UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

KENNOLLEY BROOKS, Petitioner, v. IMMIGRATION & NATURALIZATION SERVICE, Respondent.	Civil No.3:02CV02146(AWT)

RULING ON PETITION FOR A WRIT OF HABEAS CORPUS

Petitioner Kennolley Brooks' petition for a writ of habeas corpus is being dismissed for lack of subject matter jurisdiction.

I. FACTUAL BACKGROUND

The petitioner is a native and citizen of Jamaica who entered the United States as an immigrant on or about June 18, 1989. On September 27, 1996, July 6, 2000, April 17, 2001, and June 14, 2001, the petitioner was convicted in Connecticut Superior Court for Possession of a Controlled Substance - Marijuana, in violation of Connecticut General Statutes, § 21a-279(c).

As a result of those convictions, the Immigration and Naturalization Service ("INS") in Hartford, Connecticut

instituted removal proceedings against the petitioner on the following grounds:

> Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act (Act), as amended, in that, at any time after admission, you have been convicted of an aggravated felony as defined in section 101(a)(43)(B) of the Act, that is, an offense relating to the illicit trafficking in a controlled substance, as described in section 102 of the Controlled Substances Act, including a drug trafficking crime, as defined in section 924(c) of Title 18, United States Code.
>
> Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act (Act), as amended, in that, at any time after admission, you have been convicted of a violation of (or conspiracy to attempt to violate) any law or regulation of a state, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act, 21 U.S.C. 802), other than a *single* offense involving possession for one's own use of 30 grams or less of marijuana.

On June 12, 2002, the petitioner was taken into custody by the INS pursuant to a valid warrant for arrest. A removal hearing was held before an Immigration Judge on September 20, 2002. On that day, the Immigration Judge orally denied the petitioner's application for cancellation of removal. The petitioner had until October 21, 2002 to file a notice of appeal to the Board of Immigration Appeals ("BIA"). On October 21, 2002, the petitioner filed a motion for an extension of time, dated October 17, 2002, in which to file a notice of appeal; the motion for an extension of time was

denied on October 22, 2002. The petitioner filed his notice of appeal with the BIA on November 4, 2002. The BIA dismissed the petitioner's appeal as untimely and the Immigration Judge's decision became final.

II. DISCUSSION

Under the Immigration and Nationality Act ("INA"), "[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." 8 U.S.C. § 1252(d)(1); see also De La Cruz v. Ashcroft, 146 F.Supp.2d 294, 296 (S.D.N.Y. 2001) (holding that alien failed to exhaust administrative remedies by failing to timely file administrative appeal with the BIA).

> Statutory exhaustion requirements are mandatory, and courts are not free to dispense with them. Bastek v. Fed. Crop Ins., 145 F.3d 90, 94 (2d Cir. 1998). In particular, the INA's exhaustion requirement constitutes a "clear jurisdictional bar, and admits of no exceptions." Mejia-Ruiz v. I.N.S., 51 F.3d 358, 362 (2d Cir. 1995).

De La Cruz, 146 F.Supp.2d at 297.

Here, the petitioner failed to exhaust his administrative remedies, and consequently, the court lacks subject matter jurisdiction. On September 20, 2002, the Immigration Judge orally denied the petitioner's application

for cancellation of removal. Under applicable regulations, the notice of appeal was required to be filed within 30 calendar days of the Immigration Judge's oral decision unless the last day fell on a weekend or legal holiday, in which case the appeal had to be received no later than the next business day. See 8 C.F.R. § 3.38(b)(c). Thus, the petitioner had until October 21, 2002 to file a notice of appeal with the BIA. Although the petitioner filed a last minute motion for an extension of time, it was denied, and notwithstanding the petitioner's pro se status, it does not appear that there was anything improper about that denial. All that was required of the petitioner by the deadline was the filing of a notice of appeal. See BIA Form EOIR-26. As the petitioner did not file his notice of appeal with the BIA until November 4, 2002, it was untimely. Thus, the BIA properly dismissed his appeal as untimely, and consequently, the petitioner has failed to exhaust his administrative remedies. See Da Cruz v. I.N.S., 4 F.3d 721, 722 (9th Cir. 1993) (explaining that BIA lacked jurisdiction to consider appeal filed one day late); Bennett v. Reno, 2001 WL 80079 (S.D.N.Y. Jan. 30, 2001) (holding that appeal to BIA one day late required dismissal because 30-day appeal period is mandatory and jurisdictional).

The petitioner directs the court's attention to the fact that he recently received permission to appeal his June 14, 2001 conviction. However, even if he is successful in overturning the conviction, he will still have three convictions for violation of Connecticut General Statutes § 21a-279(c), which is still more than "a single offense involving possession for one's own use of 30 grams or less of marijuana." 8 U.S.C.A. § 1227(A)(2)(B)(I) (West 1994). Thus the outcome of his removal hearing would not have changed had he gotten this conviction vacated prior to the Immigration Judge's decision.

III. CONCLUSION

For the reasons set forth above, Kennolley Brooks' petition for a writ of habeas corpus (Doc. #3) is hereby DISMISSED because the court lacks subject matter jurisdiction. Accordingly, the stay of deportation, set forth in the court's Order Staying Deportation (Doc. #5), is hereby LIFTED.

It is so ordered.

Dated this 17th day of April, 2003, at Hartford, Connecticut.

Alvin W. Thompson
United States District Judge