

**COPY**

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

KENNETH FRANCES RABALAIS

**FILED**

APPELLANT

VS.

SEP 20 2007

OFFICE OF THE CLERK  
SUPREME COURT  
COURT OF APPEALS

NO. 2006-CP-1832

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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**IN THE COURT OF APPEALS OF MISSISSIPPI**

**KENNETH FRANCIS RABALAIS**

**APPELLANT**

**VERSUS**

**NO. 2006-CA-01832**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR APPELLEE**

**STATEMENT OF THE CASE**

In September 1995, Kenneth Francis Rabalais was convicted in the Circuit Court of Hancock County on a charge of rape and was sentenced to life imprisonment. (C.P.80) This Court affirmed his conviction and sentence without written opinion on April 7, 1998. *Rabalais v. State*, 708 So.2d 104 (Miss. App.1998).

On Mach 14, 2006, Rabalais filed in the Circuit Court a Motion to Clarify Sentence, which was denied without a hearing on August 16, 2006. (C.P.80-81) Aggrieved by the judgment rendered against him, Rabalais has attempted to perfect an appeal to this Court.

**SUMMARY OF THE ARGUMENT**

Rabalais failed to file his notice of appeal in a timely manner. Accordingly, this appeal should be dismissed for lack of jurisdiction.

In the alternative, the state submits the circuit court did not err in denying Rabalais' motion without a hearing.

**PROPOSITION ONE:**

**THIS APPEAL SHOULD BE DISMISSED FOR LACK  
OF JURISDICTION**

The circuit court's order denying relief in this case was signed on August 16, 2006, and filed on August 18, 2006. (C.P.80-81) Rabalais' notice of appeal was not filed until December 15, 2004, almost four months later.<sup>1</sup> (C.P.112)

M.R.A.P. 4(a) requires that the notice of appeal "shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from." Timely filing has been held to be jurisdictional. *White v. State*, 845 So.2d 760, 761-62 (Miss. App. 2003); *Eades v. State*, 805 So.2d 554, 555 (Miss. App. 2000). Because Rabalais failed to file his notice of appeal in a timely manner, the state respectfully submits this appeal should be dismissed for lack of jurisdiction.

**PROPOSITION TWO:**

**IN THE ALTERNATIVE, THE STATE CONTENDS THE CIRCUIT  
COURT DID NOT ERR IN DENYING RABALAIS' MOTION  
WITHOUT A HEARING**

The Circuit Court denied Rabalais' motion to clarify sentence with an order set out in pertinent part below:

Rabalais' motion to clarify sentence was filed on March 16, 2006. As a result of Hurricane Katrina, Rabalais' file was

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<sup>1</sup>The Notice of Appeal purportedly was signed on September 20, 2006. However, "[t]he controlling date for the rule is the date the notice of appeal is filed; therefore, the date the notice was signed is of little consequence." *Heafner v. State*, 947 So.2d 354, 356 (Miss. App. 2007). That said, the state points out that the notice apparently was signed three days past the 30-day deadline imposed by M.R.A.P. 4(a).

badly damaged and is no longer assessable by this Court. However, in his motion, Rabalais has provided this Court with the necessary factual information. In September 1994, Rabalais was arrested and charged with rape pursuant to Miss. Code Ann. § 97-3-65(2). The crime was allegedly committed on August 25, 1994. On September 13, 1995, a jury found Rabalais guilty of rape. Rabalais was sentenced to life in prison pursuant to Miss. Code Ann. § 47-7-3. In his motion to clarify sentence, Rabalais contends because the crime was committed on August 25, 1994, before Miss. Code Ann. § 470703 was amended, he should be eligible for parole pursuant to the 1993 version of the statute. He further contends the Mississippi Department of Corrections has misapplied the law as amended, thereby increasing his sentence.

Prior to its enactment, Miss. Code Ann. § 47-7-3 allowed a person convicted of a sex crime to be eligible for parole subject to certain exceptions. See Miss. Code Ann. § 47-7-3 (Supp.1993). However, in August 1994, Miss. Code Ann. § 47-7-3 was amended and prohibited any person convicted of a sex crime from being eligible for parole. See Miss. Code Ann. § 47-7-3(1)(b) (Supp.1994). Rabalais claims the amendment applied to crimes committed after October 1, 1994. Since his crime was committed prior to October 1, 1994, Rabalais argues the amendment prohibiting parole for sex crimes is inapplicable in his case.

**Upon review of the statutory history, it appears the statute went into effect on August 23, 1994. Specifically, the statutory history states, "eff from and after passage (approved August 23, 1994.)" Rabalais committed the offense of rape on August 25, 1994, two days after the amendment was passed. Thus, Rabalais' parole eligibility was controlled by Miss. Code Ann. § 47-7-3(1)(b)...**

**Because Rabalais committed the crime of rape on August 25, 1994, Miss. Code Ann. § 470703 (Supp.1994), as amended, is applicable. Since Rabalais does not meet any of the exceptions under the statute, he is ineligible for parole consideration under the above referenced statute and will therefore have to serve out his life sentence.**

(emphasis added) (C.P.80-81)

This ruling is not subject to reversal absent a finding that it is clearly erroneous. *Noel v. State*, 943 So.2d 768, 770 (Miss. App. 2006). The state submits the court's ruling embodies a correct interpretation of the pertinent statutes. No error has been shown in the court's conclusion. The circuit court properly found that this petition was facially devoid of merit and denied it without a hearing.

**CONCLUSION**

The circuit court properly denied Rabalais' motion without a hearing. The judgment entered below should be affirmed.

Respectfully submitted,

**JIM HOOD, ATTORNEY GENERAL  
STATE OF MISSISSIPPI**

A handwritten signature in black ink, appearing to read "Deirdre McCrory", written in a cursive style.

BY: DEIRDRE McCRORY  
SPECIAL ASSISTANT ATTORNEY GENERAL

## CERTIFICATE OF SERVICE

I, Deirdre McCrory, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Jerry O. Terry, Sr.  
Circuit Court Judge  
421 Linda Drive  
Biloxi, MS 39531

Honorable Cono Caranna  
District Attorney  
P. O. Drawer 1180  
Gulfport, MS 39502

Kenneth Frances Rabalais, #49942  
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This the 20<sup>th</sup> day of September, 2007.

  
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