

1 Treasure VanDreumel, 012392
2 **LAW OFFICE OF TREASURE VANDREUMEL, PLC**
3 801 N. 1st Avenue
4 Phoenix, Arizona 85003
5 602-253-7348
6 vandreumellaw@gmail.com

7 Lori L. Voepel, #015342
8 **JONES, SKELTON & HOCHULI, PLC**
9 40 N. Central Avenue, Suite 2700
10 Phoenix, Arizona 85004
11 (602) 263-7312
12 lvoepel@jshfirm.com
13 minuteentries@jshfirm.com
14 Attorneys for RPI Hanson

15
16
17 **IN THE SUPREME COURT**
18 **STATE OF ARIZONA**
19

20 BETH FAY,

21
22 Petitioner,

23 v.

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

Respondent Judge,

and

STATE OF ARIZONA; JORDAN
MICHAEL HANSON,

Real Parties in Interest.

Arizona Supreme Court Case
No. CR20-0306-PR

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

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

**RPI HANSON'S
SUPPLEMENTAL BRIEF
(RESPONSE TO BRIEF OF
ARIZONA ATTORNEY
GENERAL, AMICUS CURIAE)**

1 **I. The procedural construct governing criminal appeals does not**
2 **implicate victim rights.**

3 Restitution orders were entered in this case on April 5 and May 21,
4 2019. Unaware of those orders and of his right to appeal those orders,
5 Hanson did not file a Notice of Appeal within 20 days of their entry. Rule
6 31.2(B), Ariz.R.Crim.P. On July 12, 2019–52 days following entry of the last
7 restitution order entered–Hanson timely filed a Notice of Post Conviction
8 Relief. Rule 32.4(B). The State–now acting as *amicus curiae* despite the fact
9 it is also a party to this action–joins Petitioner’s claim that victims are
10 entitled to be heard on whether Hanson’s failure to timely appeal was his
11 fault. Rule 32.1(f).

12 *Amicus’* brief provides much about which there is no disagreement or
13 debate: The rights afforded by the Victim’s Bill of Rights (“VBR”) as
14 implemented by the Victim Rights Implementation Act (“VRIA”) must be
15 preserved, protected and honored; those rights apply throughout the
16 entirety of the criminal case. (*Amicus*, at 1-2).

17 *Amicus* appears to argue that victim’s rights must yield to those of a
18 defendant “only when they conflict with a defendant’s *trial* rights.” (*Amicus*,
19 at 2-3, *emphasis* in original). Thus, it reasons, because a “there is no federal
20 constitutional right to appeal”, and because a defendant’s “due process
21 rights decreas[e] once a defendant has been convicted”, “victim’s rights do
22 not have to yield to any due process trial rights belonging to the defendant”
23 in post-conviction proceedings. *Ibid.* “Any state victims’ right to be heard
24 must be honored”, it concludes. (*Id.*, at 4).

25 Trouble is, there exists no victim right “to be heard” on claims raised
26 under Rule 32.1. It is true that victims have a right to be heard when their
27 constitutional rights conflict with those of a defendant–such as when a
28

1 defendant seeks to waive his speedy trial right but a victim asserts their
2 own speedy trial right, art. II, §2.1(A)(10) of the Arizona Constitution. But
3 much like a victim's right to a "speedy disposition", *ibid.*, does not grant
4 victims a right "to be heard" on whether an accused may plead not guilty
5 and proceed to trial, the right to a "prompt and final conclusion of the case
6 after the conviction and sentence", *ibid.*, does not grant victims a "right to
7 be heard" on whether a defendant may appeal. Like the right to trial by
8 jury, a criminal defendant's right to appeal is constitutionally guaranteed
9 and may not, under any circumstances, be thwarted by crime victims.

10 It is clear that, following conviction and sentencing, crime victims lack
11 any right to be heard on whether the defendant may file a Notice of Appeal.
12 So too, pursuant to Rule 32.1(f), whether the failure to file a timely Notice of
13 Appeal was the defendant's fault does not implicate any victim right.
14 Should a court find that such failure *was not* the defendant's fault, he is
15 placed in the same position he would have been in had the appellate
16 deadline not been missed—a position which, as stated, does not implicate
17 any victim right.

18 On the other hand, should a court find the failure to timely appeal *was*
19 the defendant's fault, the defendant may seek higher court review of that
20 decision before proceeding on other claims raisable under Rule 32.1. *See*,
21 Rule 32.16(a) (authorizing review); *State v. Rosales*, 205 Ariz. 86 (App.2003)
22 ("request for delayed appeal is not a substantive request for relief, but a
23 procedural gateway to the appellate court"; restricting first Rule 32 petition
24 to a request for delayed appeal does not waive any potential claims arising
25 under any of Rule 32.1's other provisions.).

26

27

28

1 This procedural construct is deliberately aimed at protecting a
2 defendant's constitutional right of appeal from unintentional, unknowing
3 and unwitting waiver while simultaneously preserving the defendant's due
4 process rights. Nothing within its provisions implicates victim's rights.

5 **II. *Amicus'* argument is unsupported by the law.**

6 At the outset, *Amicus'* contention that a criminal defendant's due
7 process rights "decrease" after conviction is gravely concerning,
8 particularly coming from the State's top law enforcement agency tasked
9 with representing the State "in all capital appeals and post-conviction
10 actions, as well as in federal habeas proceedings and all appeals in felony
11 cases." (*Amicus*, at 1). Its suggested erosion of the Clause's protections
12 because "there exists no federal constitutional right to appeal" is equally
13 disconcerting and should not go unnoticed.

14 Although not required by the federal Constitution, a state has great
15 discretion and may nonetheless provide defendants with certain appellate
16 rights, so long as the appellate procedures comport with due process.
17 *Martinez v. California*, 528 U.S. 152, 163-64 (2000); *Griffith v. Illinois*, 351 U.S.
18 12, 17-18 (1956). As explained in *Evitts v. Lucey*, 469 U.S. 387, 393 (1985),
19 "[i]f a State has created appellate courts as an integral part of the system for
20 finally adjudicating the guilt or innocence of a defendant, procedures used
21 in deciding appeals must comport with the demands of the Due Process
22 and Equal Protection Clauses of the Constitution." (internal quotations and
23 citations omitted). Indeed, "the Fourteenth Amendment guarantees a
24 criminal appellant pursuing a first appeal as of right certain minimum
25 safeguards necessary to make that appeal 'adequate and effective' ...".
26 *Evitts, supra.*, at 392, quoting *Griffin, supra.*, at 20.

1 In Arizona, the state constitutional right of appeal guaranteed
2 criminal defendants by article 2, §24 necessarily includes the panoply of
3 federal and state guarantees of due process of law, article 2, §4. The
4 touchstone being fundamental fairness, defendants are entitled to an
5 opportunity be heard at a meaningful time and in a meaningful manner
6 regarding the legal propriety of their conviction(s) and/or sentence(s). *See,*
7 *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976)(“The fundamental
8 requirement of due process is the opportunity to be heard at a meaningful
9 time and in a meaningful manner.”). Where that appeal is prevented
10 through no fault of the convicted individual, the Due Process Clause
11 provides an avenue to remedy the defect. *See, e.g., Ray v. Gonzales*, 439 F.3d
12 582 (9thCir.2006)(where alien is prevented from filing an appeal due to
13 counsel’s error, court will find denial of due process if plausible grounds for
14 relief on underlying claim can be demonstrated).

15 *Amicus’* contentions that a defendant’s due process rights are
16 “decreased” or eroded in the appellate and post-conviction process finds no
17 basis in the law.

18 With this in mind, we turn to *Amicus’* next contention that “victim’s
19 rights do not have to yield to any due process trial rights belonging to the
20 defendant.” This too is incorrect, for at least two reasons: First, it is clear
21 that “when the defendant’s constitutional right to due process conflicts with
22 the Victim’s Bill of Rights in a direct manner..., then due process is the
23 superior right. This is so because due process is the foundation of our
24 system of laws, having been first provided by the Magna Carta and given to
25 us by our founders in the United States Constitution. When there is a
26 conflict, the due process clause of the U.S. Constitution prevails over a
27
28

1 provision of a state constitution by virtue of the Supremacy Clause...". *State*
2 *ex rel Romley v. Superior Court*, 172 Ariz. 232, 236 (1992). Thus, contrary to
3 *Amicus'* stance, the federal due process right—whether attendant to trial or
4 post-conviction proceedings—is always superior to a crime victim's state
5 constitutional rights.

6 Second, and more to the point here, although §2.1(A)(11) of the VBR
7 facially grants victims a "right" to have *all* rules of criminal procedure
8 protect victims, this Court narrowly construed that provision to "deal[]
9 only with procedural rules *pertaining to victims.*" *Slayton v. Shumway*, 166
10 Ariz. 87, 92 (1990)(*emphasis added*). Claims brought pursuant to Rule 32.1's
11 subsections are simply not procedural rules "pertaining to victims." Rather,
12 claims brought pursuant to subsections (a) through (h), excluding (f), are
13 purely claims challenging the legal propriety of the defendant's conviction
14 and sentence. Subsection (f) presents the sole question of whether a
15 defendant's failure to timely appeal was his fault; there simply exists no
16 "right to be heard", unique and peculiar to crime victims, on that subject.

17 Ignoring this, *Amicus* conflates the issue currently before this Court.
18 The issue is whether the VBR grants victims a right to be heard on whether
19 failure to timely appeal *was the defendant's fault*. What *Amicus* (and
20 Petitioner) really argue is that victims possess a right "to be heard" on
21 whether a defendant should be afforded his constitutional right of appeal.
22 The distinction is subtle, perhaps, but important. The former involves a
23 factual inquiry concerning fault, embedded within a procedural rule not
24 pertaining to victims. *Slayton, supra*.

25 The latter pits a defendant's constitutional right of appeal against a
26 victim's right under §2.1(A)(10)—a circumstance ostensibly, under *Amicus'*

27
28

1 view, requiring the balancing of competing rights. As such, like Petitioner,
2 *Amicus* tries mightily to concoct a “right to be heard” and thus to create
3 “conflicting” rights between Hanson and the victim. Creative as it is,
4 *Amicus* contends: 1) “the victim has a state constitutional right to be heard
5 regarding the impact a delayed appeal will have on the victim’s right to a
6 ‘prompt and final conclusion of the case after conviction and sentence’”;
7 and 2) Rule 39(b)(7)(F), along with its companion statute A.R.S. §13-
8 4437(E)¹, provides the right to be heard on whether a delayed appeal should
9 be granted because it constitutes a “criminal proceeding involving
10 restitution.” (*Amicus*, at 5, 7).

11 Neither argument was presented to the superior court or court of
12 appeals on special action; both are therefore waived. *See Paloma Inv. Ltd.*
13 *Partnership v. Jenkins*, 194 Ariz. 133, 137 ¶17 (App.1998) (“New arguments
14 may not be raised for the first time on appeal.”); *Rand v. Porsche Fin. Servs.*,
15 216 Ariz. 424, 434 n. 8, ¶39 (App. 2007)(noting that arguments not raised in
16 the trial court are waived on appeal); *Rigoli v. 44 Monroe Mktg., LLC*, 236
17 Ariz. 112, 120 ¶28 (App.2014) (“Issue and arguments raised for the first
18 time on appeal are untimely and usually deemed waived.”); *State v. Mills*,
19 242 Ariz. 33, 39 ¶18 (App.2017) (“We do not address an argument made for
20 the first time on appeal.”); *State v. Flores*, 160 Ariz. 235, 238 (App.1998)
21 (same). Moreover, this Court bases its opinions “solely on legal issues
22 advanced by the parties themselves”, not on those advanced by *amicus*
23 *curiae*. *See, Ruiz v. Hull*, 191 Ariz. 441, 446 ¶15 (1998); *State v. Glassel*, 233
24 Ariz. 353, 355 ¶12 (2013). This notwithstanding, *Amicus*’ stance lacks merit.

25

26 ¹ *Amicus* mis-identifies this statute as “A.R.S. §1337(E)”, which does
27 not exist. (*Amicus*, at 7).

28

1 *State v. Sahagun-Llamas*, 248 Ariz. 120 (App.2020)² demonstrates the
2 flaw in *Amicus*' stance. There the defendant absconded during his trial, was
3 convicted *in absentia* and arrested some thirteen years later. Following
4 sentencing, it was discovered that a trial transcript was missing; the record
5 could not be reconstructed for appeal.

6 The state contended the defendant was at fault for the missing
7 record; had he not absconded and timely appealed, fresher memories
8 would have permitted reconstruction of the record, it said. By absconding,
9 the defendant "forfeited his right to a full record on appeal." 248 Ariz. 120,
10 ¶27. The court disagreed, finding the defendant "received neither actual
11 nor constructive notice that his flight could affect his right to an appellate
12 record" and thus, "he could not possibly have knowingly and intelligently
13 waived his appellate rights by absconding." *Id.*, at ¶29.

14 The state next contended "a new trial would violate the constitutional
15 rights of the victims, in particular the right to a 'prompt and final
16 conclusion of the case after the conviction and sentence.' Ariz.Const. art. II,
17 §2.1(A)(10)." *Id.*, at ¶30. Rejecting that claim, the Court said:

18 Some delay is inevitable any time we grant a new trial.
19 Further, like the victim's right to finality, the defendant's right
20 to appeal is expressly protected in the Arizona Constitution.
21 See *State ex rel. Romley v. Superior Court*, 172 Ariz. 232, 240-41,
22 836 P.2d 445, 453-54 (App.1992) (balancing defendant's right to
23 due process against victim's constitutional rights). The state
24 has failed to offer any criteria by which we could harmonize or
25 balance those interests here.

26 The court vacated the convictions and sentences and ordered a new trial.

27 The message gleaned from *Sahagun-Llamas* and *State ex rel. Romley v.*
28 *Superior Court* is that occasionally, "the Victim's Bill of Rights must yield to

² Review denied May 27, 2020.

1 the federal and state constitutions' mandates of due process of law...". *State*
2 *ex rel Romley*, 172 Ariz., at 240-241. A defendant's right of appeal, or the
3 grant of a new trial comprise two such occurrences.

4 **B. Neither Rule 39 nor the VRIA grants victims a "right to be**
5 **heard" on claims raised under Rule 32.1(f):**

6 Rule 32.9 grants only *the State* an opportunity to respond to claims
7 brought pursuant to Rule 32.1. A crime victim's rights "to be heard" are
8 expressly set forth in Rule 39(b)(7). Rule 39(b)(7)(F) grants crime victims a
9 right to be heard "at any criminal proceeding involving... restitution."
10 (*Amicus*, at 7). A.R.S. §13-4437(E) states essentially the same. (*Amicus*, at 7).

11 However, as this Court "explained in *Brown*³... because [§2.1(A)(10)]
12 'neither creates a right nor defines a right peculiar and unique to victims'",
13 the provision cannot serve as a source of authority for the legislature to
14 usurp this court's rulemaking authority. *Reed*, at ¶23. The VRIA
15 demonstrates the legislature has not, under the auspices of defining and
16 implementing §2.1(A)(10), even attempted to usurp Rule 32.9 or Rule
17 39(b)(7) by granting victims a right to be heard on claims brought under
18 Rule 32.1—likely because Rule 32.1 is not a procedural rule "pertaining to
19 victims". *Slayton v. Shumway*, *supra*. The rights provided victims in A.R.S.
20 §13-4437(E) does not alter that fact, since a Rule 32.1(f) claim is *not* a
21 "proceeding to determine the amount of restitution [owed] pursuant to §13-
22 804" regardless of the subject matter of the anticipated appeal.

23 Expanding on a victim's non-existent "right to be heard" concerning a
24 claim brought pursuant to Rule 32.1(f), *Amicus* contends that "if a court
25 refused to hear a victim's views on granting an untimely appeal, the victim

26
27 ³ *State ex rel. Napolitano v. Brown*, 194 Ariz. 340, 343 ¶¶12-13 (1999).

1 could request the court to reexamine its ruling under A.R.S. §13-4436(A)."
2 (*Amicus* Brief, at 6). This too is incorrect; the subject matter of Rule 32.1(f)'s
3 inquiry is outside the scope of enforcing any particularized victim right.
4 *State ex rel. Montgomery v. Padilla, supra.*

5 Quite obviously, *Amicus'* contention regarding a victim's "ability to
6 lodge a written pleading regarding a defendant's request [for] delayed
7 appeal" is lawyer-speak for a professed victim "right" to plead defenses to
8 the claim that failure to timely appeal was not the defendant's fault—which
9 is precisely what Petitioner did here. But *State v. Lamberton* unambiguously
10 recognized: "[U]nder the rules for post-conviction relief proceedings,"
11 crime victims are not parties to the action and thus, "neither the VBR nor
12 the VRIA gives victims a right to control the proceedings, to plead
13 defenses, or to examine or cross-examine witnesses; the VBR and the VRIA
14 give victims the right to participate and be notified of certain criminal
15 proceedings. This is not the same as making victims 'parties.'" 183 Ariz.
16 47, 49 (1995) (emphasis added).

17 So, no. Victims do not possess a right to "lodge a written pleading"
18 asserting defenses to the claim that the defendant's failure to timely appeal
19 was no fault of his own; only the State may plead such defenses.

20 III. CONCLUSION

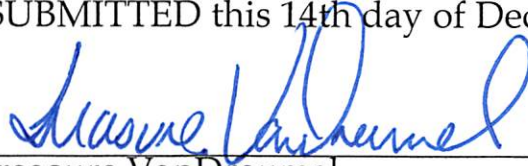
21 At bottom, like Petitioner, *Amicus* baldly declares existence of an
22 unwritten "right to be heard" concerning a rule of criminal procedure
23 which on its face does not pertain to victims. *Slayton v. Shumway, supra.*
24 Because crime victims lack any right to a particular outcome in a criminal
25 case, the VBR, VRIA and court rules are intentionally silent as to any victim
26 "right to be heard" concerning: whether a defendant's conviction or
27
28

1 sentence violated the state or federal constitution, Rule 32.1(a); whether a
2 defendant received ineffective assistance of counsel during any criminal
3 proceeding, Rule 32.1(a); whether the court possessed subject matter
4 jurisdiction over the case, Rule 32.1(b); whether the sentence imposed was
5 authorized by law, Rule 32.1(c); whether the defendant is in custody after
6 his sentence has expired, Rule 32.1(d); whether there exists newly
7 discovered material facts which probably would have changed the
8 judgment or sentence, Rule 32.1(e); whether there has been a significant
9 change in the law that, if applied to the case, would probably overturn the
10 defendant's judgment or sentence, Rule 32.1(g); *or* whether the defendant
11 has demonstrated by clear and convincing evidence that no reasonable fact
12 finder would find the defendant guilty beyond a reasonable doubt or
13 would find him eligible for the death penalty, Rule 32.1(h).

14 So too, Rule 32.1(f) is a procedural rule which implicates a
15 defendant's constitutional right "to appeal in all cases" – "the manner in
16 which the right may be exercised is subject to control through the use of
17 procedural rules." *Reed*, 248 Ariz., at ¶14. The rule requires a showing that
18 the failure to timely file a notice of appeal was not the defendant's fault. As
19 one not pertaining to victims, the rule neither implicates nor affects rights
20 unique and specific to victims. No amount of wishful thinking or creative
21 lawyering alters that fact, nor can a "right to be heard" on the subject be
22 created where, as here, no such right exists within the VBR. *Knapp v.*
23 *Martone*, 170 Ariz. 237, 239 (1992) (emphasizing "Arizona courts must
24 follow and apply the plain language of [the VBR]").

25
26
27
28

1 RESPECTFULLY SUBMITTED this 14th day of December, 2020.

2
3 

4 Treasure VanDreumel
5 Lori Voepel
6 Attorneys for RPI Hanson
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28