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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON

Respondent

v.

PHILLIP L SCHLOREDT,

Appellant

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ANSWER TO PETITION FOR REVIEW

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Prosecuting Attorney

KATHLEEN WEBBER  
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 ORIGINAL

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## **I. STATEMENT OF THE CASE**

The defendant, Phillip Schloredt, was convicted of one count of second degree burglary alleged to have been committed while the defendant was on community custody. 1 CP 171-72. He was convicted as charged after a jury trial. 1 CP 135. The defendant's trial counsel withdrew before sentencing and new counsel, Ms. Rivera, was appointed to represent the defendant for post-conviction proceedings. 1 CP 15-20, 180-82.

Ms. Rivera met with the defendant to discuss the merits of a motion for new trial that he wanted to bring. She investigated his claims, and researched the merits of his motion. After discussing the case with her supervisor, Ms. Rivera determined that she could not bring the motion without providing the court authority that was contrary to her client's position. She informed the defendant that she would not brief his motion for arrest of judgment under CrR 7.4(a) on the basis that there was insufficiency of proof of a material element of the crime. Ms. Rivera did arrange for a transcript of a portion of the trial to investigate a claim the defense had not been provided complete discovery. 1 CP 15-20; 1-13-12 RP 1-6; 1-31-12 RP 9.

The defendant filed a Motion for Arrest of Judgment and/or New Trial. 1 CP 117-128. Ms. Rivera notified the court that she would not be presenting the defendant's motion, but that she was willing to help the defendant with research and filing any reply to the State's response. 1-13-12 RP 1-2.

The matter was continued to January 31. At that time Ms. Rivera stated that she was appearing on behalf of the defendant, but would not participate in his motion for new trial. The court then heard from the defendant on his motions. Although the defendant requested the motion for arrest of judgment be heard later, he argued both the motion to arrest judgment and motion for new trial based on ineffective assistance of counsel. 1-31-12 RP 2-18. Counsel did assist the defendant in his oral argument by inquiring whether the court had reviewed a transcript of the relevant portion of the trial. 1-31-12 RP 9. The court addressed both arguments, and then denied the defendant's motions. 1-31-12 RP 18-23.

The sentencing hearing was continued to February 27 at which time the parties anticipated the defendant would argue for arrest of judgment pursuant to CrR 7.4 based on insufficiency of the proof of a material element of the crime. 1-31-12 RP 29-34; 2-8-12; RP 1-2. On that date the defendant stated that he did not want to

represent himself on this motion. Ms. Rivera stated that she would represent the defendant at sentencing, but not on the motions. The court noted that a new attorney would not likely remedy the problem faced by Ms. Rivera. It gave the defendant the option of representing himself on the motions, or having Ms. Rivera represent him with the understanding that she would present authority that conflicted with his position. The defendant conferred with Ms. Rivera, and then opted to represent himself on the motion. 2-27-12 RP 6-16, 19-24.

The court then asked the defendant if he understood he had been charged with and convicted of a burglary at trial, if he understood he had a right to counsel at public expense, and that if he chose to represent himself the court would be unable to advise him on how to defend himself. The court also asked if the defendant understood that the motion would be governed by the rules of evidence and rules of criminal procedure. The court asked the defendant if he understood that if testimony was required how he was to present that testimony. The court asked if he understood that a lawyer may understand things about the rules governing the motion that he may not understand. The court asked the defendant if he was threatened or promised anything to give up the right to

counsel, and if he was making a voluntary decision. The court also warned the defendant that it was not advisable to represent himself. After receiving appropriate answers from the defendant the court found the defendant made a knowing and voluntary waiver of his right to counsel "as to that motion only." 2-27-12 RP 24-27.

The defendant made the same arguments in support of his motion that he had previously made on January 31. The court denied the motions. 3-14-12 RP 2-22, 24-26, 27-34. Ms. Rivera represented the defendant at sentencing arguing for an exceptional sentence below the standard range, or for a low end sentence. 3-14-12 RP 35-39. After the defendant was sentenced Ms. Rivera filed a notice of appeal on the defendant's behalf. 1 CP 2.

## **II. ARGUMENT**

On appeal the defendant argued that the trial court erred when it allowed him to represent himself in the absence of an adequate colloquy to ensure that he knowingly, voluntarily, and intelligently waived his right to counsel. The Court of Appeals rejected this argument on the basis that counsel had not withdrawn, no waiver of right to counsel was necessary under these circumstances, the court did conduct an adequate colloquy before the second time he argued his post-conviction motions, and any

error in failing to conduct a colloquy before the first time he argued those motions was harmless. See Appending A to petition, Slip opinion at 6-7. The defendant asks this Court to review this portion of the Court of Appeals decision on the basis that it is in conflict with a decision of this Court and that it is in conflict with a decision of the Court of Appeals. RAP 13.4(b)(1), and (2). Petition at 4.

The defendant's argument is largely based on a misstatement of the facts. He states that "Ms. Rivera's refusal to represent her client's position should be seen as a constructive withdrawal." Petition at 6. He then argues this action obligated the court to conduct a waiver colloquy "which it failed to do." Id.

First Ms. Rivera did not "constructively withdraw" from the defendant's case. She made a reasoned decision, after investigating the motions that the defendant wanted to bring and conferring with her supervisor, that the defendant would not be benefitted if she brought those motions. Although she personally would not bring the motions, she assisted the defendant in bringing them by helping him with his research and ensuring the court had an opportunity to be familiar with the relevant portion of the record. The only portion of the post-conviction proceedings that Ms. Rivera

did not participate in was the actual argument for the defendant's motions for arrest of judgment and for new trial.

The Court has recognized that counsel has wide latitude to make decisions on behalf of her client based on her skill and knowledge. Strickland v. Washington, 466 U.S. 6868, 688-89, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). An attorney has no obligation to raise every non-frivolous issue the defendant wishes to pursue. Jones v. Barnes, 463 U.S. 745, 751-752, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983).

Counsel is not, at the risk of being charged with incompetence, obliged to raise every conceivable point, however frivolous, damaging or inconsequential it may appear at the time, or to argue every point to the court and jury which in retrospect may seem important to the defendant nor is he obliged to obtain a written waiver or instructions from the defendant as to each and every turn or direction the accused wants his counsel to take.

State v. Piche, 71 Wn.2d 583, 590, 430 P.2d 522 (1967), cert. denied, 390 U.S. 912 (1968).

The Court of Appeals found no waiver of right to counsel was necessary where, as here, the defendant was permitted hybrid representation, but where counsel continued to perform core functions of counsel. Slip Op. at 6, State v. Barker, 35 Wn. App.

388, 394-95, 667 P.2d 108 (1983). The defendant cites no contrary authority.

Second, the defendant states that the trial court made “no inquiry into whether Mr. Schloredt was knowingly and intelligently waiving his right to counsel before proceeding pro se on his post-conviction motions.” Petition at 7. That assertion is flatly contradicted by the record. 2-27-12 RP 24-27. Even if a colloquy were required, the court did conduct one. The colloquy was sufficient to ensure the defendant was making a knowing, voluntary, and intelligent waiver of his right to counsel as to the post-conviction motions. State v. Christensen, 40 Wn. App. 290, 295 n.2, 698 P.2d 1069 (1985), State v. Vermillion, 112 Wn. App. 844, 858 n. 3, 51 P.3d 188 (2002), review denied, 148 Wn.2d 122 (2003).

The defendant also asks the Court to review every one of the issues he raised by appellate counsel and in his statement of additional grounds for review. Petition at 1, 9. However, he provides no authority or argument to show why this Court should accept review under RAP 13.4(b). Nor does he provide a concise statement of the specific issues that he seeks this Court to review. Under similar circumstances this Court has refused to consider

issues argued in supplemental briefing because the party did not properly raise the issue pursuant to RAP 13.7(b) and RAP 13.4(c)(5). State v. Korum, 157 Wn.2d 614, 623-24, 141 P.3d 13 (2006). This Court has also refused to consider issues where the party assigned error to the lower court's decision on the issue, but then only provided argument by reference to its briefing in the lower court. U.S. West Communications, Inc. v. Washington Utilities and Transportation Commission, 134 Wn.2d 74, 111-112, 949 P.2d 1337 (1997). Because the defendant has failed to properly raise any additional issues for review, the Court should refuse to review them.

### **III. CONCLUSION**

The reasons the defendant gives to argue this Court should review the decision of the Court of Appeals are based on a misstatement of facts. The Court's decision is not contrary to authority from this Court or any other Court of Appeals decision. The Court should deny the petition for review as to the waiver of

right to counsel issue. Review of any other issues not properly raised should also be denied.

Respectfully submitted on December 19, 2013.

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RE: State v. Phillip L. Schloredt  
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Please accept for filing the following: State's Answer to Petition for Review.

Let me know if anyone has a problem opening the attachment.

Thanks.

Diane.

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