 39 U.N. GAOR Supp. No. 51 at 197, U.N. Doc A/39/51 (1984); section 2242(b) of the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, Division G, 112 Stat. 2681 (Oct. 21, 1998).

the Board's determination that petitioner failed to establish eligibility for withholding of removal under the regulations implementing the Torture Convention is amply supported by the evidentiary record.

Petitioner's Torture Convention claim was premised on his assertion that he had been detained for two weeks in 1993 by governmental officials who were attempting to wrest money from him. The Board reasonably determined that this extortive detention was an isolated, apolitical incident, and therefore did not establish that it was more likely than not that petitioner would be tortured if repatriated to Kenya.

Because respondent believes that the issues presented in this case are thoroughly addressed in the briefs, he does not request oral argument.

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

01-1068

ANTONY GATHITU MURIITHI,
INS No. A78 159 453,

Petitioner,

v.

JOHN ASHCROFT,
Attorney General,²

Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF
THE BOARD OF IMMIGRATION APPEALS

BRIEF FOR RESPONDENT

STATEMENT OF JURISDICTION

This is an immigration case in which petitioner seeks review of a final order of removal issued by the Board on September 14, 2000. A.R. 2-6.³ The petition raises the issue of whether the Board properly determined that petitioner had been "convicted" of a domestic violence offense pursuant

² In cases involving the new judicial review provisions of INA § 242, the Attorney General is the respondent rather than the Immigration and Naturalization Service. See INA § 242(b)(3)(A), 8 U.S.C. § 1252(b)(3)(A).

³ The abbreviation "A.R." followed by a number refers to a page or pages in the Certified Administrative Record on file with the Court.

to INA § 101(a)(48) based on an August 28, 1998, Kansas conviction for misdemeanor domestic battery. Petitioner also challenges the Board's conclusion that he failed to meet his burden of establishing that, more likely than not, he would be tortured if removed to Kenya.

This petition is subject to the permanent judicial review provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-626 (Sept. 30, 1996), as amended by technical corrections set forth in the Extension Of Stay In United States For Nurses Act of October 11, 1996, Pub. L. 104-302, 110 Stat. 3656 (Oct. 11, 1996). See IIRIRA § 309(a); INA § 242, 8 U.S.C. § 1252. Section 242(b)(1) of the INA provides that a petition for judicial review must be filed not later than 30 days after the date of the final order of removal. In this case, the petition for review was filed on October 5, 2000, within thirty days of the Board's final order.⁴ Therefore, the petition is timely.

⁴ Petitioner originally filed the instant petition in the Tenth Circuit. See PACER docket sheet, No. 00-9537 (10th Cir.). However, the Tenth Circuit subsequently transferred the case to this Court on December 18, 2000. Id.

STATEMENT OF THE ISSUES

1) Whether this Court lacks jurisdiction to review petitioner's claims that the failure to provide him with counsel and access to a law library constituted a denial of due process where these issues were never raised on appeal to the Board and petitioner has thus failed to exhaust his administrative remedies as statutorily mandated in section 242(d)(1) of the INA, 8 U.S.C. § 1252(d)(1).

2) Whether petitioner's predicate conviction for domestic battery qualifies as a "conviction," regardless of his subsequent collateral challenge to this conviction, where the Board and this Court are precluded from examining the validity of the conviction for purposes of removal.

3) Whether substantial evidence supports the Board's determination that petitioner did not carry his burden of establishing that he would likely be tortured if returned to Kenya, where his claim was solely premised on an isolated incident in 1993 in which governmental authorities, upon learning that petitioner possessed a large sum of money, detained him for two weeks to extort a payment.

STATEMENT OF THE CASE

Petitioner, a native and citizen of Kenya, entered the United States on or about August 23, 1993, as a nonimmigrant student to

attend Washburn University in Topeka, Kansas. A.R. 50-51, 264. However, petitioner violated the terms of his visa when he stopped attending classes at the university in the fall semester of 1995. A.R. 71, 264. On August 20, 1998, petitioner was convicted, in accordance with his plea, of domestic battery, in violation of section 21-3412(c) of the Kansas Criminal Code, and child endangerment, a violation of Kansas Criminal Code § 21-3608. A.R. 251. The district court suspended execution of the sentence for these offenses, and placed petitioner on 12 months of supervised probation. Id. On October 14, 1999, after violating the conditions of his release, petitioner's probation was revoked and he was sentenced to six months imprisonment. A.R. 254. Petitioner subsequently filed a motion to reconsider, and on December 3, 1999, the district court granted his motion, terminated his jail sentence, and reinstated probation for 12 months. A.R. 203-204, 254.

The Immigration and Naturalization Service ("INS") initiated removal proceedings by serving petitioner with a Notice to Appear ("NTA") on December 6, 1999, charging that he was removable under INA § 237(a)(1)(C)(i), 8 U.S.C. § 1227(a)(1)(C)(i), as a nonimmigrant who failed to maintain the conditions of his admission into the United States. A.R. 264. Petitioner was also charged with removability pursuant to INA § 237(a)(2)(E)(i), 8 U.S.C. § 1227(a)(2)(E)(i), for his

conviction "of a crime of domestic violence." Id. In the ensuing removal proceedings, petitioner contested his removability on the ground of his domestic violence conviction, but admitted the remaining factual allegations. A.R. 70-75. Petitioner also applied for asylum and withholding of removal, and the Immigration Judge, sua sponte, considered the availability of relief under the Torture Convention. A.R. 87-89. After reviewing the testimony and the evidence submitted, the Immigration Judge found petitioner statutorily ineligible for asylum, and denied his applications for withholding of removal under both INA § 241(b)(3), 8 U.S.C. § 1231(b)(3), and the Torture Convention. A.R. 56-63. Petitioner then appealed to the Board. A.R. 41-46. On September 14, 2000, the Board dismissed petitioner's appeal. A.R. 2-6. The instant petition for review followed.

STATEMENT OF FACTS

I. PROCEDURAL BACKGROUND AND EVIDENCE PRESENTED ON THE ISSUE OF ASYLUM AND WITHHOLDING OF REMOVAL

A. Petitioner's Entry Into The United States And Commencement Of Removal Proceedings

Petitioner is a 36-year-old native and citizen of Kenya. A.R. 50, 175. In August 1993, he was admitted into the United States under a student visa to pursue an undergraduate degree at Washburn University in Topeka, Kansas. A.R. 260-61, 264. In the fall semester of 1995, petitioner, contrary to the terms of his visa,

stopped attending classes at the university. A.R. 71, 264; see A.R. 261 (under paragraph 11, entitled "Student Certification," petitioner attested that he sought to enter the United States "temporarily, and solely for the purpose of pursuing a full course of study at [Washburn University]").

In 1997, petitioner married Virginia Smith, but promptly divorced Ms. Smith sometime in 1998.⁵ A.R. 89-90. In approximately January 1998, petitioner entered into a "common law" marriage with Dena L. Yoakum, a United States citizen, and the couple had a child on June 15, 1998.⁶ A.R. 177, 197; see In re Estate of Antonopoulos, 268 Kan. 178, 192-93, 993

⁵ In response to the Immigration Judge's questions regarding the date of his marriage to Virginia Smith, petitioner responded, "I think in 1997." A.R. 90. Similarly, when the Immigration Judge inquired as to the date of his divorce from Ms. Smith, petitioner stated, "I think in '98." A.R. 91.

⁶ Apparently, this was petitioner's third marital union, and second "common law" marriage, as he had entered into a common law marriage in Kenya prior to his departure for the United States in 1993. A.R. 89. There is some uncertainty regarding the time frame of petitioner's second United States "marriage." According to petitioner's testimony, his common law relationship with Ms. Yoakum commenced in 1995, prior to his marriage with Ms. Smith, but he did not share a residence with Ms. Yoakum until sometime in 1998. A.R. 90.

It should also be noted that while petitioner characterized his relationship with Ms. Yoakum as a common law marriage, the District Court of Shawnee County, Kansas, made no mention of this common law union in a May 1999 paternity action filed by petitioner--referring to petitioner and Ms. Yoakum as simply the "parents" of the child. A.R. 205-207.

P.2d 637, 647 (1999)(Kansas common law marriage has the following "essential" elements: "(1) capacity of the parties to marry; (2) a present marriage agreement between the parties; and (3) a holding out of each other as husband and wife to the public"). Less than one month after the birth of their son, on July 6, 1998, petitioner was charged with multiple counts of domestic battery and child endangerment. A.R. 250.

On August 20, 1998, in accordance with his plea, petitioner was convicted of single counts of domestic battery and child endangerment, violations of Kansas Criminal Code §§ 21-3412(c) and 21-3608 respectively, and the remaining charges were dismissed. A.R. 251. The district court suspended execution of petitioner's sentence of imprisonment and, alternatively, placed him on supervised probation for a period of 12 months. Id. Petitioner thereafter failed to complete a prescribed anger management course, a violation of the terms of his probation, and his probation was accordingly revoked on October 14, 1999. A.R. 193, 253. Although petitioner was sentenced to six months imprisonment, he was subsequently released from confinement, and his probation reinstated, on December 3, 1999. A.R. 203-204, 254. Three days after his release, the INS initiated removal proceedings against petitioner by issuing and serving him with an NTA, alleging that he was removable pursuant to INA § 237(a)(1)(C)(i), for failure to comply with the conditions of his

visa, and INA § 237(a)(2)(E)(i), for his domestic violence conviction. A.R. 264-65.

On January 27, 2000, petitioner, proceeding pro se, appeared before an Immigration Judge. In the course of the hearing, petitioner admitted that he was a native and citizen of Kenya who had entered the United States under a student "F-1" visa, and acknowledged that he had stopped attending classes at Washburn University in the fall of 1995. A.R. 70-71. Although petitioner was reluctant to concede his removability for failure to maintain his nonimmigrant status, positing that he was "led to believe" that his "status automatically changed" when he was married, the Immigration Judge sustained this charge. A.R. 74. Petitioner also contested that he was removable under INA § 237(a)(2)(E)(i) for his domestic violence conviction, asserting that he was "working on having that conviction overturned." A.R. 74-75. In response, the Immigration Judge received into evidence petitioner's conviction documents, verified with petitioner that he had entered pleas of "no contest" to the charges of domestic battery and child endangerment, and therefore found petitioner subject to removal on the basis of this conviction. A.R. 72-75.

In light of petitioner's hesitance to specify a country for

removal,⁷ the Immigration Judge designated Kenya as the country of removal in the event such action was determined necessary at the conclusion of the hearing. A.R. 75-76, 82. However, petitioner was apprehensive about returning to Kenya, stating that he had experienced "problems" at his previous place of employment. A.R. 76. Accordingly, the Immigration Judge outlined the various forms of relief for which petitioner might be eligible, and inquired whether he would be seeking relief through either an asylum application or a request for withholding of removal. A.R. 76-82. Petitioner stated that he was not seeking asylum, but merely desired to remain in the United States with his "family."⁸ A.R. 77. Nevertheless, the Immigration Judge continued the case to enable petitioner to execute and submit an application for asylum. A.R. 82.

The proceedings resumed on March 21, 2000, at which time petitioner submitted his request for asylum and withholding of removal. A.R. 85-86; see A.R. 175-96. The Immigration Judge also

⁷ Petitioner expressed a desire to be removed to Canada, but was informed by the Immigration Judge that this was not an available option. A.R. 76; see INA § 241(b)(2)(B), 8 U.S.C. § 1231(b)(2)(B) (alien cannot designate any foreign territory contiguous to the United States as the place to which he wishes to be deported, unless that alien is a native, citizen, subject, national, or former resident of that contiguous territory).

⁸ At the time of the hearing, Ms. Yoakum had severed all contact with petitioner and was residing in Missouri with their child. A.R. 91-92.

received into evidence the State Department's 1999 Country Reports on Human Rights Practices for Kenya ("Country Reports"). A.R. 87; see A.R. 138-74. The Immigration Judge, noting that petitioner did not appear to have met the statutory deadline for submission of his asylum application, advised him if it was determined that petitioner was ineligible for asylum he would still be considered for withholding under both INA § 241(b)(3) and the Torture Convention. A.R. 88; see INA § 208(a)(2)(B), 8 U.S.C. § 1158(a)(2)(B) (stipulating that an alien is ineligible for asylum unless an application for such relief "has been filed within 1 year after the date of the alien's arrival in the United States").

B. Petitioner's Asylum Application And Withholding Request

Petitioner is a member of the Kikuyu tribe, the largest of the Kenyan tribes, and was raised in the capital city of Nairobi. A.R. 96, 98, 176, 179. Following completion of high school, petitioner was hired as a clerical officer at the government-owned Kenya Post Office Savings Bank in 1985. A.R. 96-97. Petitioner stated that he immediately joined the Kenyan Union of Commercial Food and Allied Workers ("KUCFAW"), and was appointed as a shop steward for the bank employees. A.R. 100-101, 188. In this capacity, petitioner stated that his advocacy for higher wages, non-discriminatory hiring policies, and improved working conditions earned him the enmity of

the bank's management.⁹ A.R. 101, 188, 190. His service as a union representative voluntarily ended in 1988. A.R. 101-102.

Although petitioner was compelled to join the Kenya African National Union ("KANU"), the predominant Kenyan political party, as a condition of his employment at the bank, he stated that he was politically allegiant to the Forum for Restoration of Democracy ("FORD").¹⁰ A.R. 99, 188-89. While petitioner's asylum application detailed the general strife that characterized Kenyan politics in the early 1990's, his political activism was apparently confined to attending "anti-government" rallies.¹¹ A.R. 113, 185-86. Petitioner also alleged in his asylum application that the bank had suspended him for six months without pay following "the general

⁹ While petitioner asserted that he was "harassed and threatened" as a result of his union activities, he neither identified his alleged harassers nor elaborated on the nature or frequency of this harassment. A.R. 190.

¹⁰ According to petitioner, his "unofficial" affiliation with the FORD party commenced in 1990, A.R. 99, 113, although opposition parties were banned by the KANU until 1992. A.R. 168.

¹¹ Petitioner asylum application specifically noted that he had attended an "anti-government" rally on July 7, 1990 that was violently dispersed by governmental forces. A.R. 185-86. However, petitioner was never arrested for his political activities. A.R. 113.

elections,"¹² but subsequently reinstated him to his former position with a warning to "drop [his] political ideologies."¹³ A.R. 186.

In 1993, petitioner was accepted for admission to Washburn University,¹⁴ and on July 30, 1993, received his student visa from the American Embassy in Nairobi. A.R. 94, 128.

Petitioner subsequently received a telephone call at the bank from his brother-in-law, who was residing in Austria, and was informed that he could obtain \$1,500.00 for the purchase of his airfare to the United States from an individual at the "U.N. Complex in Nairobi." A.R. 103-104, 186. Petitioner retrieved a check from this individual and purchased his plane ticket in "early August" 1993. A.R. 104-105. However, immediately upon his return to the office, he was notified that investigators from the bank's "criminal investigations

¹² Apparently, petitioner was referring to the 1992 general elections. See A.R. 159 (Country Report noting that, prior to 1997, the last elections had been held in 1992).

¹³ Although petitioner intimated that his suspension was related to his political affiliations, he did not mention any overt political activities that would have been noted by the banking management, much less have prompted his suspension. Based on his testimony and the content of his asylum application, petitioner was apparently a fervent believer, but passive activist, in the FORD agenda.

¹⁴ This was petitioner's second application for admission to Washburn University. He had previously applied "in 1990 or '91." A.R. 94.

department" wanted to speak with him. A.R. 105-106, 186.

These investigators interrogated petitioner for approximately "four-five" hours regarding the source of his funding for college tuition, and "where the \$1500 was." Id. According to petitioner, the bank's "management" had learned of this \$1500.00 transaction through a "bug" that had been installed in petitioner's office telephone. A.R. 104-106, 186.

Although petitioner informed these officials that his brother-in-law was financing his trip and his tuition, the bank's investigators accused him of "stealing money" and contacted the police "special branch." A.R. 106, 186-87. Petitioner stated that he was detained by the "special branch" for approximately two weeks, but was never formally charged with any offense. A.R. 106-107, 186-87. Petitioner testified that he was accused of embezzlement, but emphasized that his detention was, in reality, a coercive scheme "to get the money out of me." A.R. 108-109. According to petitioner, this was a common practice of the Kenyan police. A.R. 109 ("If you have money, they just want to take it away from you"). Petitioner stated that during this two-week period the police questioned him about the money he had received, and insisted that he had to remit \$1,500.00. A.R. 107-110. He also alleged that he was beaten and

denied his tuberculosis medication.¹⁵ Id. Finally, petitioner's sister convinced a family friend, an army major, to intervene and obtain petitioner's release. A.R. 108-109, 187. Petitioner did not seek, nor apparently require, medical attention upon release. A.R. 110.

Following his release, petitioner left Kenya on the "17th or the 18th" of August 1993, and arrived in Austria on August 20, 1993. A.R. 107, 132. He remained in Austria for approximately three days, but did not seek asylum during this time frame. A.R. 107, 119. Similarly, upon arrival in the United States on August 23, 1993, he neither applied for asylum nor even considered submitting such an application. A.R. 118-19; see A.R. 129. Approximately three years later, on August 14, 1996, petitioner's Kenyan passport expired, so he mailed the passport to the Kenyan Embassy in Washington, D.C., and had the "validity of [the] passport...extended" until August 14, 2001. A.R. 95-96, 128, 130.

Petitioner testified that, despite the passage of time, he feared he would be tortured or imprisoned if repatriated to Kenya. A.R. 111. While petitioner intimated that he feared future persecution on account of his union activism, A.R. 188, 190, and his

¹⁵ Although not reflected in his testimony, petitioner alleged in his asylum application that the police "crushed peppers on my eyes" and subjected him to "electric shocks all over my body." A.R. 187.

political affiliation with the FORD party, A.R. 190, 195, he essentially based his claim on the bank's instigation of his arrest and detention. See A.R. 76 (petitioner's statement that he did not want to be removed to Kenya because "he had some problems" at the bank), A.R. 180 (petitioner's statement that "the bank I worked for is one of the government torture agents"). In this regard, petitioner alleged that he feared reprisals if returned to Kenya because he has telephoned "the management at Postbank" from the United States and "threatened them with revenge." A.R. 111, 187.

Petitioner's professed fear of persecution and torture does not extend to his family, as his mother, brother, and one of his sisters continue to reside, apparently unmolested, in Kenya. A.R. 98-99. Additionally, and in regard to petitioner's claim that he was subjected to torture during his detention, the State Department's Country Report noted that "[d]etainees routinely claimed that they had been tortured, making it difficult to separate real from fabricated incidents." A.R. 143. The Country Report also stipulated that "[c]ivil servants," which would include petitioner, "must get governmental permission for international travel." A.R. 158.

II. THE IMMIGRATION JUDGE'S DECISION

At the conclusion of the merits hearing, the Immigration Judge rendered a lengthy oral decision denying the application for asylum and withholding of removal. A.R. 50-64.

As a preliminary matter, the Immigration Judge found that petitioner's failure to file his application for asylum within one year of his arrival in the United States, and the absence of any "extraordinary circumstances" to excuse such a delay, rendered him statutorily ineligible for asylum consideration. A.R. 53-54; see INA § 208(a)(2)(B), 8 U.S.C. § 1158(a)(2)(B). The Immigration Judge then provided a recitation of petitioner's account, and examined his application for withholding in relation to these elicited facts.

The Immigration Judge noted that petitioner's withholding claim was premised on his arrest and detention "two weeks prior to his departure from Kenya," and that this period of imprisonment "was due mainly" to petitioner's possession of \$1,500.00 in foreign currency. A.R. 56-57. Furthermore, the Immigration Judge found that the arrest was due to either a "shake down[]" by corrupt banking officials," as asserted by petitioner, or, alternatively, a legitimate embezzlement investigation. A.R. 59-60. However, under either scenario, petitioner had not established a causal nexus between this incident and his political opinion, membership in a particular social group, nationality, religion, or race. A.R. 59. Consequently, the Immigration Judge concluded that petitioner had failed to demonstrate "a legitimate basis for withholding of removal" under INA § 241(b)(3), 8 U.S.C. § 1231(b)(3).

Similarly, the Immigration Judge determined that petitioner did

not establish that it was more likely than not that he would be tortured upon return to Kenya. A.R. 60-63. In this regard, the Immigration Judge focused on the fact that "apart from the one incident that allegedly occurred in August 1993, the [petitioner] was never threatened with any type of harm in Kenya." A.R. 61-62. The Immigration Judge found that petitioner's treatment, if regarded as credible, was tied to a specific factual circumstance, his possession of \$1,500.00 in foreign currency, and was unrelated to his political beliefs, or any other consideration. A.R. 62. Additionally, the Immigration Judge noted that petitioner was allowed to leave the country, was able to renew his passport, and "had no basis to contend that he would be put in jail or tortured upon his return home." A.R. 62-63. Consequently, the Immigration Judge decided that petitioner's testimony fell short of the "high standard of proof" required to establish eligibility for withholding under the Torture Convention.

Id.

III. THE BOARD'S DECISION

On April 4, 2000, petitioner filed his Notice of Appeal with the Board. A.R. 41-46. In the notice and his ensuing brief, petitioner curiously argued that his domestic battery conviction was not a "domestic violence" offense under INA § 237(a)(2)(E)(i), because "force was not an element, but anger was." A.R. 28. Petitioner also advised that he had a pending district court case "in

which I am challenging as unconstitutional the said conviction." A.R. 28. Finally, he asserted that he had presented sufficient evidence to qualify for asylum and for withholding under either INA § 241(b)(3) or the Torture Convention.¹⁶ See A.R. 29-33, 44-46.

On September 14, 2000, the Board dismissed petitioner's appeal. A.R. 2-6. The Board first determined that petitioner's conviction qualified as a crime of domestic violence. A.R. 3. Turning to the import of petitioner's constitutional challenge to his conviction, the Board noted that both it "and the federal courts have consistently held that an alien may not attack the legitimacy of his or her otherwise valid state...criminal conviction in immigration proceedings." A.R. 3-4. The Board also held that petitioner's delinquency in timely filing an asylum application rendered him statutorily ineligible for such relief. A.R. 4.

In assessing the merits of petitioner's withholding claim, the Board focused on petitioner's testimony before the Immigration Judge. A.R. 5-6. The Board discounted petitioner's claim that his detention was prompted by his

¹⁶ In his Notice of Appeal, petitioner also alleged that the Immigration Judge's statement that petitioner "had no right to be in the United States," evidenced that the judge was "prejudiced...against me." A.R. 46.

political activism, union membership, or tribal origins. A.R.

5. It found that this claim was belied by the fact that "he did not indicate at the hearing that the police discussed these subjects with him," and by petitioner's own stated belief that his detention was a "shakedown to gain control of his money."

Id. Furthermore, petitioner's release from custody, the absence of any pending criminal charges, and petitioner's ability to leave the country and subsequently renew his passport, undercut the reasonableness of his claimed fear of future torture. A.R. 6. These facts, coupled with petitioner's inability to explain why the government would still be interested in persecuting him after the passage of six years, convinced the Board that he had "failed to show that he more likely than not would be tortured for any reason if removed to Kenya." Id.

SUMMARY OF ARGUMENT

Petitioner asserts for the first time in this appeal that the failure to provide him counsel or access to a "law/legal library" in the course of his removal proceedings was violative of his due process rights. Because petitioner never presented these arguments to the Board, he has failed to exhaust his administrative remedies and this Court should decline to review his claims. Additionally, even if this Court were to find jurisdiction, petitioner has no

constitutional right to legal representation in a civil removal proceeding and cannot show that the alleged inaccessibility of legal resources resulted in actual injury.

Furthermore, petitioner's collateral attack on his 1993 conviction, asserting that the waiver of rights made in conjunction with his plea was not knowing and intelligent, does not preclude the use of such conviction for purposes of removal. Under the case law of this Court, and every other circuit that has considered the issue, neither the Board nor the reviewing court may go behind the judicial record to assess the validity of a conviction. Thus, petitioner's post-conviction assertion that his plea of nolo contendere was constitutionally infirm is immaterial to the validity of the instant removal proceedings.

As a final matter, substantial evidence supports the Board's conclusion that petitioner did not carry his burden of establishing eligibility for withholding of removal under the Torture Convention. Accepting petitioner's account as credible, the Board reasonably determined that the motivation for petitioner's detention was specifically related to a set of circumstances, his possession of \$1,500.00 in United States currency, that existed six years ago. Consequently, petitioner did not and cannot show a clear probability that he would be tortured by Kenyan authorities if repatriated.

ARGUMENT

I. PETITIONER'S FAILURE TO EXHAUST HIS ADMINISTRATIVE REMEDIES DEPRIVES THIS COURT OF JURISDICTION TO CONSIDER THAT PORTION OF HIS PETITION FOR REVIEW WHICH ALLEGES THAT HE IS CONSTITUTIONALLY ENTITLED TO COUNSEL AND ACCESS TO A LAW LIBRARY IN REMOVAL PROCEEDINGS

Petitioner's opening argument is that the "absence [sic] of [appointed] counsel to conduct and assist his case and denial of access to law library" constituted a violation of due process. See Petitioner's Brief ("Pet. Brief") at 11. However, because this issue was never raised before the Board, petitioner has failed to exhaust his administrative remedies. This Court therefore lacks jurisdiction to hear this aspect of the instant petition for review. See Sousa v. INS, 226 F.3d 28, 31 (1st Cir. 2000)(although the "common law requirement of exhaustion is a fairly flexible rule....we are bound by precedent to apply the INA exhaustion requirement in a more draconian fashion"); Vargas v. U.S. INS, 831 F.2d 906, 907-08 (9th Cir. 1987)("Failure to raise an issue in an appeal to the BIA constitutes a failure to exhaust remedies with respect to that question and deprives this court of jurisdiction to hear the matter").

When Congress specifically mandates exhaustion, the courts possess no discretion and must require exhaustion before exercising jurisdiction. See Bastek v. Federal Crop Ins. Corp., 145 F.3d 90, 94 (2d Cir. 1998)("Statutory exhaustion requirements are mandatory, and

courts are not free to dispense of them"). Accordingly, the Court must decline to review petitioner's purported due process claims pursuant to INA § 242(d)(1), 8 U.S.C. § 1252(d)(1), which mandates that a "court may review a final order of removal only if...the alien has exhausted all administrative remedies available to the alien as of right."¹⁷ See West v. Bergland, 611 F.2d 710, 715 (8th Cir. 1979), cert. denied, 449 U.S. 821 (1980)(exhaustion of administrative remedies required where it is mandated by statute)(citing Weinberger v. Salfi, 422 U.S. 749 (1975)).

Assuming, arguendo, that this Court were to find jurisdiction, petitioner's assertion that he was constitutionally entitled to the appointment of an attorney is

¹⁷ Reviewing courts have recognized a limited exception to the exhaustion requirement for "constitutional challenges to the immigration laws, because the BIA has no jurisdiction to review such claims." Akinwunmi v. INS, 194 F.3d 1340, 1341 (10th Cir. 1999); see generally Bernal-Vallejo v. INS, 195 F.3d 56, 64 (1st Cir. 1999); Liu v. Waters, 55 F.3d 421, 426 (9th Cir. 1995); Marrero v. INS, 990 F.2d 772, 778 (3rd Cir. 1993). Although petitioner has clothed his arguments in due process garb, his claims do not fall within this narrow exception. In regard to his claimed entitlement to representation, there is no constitutional issue implicated because the Sixth Amendment right to counsel does not apply to civil immigration proceedings. Furthermore, his alleged inability to access a law library is a procedural issue that is within the purview of the Board. See Rashtabadi v. INS, 23 F.3d 1562, 1567 (9th Cir. 1994)("a petitioner cannot obtain review of procedural errors...that were not raised before the agency merely by alleging that every such error violates due process").

meritless. This Court, in consonance with every other circuit, has conclusively held that "[w]hile an alien has the statutory right to counsel at his own expense...there is no Sixth Amendment right to appointed counsel at a deportation hearing."¹⁸ U.S. v. Torres-Sanchez, 68 F.3d 227, 230 (8th Cir. 1995); see generally Stroe v. INS, 256 F.3d 498, 500 (7th Cir. 2001)("Deportation proceedings are civil, and so, as all the cases that we have cited recognize, the Sixth Amendment is not in play"); Saakian v. INS, 252 F.3d 21, 24 (1st Cir. 2001)("Deportation is a civil, not a criminal, proceeding; as such, there is no Sixth Amendment right to counsel"); Goonsuwan v. Ashcroft, 252 F.3d 383, 385 n.2 (5th Cir. 2001)("It is well settled that, because deportation hearings are considered civil in nature, there is no Sixth Amendment right to counsel").

Additionally, petitioner's claim that the "denial of

¹⁸ Petitioner's reliance on former section 242(b) of the INA, 8 U.S.C. § 1252(b) (1994), and the implementing regulation at 8 C.F.R. § 242.16(c) (1994), for his purported right to "the appointment of a government trial attorney" is misplaced. See Pet. Brief at 8. As a preliminary matter, this statutory section was significantly amended by IIRIRA, and is inapposite to petitioner's case which is controlled by the permanent, post-IIRIRA, rules. See IIRIRA §§ 305, 306. Furthermore, the "appointment of a government trial attorney" that is cited by petitioner referred to the assignment of "an additional immigration officer...to present the evidence on behalf of the United States." INA § 242(b), 8 U.S.C. § 1252(b) (1994) (emphasis added).

access to [a] law library" was a violation of due process, Pet. Brief at 11, is crippled by the fact that he has not shown a resultant "actual injury." See Lewis v. Casey, 518 U.S. 343, 349 (1996). In this regard, the "injury requirement is not satisfied by just any type of frustrated legal claim." Id. at 354. The detained alien claiming actual injury must "demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim." Id. at 351. Petitioner has simply raised a bald allegation that "at the Shawnee County Jail...he did not have access to a legal library." Pet. Brief at 11. He does not state whether he requested and was denied any legal materials; he does not address the availability of other legal resources; and, he does not show how his efforts to pursue a legal claim have been hindered.

At the March 21, 2000 hearing before the Immigration Judge, petitioner was fully apprised of the considerations for establishing his eligibility for withholding of removal under the Torture Convention, and stated that he understood the requisite criteria. See A.R. 88-89. To establish his eligibility, he did not require any legal knowledge or resources. Petitioner simply had to provide a factual recitation of his experiences and detail his bases for fearing that he would be tortured if repatriated to Kenya. Similarly, he cannot demonstrate any injury or prejudice in regard to

his remaining claims because he clearly had no constitutional right to the appointment of counsel, and the filing of his post-conviction motion did not serve to negate the finality of this conviction for immigration purposes. See U.S. v. Polanco-Gomez, 841 F.2d 235, 237 (8th Cir. 1988)("a defendant must show prejudice to successfully collaterally attack a deportation hearing on due process grounds").

II. PETITIONER'S CONVICTION WAS FINAL FOR PURPOSES OF REMOVAL

The second argument raised by petitioner, an argument that permeates the entire petition for review, is that his filing of a post-conviction motion, and the pendency of that motion before the "Kansas Court of Appeals," demonstrated that his conviction was not final and could not serve as a ground for his removal. See Pet. Brief at 11-20. However, this Court has previously considered such a claim and held that an alien's collateral attack on a conviction is irrelevant to the finality of the conviction, and such conviction may properly serve as a basis for a removal proceedings.

Longoria-Castenada v. INS, 548 F.2d 233, 236 (8th Cir.), cert. denied, 434 U.S. 853 (1977); see also Grageda v. INS, 12 F.3d 919, 921 (9th Cir. 1993)("A conviction subject to collateral attack or other modification is still final"); Palmer v. INS, 4 F.3d 482, 489 (7th Cir. 1993)("As the BIA correctly observed, an alien may not collaterally attack an otherwise valid state

court conviction, or go behind the judicial record to determine, in immigration proceedings, the guilt or innocence of the alien"); Gouveia v. INS, 980 F.2d 814, 817 (1st Cir. 1992)("Criminal convictions cannot be collaterally attacked during immigration proceedings").

While petitioner concedes that "post conviction motions do not operate to negate the finality of a conviction for deportation purposes," he nevertheless argues that the record of his conviction is "void on its face." Pet. Brief at 19-20. This assertion is curious in light of the fact that his motion has already been considered and rejected by a Kansas state district court. See Pet. Brief at 19. Furthermore, petitioner's argument necessarily contemplates this Court conducting an independent assessment of the validity of his 1993 conviction, and the Court clearly "may not go behind [the judicial record of conviction] to make an independent determination of guilt or innocence." See Longoria-Castaneda, 548 F.2d at 236.

As a final matter, the plain language of INA § 101(a)(48) states that "the term 'conviction' means...the alien has entered a plea of...nolo contendere...and the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed." As the Fifth Circuit has noted, the language of the statute is clear. See Moosa v.

INS, 171 F.3d 994, 1005-06 (5th Cir. 1999). Petitioner's Kansas disposition comes squarely within this definition. He was convicted and sentenced to twelve months of supervised probation. A.R. 251.

III. SUBSTANTIAL EVIDENCE SUPPORTS THE DENIAL OF WITHHOLDING OF REMOVAL UNDER THE TORTURE CONVENTION BECAUSE PETITIONER FAILED TO ESTABLISH THAT IT IS MORE LIKELY THAN NOT THAT HE WOULD BE SUBJECTED TO TORTURE UPON RETURNING TO KENYA

A. The Torture Convention

1. The Treaty And Implementing Regulations

In the instant appeal, petitioner's sole claim regarding a fear of future mistreatment focuses on his eligibility for relief under the Torture Convention. As of the date of this brief, this Court has not published a decision in which the issue of protection under the Torture Convention has arisen. Therefore, the issue of applicant's eligibility for withholding of removal under the regulations implementing the Torture Convention appears to be a question of first impression in this Circuit.

Article 3 of the Torture Convention provides that a signatory nation shall not "expel, return...or extradite" a person to another country "where there are substantial grounds for believing that he would be in danger of being subjected to torture." See, e.g., Khourassany v. INS, 208 F.3d 1096, 1099

(9th Cir. 2000). The Torture Convention is a non-self-executing treaty. See S. Treaty Doc. No. 100-20 (9188); 136 Cong. Rec. S17486-01, 1990 WL 168442 (Daily Ed. Oct. 27, 1990); Ali v. Reno, 237 F.3d 591 (6th Cir. 2001).

Jurisdiction to hear a claim for protection under its provisions arose only after Congress enacted legislation authorizing implementation of the Torture Convention and granting federal jurisdiction. See id; see generally De la Rosa v. United States, 32 F.3d 8, 10 n.1 (1st Cir. 1994), cert. denied, 514 U.S. 1049 (1995)(treaties that are "not self-executing...could not...give rise to privately enforceable rights under United States law"); In re Estate of Ferdinand E. Marcos Human Rights Litigation, 978 F.2d 493, 503 (9th Cir. 1992), cert. denied, 508 U.S. 972 (1993)("no private cause of action can ever be implied from a non-self-executing treaty").

That legislation is the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. No. 105-277, 112 Stat. 2682-822, which Congress enacted in 1998. The protections in FARRA essentially mirror the protections provided under Article 3 of the Convention. In FARRA, Congress stated, "It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary

return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States." See FARRA § 2242(a); Ali, 237 F.3d at 597.

In FARRA, Congress made the grant of jurisdiction required for the implementation of a non-self-executing treaty. It granted limited jurisdiction to the federal courts to review any decision made on a claim for protection under the Torture Convention, barring jurisdiction except as part of the review of a final order of removal pursuant to section 242 of the Act. See FARRA § 2242(d).

FARRA gave the Attorney General authorization to promulgate regulations implementing the Torture Convention. See FARRA § 2242. The Attorney General promulgated the pertinent regulations, and they became effective on March 22, 1999. See 64 Fed. Reg. 8478 (1999).¹⁹ Therefore, the regulations were in effect at the time of petitioner's removal proceedings and govern this case. See id.

2. Under The Deferential Substantial Evidence Standard of Review, The Board's Denial of

¹⁹ These regulations were incorporated into existing regulations at 8 C.F.R. §§ 3, 103, 208, 235, 238, 240, 241, 253, and 507. The bulk of the new regulations are in 8 C.F.R. § 208.18.

**Petitioner's Request For Withholding Under The
Torture Convention Can Be Reversed Only For
Compelling Reasons**

Questions of law and statutory construction are reviewed de novo, but in applying the principles of Chevron deference, the Court must defer to the Board's construction so long as it is "permissible." INS v. Aguirre-Aguirre, 526 U.S. 415, 424 (1999); Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984); Vue v. INS, 92 F.3d 696, 699 (8th Cir. 1996). As this Court has held, "we must defer to the agency's interpretation unless it is inconsistent with the plain language of the statute or constitutes an unreasonable interpretation of an ambiguous statute." Afolayan v. INS, 219 F.3d 784, 787 (8th Cir. 2000)(citing Chevron, 467 U.S. at 842-45). The principle of deference is particularly applicable to determinations regarding "whether the statutory conditions for withholding [of removal] have been met." Aguirre-Aguirre, 516 U.S. at 424-25.

The standard of review for factual findings is set forth in the new statute governing review of this case. The statute states:

[t]he administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.

INA § 242(b)(4)(B), 8 U.S.C. § 1252(b)(4)(B). This statutory

provision codifies the well-established "substantial evidence" standard of review. Under this standard, a denial of asylum and withholding of removal may be overturned only if the evidence is "so compelling that no reasonable factfinder could fail to find the requisite fear of persecution."²⁰ INS v. Elias-Zacarias, 502 U.S. 478, 484 (1992); Hamzehi v. INS, 64 F.3d 1240, 1242 (8th Cir. 1995); see Chang v. INS, 119 F.3d 1055, 1059 (3d Cir. 1997) (stating that court's "review of the BIA's decision is narrow"); Chun v. INS, 40 F.3d 76, 78 (5th Cir. 1994)(reviewing court may not reverse the Board's factual determinations absent a finding "not only that the evidence supports such a contrary conclusion, but that the evidence compels it")(citing Elias-Zacarias, 502 U.S. at 483-84)(emphasis in original). Therefore, reversal of the Board's decision is not proper if the evidence, and reasonable inferences arising therefrom, support more than one interpretation. See generally Feleke v. INS, 118 F.3d 594, 598 (8th Cir. 1997)("We are not at liberty to reweigh the evidence"); Mikhael v. INS, 115 F.3d 299, 304 (5th Cir.

²⁰ The substantial evidence standard requires the evidence in petitioner's favor to be so strong that, were this a civil trial, he would be entitled to a judgment as a matter of law. See Elias-Zacarias, 502 U.S. at 481 (discussing the substantial evidence standard, and citing NLRB v. Columbian Enameling & Stamping Co, Inc., 306 U.S. 292, 300 (1939)).

1997)("Any disagreement we might have with the BIA's appraisal of the facts is not a sufficient ground for reversal"); Kotasz v. INS, 31 F.3d 847, 851 (9th Cir. 1994)(reviewing court is barred from "independently weighing evidence and holding that petitioner is eligible for [withholding], except in cases where compelling evidence is shown").

3. The Alien Bears the Burden of Proof And Must Demonstrate That It Is More Likely Than Not That He Will Be Tortured, As Defined In The Regulations, In The Country Of Removal

Unlike asylum, which is discretionary, withholding of removal under the Torture Convention is mandatory. 8 C.F.R. § 208.16(d)(1). Pursuant to the implementing regulations, "the burden of proof is on the applicant...to establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal." 8 C.F.R. § 208.16(c)(2). In turn, torture is defined at 8 C.F.R. § 208.18(a)(1) as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

The burden of proof for an applicant seeking withholding of removal under the Convention, like that for an applicant seeking withholding of removal under INA § 241(b)(3), is higher than the burden imposed on an asylum applicant. See 8 C.F.R. § 208.16(c)(2); Kamalthas v. INS, 251 F.3d 1279, 1282 (9th Cir. 2001); Ali, 237 F.3d at 596; cf. Lopez-Zeron v. INS, 8 F.3d 636, 638 (8th Cir. 1993).

B. Substantial Evidence Supports The Board's Decision

Petitioner's brief focuses extensively on his alleged treatment by Kenyan governmental authorities in August 1993, but utterly fails to provide any grounds for his assertion that he faces a clear probability of torture if repatriated. In contrast, the Board assessed and refuted every characteristic and belief that petitioner identified as a potential ground for the government's interest in torturing him, and reasonably concluded that he had failed to carry his high burden for demonstrating withholding eligibility.

In this regard, the Board noted that petitioner admitted in his testimony that he was never questioned about his political beliefs or union activities during the course of his two-week detention in 1993.²¹ A.R. 5; see A.R. 105-10, 116-17.

²¹ It must also be noted that petitioner has not been active in the FORD party, or any other political party, since
(continued...)

Additionally, petitioner's role as a union representative had ended in 1988--five years before his alleged arrest and detention by the Kenyan "special branch." A.R. 5, 101-102. In fact, petitioner conceded that his arrest and detention were solely attributable to the fact that the authorities had learned of his receipt of \$1,500.00 and sought to "blackmail" him. A.R. 105 ("They just wanted me to pay them money").

The Board also determined that petitioner's professed fear of torture was undercut by his ability to leave the country following his detention, and the fact that he subsequently renewed his passport without difficulty.²² A.R. 6, 112, 115; cf. Safaie v. INS, 25 F.3d 636, 640 (8th Cir. 1994)(alien's ability to get visa and leave the country undermined well-founded fear of future persecution). In light of these factors, the Board's decision is amply supported by substantial evidence, and petitioner has certainly not demonstrated that the evidence is "'so compelling that no reasonable fact-finder could fail to find the requisite fear of persecution.'" Nyonzele v. INS, 83 F.3d 975, 981 (8th Cir. 1996)(citing Hamzehi, 64

²¹(...continued)
his departure from Kenya in 1993. A.R. 112-13.

²² According to the Country Report, petitioner, as a civil servant employee of a government bank, would be required to obtain government permission for international travel. A.R. 158.

F.3d at 1242 (quoting Elias-Zacarias, 502 U.S. at 484)). In short, accepting petitioner's account of his ordeal as credible, his withholding claim is based on a specific, isolated set of circumstances that existed in 1993, and thus cannot show that it is more likely than not that he would be tortured if returned to Kenya.

CONCLUSION

For the foregoing reasons, the decision of the Board of Immigration Appeals should be affirmed, and the petition for review should be denied.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7), and Eighth Circuit Rule 28A(c), I certify that respondent's brief:

(1) was prepared using Corel WordPerfect 9 and Courier type in font size 12;

- (2) is monospaced;
- (3) has 10.5 or less characters per inch;
- (4) does not exceed 50 pages; and
- (5) contains less than 1,300 lines of text.

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of September 2001, I caused two copies of the foregoing "Brief for Respondent" and one copy of a computer diskette containing the brief to be served upon petitioner, by having them placed in the Department of Justice mail room in sufficient time for same-day mailing, first class postage prepaid, and addressed to:

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I further certify that the computer diskette has been scanned for viruses and it is virus-free.

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