

ARIZONA SUPREME COURT

BETH FAY,

Petitioner,

v.

THE HONORABLE DEWAIN D.
FOX, Judge of the SUPERIOR
COURT OF THE STATE OF
ARIZONA, in and for the County of
MARICOPA,

Respondent Judge,

THE STATE OF ARIZONA;
JORDAN MICHEAL HANSON,

Real Parties in Interest.

CR-20-0306-PR

Court of Appeals, Division One
No. 1 CA-SA 20-0123

Maricopa County Superior Court
No. CR 2015-005451-001

AMICUS BRIEF OF THE ARIZONA ATTORNEY GENERAL

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QUESTION PRESENTED FOR REVIEW

Is a victim entitled to be heard on a Rule 32.1(f) Request for Delayed Appeal concerning restitution?

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I. Introduction and statement of Amicus' interest.¹

The Arizona Attorney General represents the State in all capital appeals and post-conviction actions, as well as in federal habeas proceedings and all appeals in felony criminal cases. The Attorney General, therefore, has an interest in ensuring that Arizona's statutes are interpreted and applied in a manner that complies with the Sixth, Eighth, and Fourteenth Amendments and that will withstand scrutiny by the federal courts. The Attorney General also has an obligation to ensure that Arizona's victims are afforded the rights and protections granted by the Arizona Constitution. To that end, Amicus endeavors to assist this Court with the issue raised by this Court's rephrased question presented for review² in this case.

II. A victim is entitled to be heard on a Request for Delayed Appeal under Rule 32.1(f) of the Arizona Rules of Criminal Procedure.

While not a party to a criminal proceeding, victims "deserve to be heard and to receive fair treatment in the criminal justice system." *Lynn v. Reinstein*, 205 Ariz. 186, 191, ¶ 16 (2003). The United States Supreme Court has recognized this, affirming that "justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to

¹ Amicus files this brief pursuant to Arizona Rule of Criminal Procedure 31.15(b)(1)(B).

a filament. We are to keep the balance true.” *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934)).

To that end, “Arizona has been a national leader in providing rights to crime victims. Adopted as a constitutional amendment in 1990, the Victims’ Bill of Rights [VBR] provides crime victims the right “[t]o be treated with fairness, respect and dignity . . . throughout the criminal justice process.” *Morehart v. Barton*, 226 Ariz. 510, 512, ¶ 9 (2011) (quoting Ariz. Const. art. 2, § 2.1(A)(1)). The VBR also “guarantees the right to be heard,” though “it does not clearly define what that right is.” *State v. Lamberton*, 183 Ariz. 47, 50 (1995) (holding that victims are not “parties” with the right to file their own petition for review). The “implementing statutes and rules cannot eliminate or narrow rights guaranteed by the state constitution.” *Id.* See also 1992 Ariz. Sess. Laws, ch. 229, § 2(2) (noting that the Victims’ Bill of Rights seeks to ensure that “all crime victims are provided with basic rights of respect, protection, participation, and healing of their ordeals”).

This Court has held that victims’ rights must be upheld and yield only when they conflict with a defendant’s *trial* rights. See *Morehart*, 226 Ariz. at 516, ¶ 23 (citing *State v. Riggs*, 189 Ariz. 327, 330 (1997) (“[I]f, in a given case, the victim’s state constitutional rights conflict with a defendant’s federal

(... continued)

² See Order, dated November 4, 2020.

constitutional rights to due process and effective cross-examination, the victim's rights must yield."); *State v. Bible*, 175 Ariz. 549, 602–03 (1993) (noting that victims' rights cannot conflict with right to a fair trial).

The narrow limitation on victims' rights only when they conflict with a defendant's fair trial rights recognizes the difference in due process considerations for a defendant pre-conviction versus post-conviction, with due process rights decreasing once a defendant has been convicted. The Sixth and Fourteenth Amendments ensure a defendant rights specific to *trial*, "where the State by presenting witnesses and arguing to a jury attempts to strip from the defendant the presumption of innocence and convict him of a crime." *Murray v. Giarratano*, 492 U.S. 1, 7 (1989). "A criminal defendant proved guilty after a fair trial does not have the same liberty interests as a free man." *District Attorney's Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52, 68 (2009). This is because "[a]t trial, the defendant is presumed innocent and may demand that the government prove its case beyond a reasonable doubt." *Id.* at 68–69. However, once a fair trial has resulted in a conviction for the offense for which the defendant was charged, "the presumption of innocence disappears." *Id.* at 69 (quoting *Herrera v. Collins*, 506 U.S. 390, 399 (1993)).

The interaction between the VBR and Rule 32.1(f) occurs *after* conviction, and thus victims' rights do not have to yield to any due process trial

rights belonging to the defendant. Rule 32.1(f) of the Arizona Rules of Criminal Procedure provides an avenue for post-conviction relief if “the failure to timely file a notice of appeal was not the defendant’s fault.” Because there is no federal constitutional right to appeal (*see McKane v. Durston*, 153, U.S. 684, 687–88 (1894)), any state victims’ right to be heard must be honored. Several rules and statutes implementing the VBR intimate that an Arizona crime victim has a right to be heard on the propriety of an untimely appeal.

While the instant case involves an attempt at a belated appeal from a negotiated restitution settlement, Rule 32.1(f) is not limited to circumstances involving restitution. A.R.S. § 13–4418 requires that victims’ rights “shall be liberally construed to preserve and protect the rights to which victims are entitled.” *See also* Ariz. R. Crim. P., Rule 39(b) (“These rules *must* be construed to preserve and protect a victim’s rights to justice and due process.”) (emphasis added). And A.R.S. § 13–4435(F) requires courts to “consider the victim’s views and the victim’s right to a speedy trial” before ruling on a motion for a continuance. This is because the VBR also guarantees to a victim the “prompt and final conclusion of the case after the conviction and sentence.” Ariz. Const. art. 2, § 2.1(A)(10). *See also* Ariz. R. Crim. P. 39(b)(17) (guaranteeing “the right to a speedy trial or disposition and a prompt and final conclusion of the case after conviction and sentence”). Thus, particularly in

the post-conviction context, a victim's right to a prompt and final conclusion requires a court to consider a victim's views before delaying the case further.

A delayed or untimely criminal appeal essentially constitutes a long continuance. It restarts an appellate process that will itself, nearly inevitably, include additional continuances for both parties (the defendant and the state) to brief the appeal, which then gives way to *additional* review by the appellate courts. Moreover, permitting a victim to exercise the right to be heard on the subject of whether a defendant is entitled to relief under Rule 32.1(f) does not impinge at all on a defendant's ability to request that relief. And while a victim may or may not have information relevant to the inquiry surrounding a defendant's responsibility (or lack thereof) for the failure to timely file a notice of appeal, the victim has a state constitutional right to be heard regarding the impact a delayed appeal will have on the victim's right to a "prompt and final conclusion of the case after conviction and sentence." *See* Ariz. Const. art. 2, § 2.1(10).

Further, although this Court has held that a victim is not a party and thus cannot file his or her own substantive petition for review from the decision of a post-conviction court, it specifically did "not address whether the victim can be heard in some manner other than in a separate petition for review." *Lamberton*, 183 Ariz. at 49–50. In fact, this Court noted that the way an appellate court

“hears” a victim is through review of the trial court record. *Id.* at 50. The only way an appellate court will hear the victim’s position on whether a defendant is entitled to a delayed appeal under Rule 32.1(f) is if the victim is heard in the post-conviction court. In fact, arguably, if a court refused to hear a victim’s views on granting an untimely appeal, the victim could request the court to reexamine its ruling under A.R.S. § 13–4436(A):

The failure to comply with a victim’s constitutional or statutory right is a ground for the victim to request a reexamination proceeding within ten days of the proceeding at which the victim’s right was denied or with leave of the court for good cause shown. After the victim requests a reexamination proceeding and after the court gives reasonable notice, the court *shall* afford the victim a reexamination proceeding to consider the issues raised by the denial of the victim’s right. Except as provided in subsection B, the court *shall* reconsider any decision that arises from a proceeding in which the victim’s right was not protected and *shall* ensure that the victim’s rights are thereafter protected.

(Emphasis added.) As previously noted, a delayed appeal impacts a victim’s constitutional right to a prompt and final conclusion after the conviction and sentence. *See* Ariz. Const. art. 2, § 2.1(10). And a victim is entitled to be heard on any criminal process that impacts that constitutional right. *See Lamberton*, 183 Ariz. at 50.

This right to be heard, of course, applies to a 32.1(f) request for delayed appeal concerning restitution, as reflected in several rules and statutes. For

example, A.R.S. § 13–4402 (A) provides, in pertinent part, that victims’ rights continue through the post-conviction proceedings:

. . . The rights and duties continue to be enforceable pursuant to this chapter until the final disposition of the charges, including acquittal or dismissal of the charges, all post-conviction release and relief proceedings and the discharge of all criminal proceedings relating to restitution. If a defendant is ordered to pay restitution to a victim, the rights and duties continue to be enforceable by the court until restitution is paid.

(Emphasis added.) Additionally, A.R.S. § 13–1337(E) grants a victim the right to be heard on issues affecting restitution:

Notwithstanding any other law and without limiting any rights and powers of the victim, the victim has the right to present evidence or information and to make an argument to the court, personally or through counsel, at any proceeding to determine the amount of restitution pursuant to section 13–804.

(Emphasis added.) A delayed appeal about restitution is necessarily designed to impact the amount of the restitution.

Further, Rule 39(b)(7)(F) of the Arizona Rules of Criminal Procedure gives a victim “upon request, the right to notice of and to be heard at any criminal proceeding involving: . . . restitution.” The right to be heard regarding restitution cannot be fairly limited only to an in-person restitution hearing, but necessarily includes the ability to lodge a written pleading regarding a defendant’s request to a delayed appeal about restitution as well. *See* Ariz. R. Crim. P., Rule 39(c)(4) (explaining exercising victim right to be heard at

sentencing, including restitution, and permitting victim to present evidence, information, and opinions, written or oral impact statements).

Given the constitutional and statutory mandate to liberally construe the criminal statutes and rules to ensure the promise of the rights granted to victims in the VBR, combined with the lack of any adverse impact on a defendant's due process trial rights, this Court should answer its rephrased issue in the affirmative and hold that a victim is entitled to be heard on a Rule 32.1(f) Request for Delayed Appeal concerning restitution.

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CONCLUSION

Based on the foregoing authorities and arguments, Amicus respectfully requests that this Court hold that a victim is entitled to be heard on a Rule 32.1(f) Request for Delayed Appeal.

Respectfully submitted,

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