

**Supreme Court No. 94567-5
(Court of Appeals No. 74713-4-I)**

**THE SUPREME COURT OF THE STATE OF
WASHINGTON**

STATE OF WASHINGTON, Respondent,

v.

TERRI HUIZENGA, Appellant.

ANSWER TO PETITION FOR REVIEW

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A. IDENTITY OF RESPONDENT

Respondent, State of Washington, by Hilary A. Thomas, appellate deputy prosecutor for Whatcom County, seeks the relief designated in Part

B.

B. COURT OF APPEALS DECISION AND RELIEF REQUESTED

Respondent asks this Court to deny Petitioner Huizenga's Petition for Review of its unpublished decision reversing her sentence based on the State's concession that defense counsel had been ineffective in failing to argue that her two convictions constituted the same course of criminal conduct, but denying her claim that the court's consideration of her voluntary allocution in which she did not accept responsibility for her crime violated her right against self-incrimination. See App. A to Petitioner's petition.

C. ISSUES PRESENTED FOR REVIEW

1. Whether this Court should consider and accept review of petitioner's "due process" argument where petitioner did not assign error to and did not brief the issue as a due process argument, but only as a violation of her right against self-incrimination under the Fifth Amendment.

D. STATEMENT OF THE CASE

Petitioner Huizenga was found guilty of felony harassment and assault in third degree. She requested a first-time offender sentence which

the court denied, imposing instead a standard range sentence. Pet. App. A. On appeal, Huizenga asserted that defense counsel had been ineffective for failing to argue that the offenses constituted the same course of criminal conduct and that the sentencing judge had violated her right against self-incrimination. She asserted two assignments of error: one regarding the ineffective assistance of counsel and the other was set forth as:

The trial court violated defendant’s Fifth Amendment right against self-incrimination when it denied her request for a first-time offender waiver based on her refusal “to acknowledge any responsibility whatsoever.”

She summarized the issue regarding this assignment of error as to whether the court’s reliance on her refusal to acknowledge responsibility “improperly punished [her] for the lawful exercise of her Fifth Amendment right against self-incrimination, which continues through sentencing and the appeal.” Huizenga did not object at sentencing, on due process or Fifth Amendment grounds, to the court considering her voluntary allocution in imposing sentence. She did not cite to State v. Garibay, 67 Wn. App. 773, 841 P.2d 49 (1992), *overruled on other grounds by State v. Moen*, 129 Wn.2d 535, 919 P.2d 69 (1996), or State v. Ramires, 109 Wn. App. 749, 37 P.3d343 (2002), *rev. den.*, 146 Wn.2d 1022 (2002) in her opening brief and did not file a reply brief, but did file

a statement of additional authorities before oral argument including those cases and did reference them in her motion for reconsideration. Huizenga did not make a due process argument in her opening brief. She asserted at oral argument that a sentencing court could not consider at all a defendant's lack of remorse in deciding not to impose a sentencing alternative.

http://www.courts.wa.gov/appellate_trial_courts/appellateDockets/index.cfm?fa=appellateDockets.showOralArgAudioList&courtId=a01&docketDate=20170306.

In its response, the State conceded that defense counsel had been ineffective in failing to make an argument that the two offenses were the same course of criminal conduct and that the matter should be remanded to permit defense counsel an opportunity to do so. The State addressed Petitioner's self-incrimination argument arguing that Huizenga did not invoke her Fifth Amendment right against self-incrimination and that the judge did not violate it in declining to impose a first time offender waiver sentence, noting that Huizenga voluntarily chose to speak at sentencing.

The Court of Appeals on this issue ruled:

... Huizenga has not established that the sentencing court violated her Fifth Amendment right against compelled self-incrimination in sentencing her. Accordingly, she presents no constitutional ground authorizing her appeal from a standard range sentence.

Slip Opinion at 8. The opinion then addressed the argument counsel made at oral argument that the only factors a sentencing court could consider are the criminal history and the facts of the offense. Slip Opinion at 8-12; http://www.courts.wa.gov/appellate_trial_courts/appellateDockets/index.cfm?fa=appellateDockets.showOralArgAudioList&courtId=a01&docketDate=20170306.

E. REASONS WHY REVIEW SHOULD NOT BE ACCEPTED

The State files this answer only to highlight the fact that Petitioner’s “due process” argument was not raised in her initial briefing below, and therefore this Court should not accept review of this case on that basis. The State believes that its briefing below otherwise adequately addresses the self-incrimination argument that Petitioner did initially brief below, and submits that review should not be accepted.

Under RAP 13.4(b), this court will grant review only:

- (1) if the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) if the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
- (3) if a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) if the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

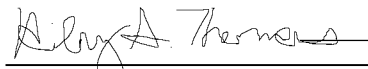
Petitioner's asserts that review should be accepted because this case presents a significant question of constitutional law and because the Court of Appeals opinion conflicts with State v. Garibay, 67 Wn. App. 773, 841 P.2d 49 (1992) and State v. Ramires, 109 Wn. App. 749, 37 P.3d 343 (2002). With respect to Garibay, the State would note that the issue in that case was whether the sentencing court could consider general lack of remorse as an aggravating factor in imposing an exceptional sentence, noting that lack of remorse needs to be egregious in order to constitute an aggravating factor. Garibay, 67 Wn. App. at 781. With respect to Ramires, that court also found that the defendant's lack of remorse in that case, which was consistent with his failed defense, was not a sufficient basis for imposition of an exceptional sentence. Ramires, 109 Wn. App. at 766. The court did note however, that egregious lack of remorse can constitute the basis for imposition of an exceptional sentence. *Id.* at 765-66. To the extent that petitioner is now characterizing her Fifth Amendment claim as a due process violation, the State submits that issue is not properly before this Court as no assignment of error or argument in her initial briefing was predicated on a due process argument.

F. CONCLUSION

For the reasons set forth above and in its briefing below, Respondent, State of Washington, respectfully requests that this Court not

accept discretionary review and permit this matter to be remanded to the sentencing court for reconsideration of sentence on the basis of whether the two offenses should be considered the same course of criminal conduct.

Respectfully submitted this 16th day of June, 2017.



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CERTIFICATE

I CERTIFY that on this date I caused to be delivered a true and correct copy of the document to which this Certificate is attached to this Court and appellant's counsel, addressed as follows:

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6/16/17

LEGAL ASSISTANT

DATE

WHATCOM COUNTY PROSECUTOR'S OFFICE APPELLATE DIVISION

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