

No. 29952-0

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

FILED  
Jan 10, 2012  
Court of Appeals  
Division III  
State of Washington

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STATE OF WASHINGTON, Respondent

v.

PEDRO AROUSA, Appellant

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APPEAL FROM THE SUPERIOR COURT  
OF GRANT COUNTY

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BRIEF OF APPELLANT

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Marie J. Trombley, WSBA 41410  
PO Box 28459  
Spokane, WA 99228  
509.939.3038  
Fax: None  
marietrombley@comcast.net

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## I. ASSIGNMENTS OF ERROR

- A. The trial court violated Mr. Arousa's CrR 3.3 right to a speedy trial.
- B. The court erred in making finding of fact (FF) 2.5: "The defendant, Pedro Arousa, slept in the travel trailer but came to the residence to cook meals and use the toilet facilities. When Anna Chavez was at the residence she would similarly sleep in the travel trailer but would come to the residence to cook and use the toilet facilities. Anna Chavez and Pedro Arousa came and went freely to the travel trailer without needing permission from Cherri Roberts." (CP 75).
- C. The court erred in entering conclusion of law (CL) 3.3: "However, the defendant did have actual authority as a joint tenant of the residence. As a joint tenant, the defendant had the actual authority to allow the officers to enter the living room of the residence. Therefore, the officers lawfully entered and the motion to suppress should be denied." (CP 77).
- D. The court erred in denying the motion to suppress the items found during the search of Mr. Arousa.

## Issues Related To Assignments Of Error

1. Did the trial court violate Mr. Arousa's right to a speedy trial under CrR 3.3, when on its own motion it reset the outside trial date, because it was under the belief that court rules and case law precluded a 3.6 hearing from occurring on the same day as a trial?
2. Did the trial court violate Mr. Arousa's right to a speedy trial under CrR 3.3, when it granted four continuances due to court congestion or state unavailability?
3. Did the trial court err when it made a finding that Anna Chavez and Pedro Arousa went freely between the trailer and the residence without needing permission from the homeowner?
5. Did the trial court err when it concluded that Mr. Arousa had actual authority to allow officers into the home?
7. Did the trial court err when it denied Mr. Arousa's motion to suppress evidence?

## II. STATEMENT OF FACTS

### A. Procedural History

Pedro Arousa was charged by information with possession of a controlled substance on March 4, 2011. (CP 1-2). On March 8, the court entered a scheduling order: commencement date was

listed as March 8, trial date was set for April 26 and the trial deadline was entered as May 9. (CP 6).

One month later, April 11, defense counsel filed and noted a motion to suppress an item obtained as the result of a search incident to arrest. (CP 16-23).

On April 18, the 3.6 hearing was continued to April 20, 2011. According to court minutes, defense counsel stated the need for a 3.6 hearing, and state's counsel informed the court the assigned prosecutor may request a continuance. (CP 40).

On April 20, the court struck the 3.6 hearing because State's counsel was unavailable. The court reset the date to April 26. (CP 41).

On April 26, the date set for trial, the prosecutor informed the court that the state did not have lab results on the alleged drugs that were found on Mr. Arousa, nor had there been a 3.6 hearing on the suppression motion. She further informed the court: "I do know that – And I really don't have any good cause to put before the

court...” the state still did not have the names of the U.S. Marshalls who had assisted in the arrest of Mr. Arousa. (RP 4-6)<sup>1</sup>.

Defense counsel requested that the 3.6 hearing be scheduled for the next day, or the next week, as Mr. Arousa was unwilling to waive his speedy trial right. (RP7). The court reset the 3.6 hearing for the next day, April 27. (RP 8). Defense counsel and the defendant objected when the court, on its own motion, entered a scheduling order with a new outside trial date of June 2. (RP 10; CP 33). The court stated:

“But if we have to continue in order to conduct the 3.6 hearing, and unless it would do prejudice to the defendant in the presentation of a defense, then we should – it should result in a continuance of the outside date – under the rule... I think because we’re in need of that hearing I think we have to continue trial a week to May 3<sup>rd</sup>. But unless there is a – unless there is some – unless there is some prejudice to the defendant, his outside date would become – June 2<sup>nd</sup>.”

(RP 8-9).

On April 27, counsel told the court the clerk advised them the 3.6 hearing had been stricken, because of an unavailability of a judge, and they released their witnesses. (RP 12). The court made the following record:

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<sup>1</sup> For purposes of this brief, hearings dates April 26, 27, May 10, 11, 16,17, 23, 24, and 31, 2011 will be referred to as RP; hearing date May 4, 2011 will be referenced as 1RP; and hearing date May 18, 2011 will be referenced as 2RP.

“First of all, -- we have two judges here this week, two of our three, and I am set to hear a trial that has – over 800 pages of reading, to begin tomorrow, so I have to read all that today...And so that’s why I was unavailable for a civil case-- Judge Knodell was going to try a criminal case. I’m not sure what happened over there, but it was four – I think four cases set for trial, and I guess the record will have to speak for itself if there’s ever any kind of review of this as to what happened over there. So Judge Knodell couldn’t try the case.” (RP 14).

State’s counsel also reported that something “came up yesterday that was totally unexpected and I am not available tomorrow ” (RP 12) and no other prosecutor was available to assist in the case. (RP 17). While preserving the defendant’s objection to waiver of speedy trial, the defense counsel agreed to the continuance of the 3.6 hearing to May 4. (RP 13; CP 42). The court rescheduled the trial date to May 10<sup>th</sup>. (RP 18; CP 43).

On May 4, 2011, over defense objection, the state again requested a week’s continuance, stating for the record:

“The state is asking to move this a week. This is Ms. Highland’s case and she is in trial.” (1RP 3).

The court stated:

“The case will remain set for trial next week, the 10<sup>th</sup>. Because Ms. Highland is in trial and unavailable to conduct the 3.6 hearing, that hearing is continued to next Wednesday, the 11<sup>th</sup>, and you can address any questions regarding release on the docket next Tuesday, the 10<sup>th</sup>, when the case is called for trial.” (1RP 4).

On May 10, the state asked for a one-week continuance for the trial date. (RP 21). Defense counsel again objected to the extension of the trial date beyond the 60-days. (RP 21). Defense counsel filed a motion to dismiss on May 10, based on a violation of speedy trial rights and prosecutorial mismanagement. The motion documented the timeline and prosecutorial mismanagement, in pertinent part:

March 23: the State filed its Certification of Compliance with Omnibus Order: The State's first witness list was filed that day and listed two witnesses; it did not list the US Marshals, even though the State knew of the existence of the Marshals from Deputy Harris' report.

March 29: The defense filed its Omnibus Application but the court never signed it. The court's omnibus order was entered with the caveat that the defense may bring a motion to suppress. The defense still did not have the discovery of the arrest warrant for Anna Chavez.

April 5: The Defense filed a witness list for trial. Defense also filed its notice the case was not ready for trial or settlement because the State had not provided a copy of the bench warrant for Anna Chavez.

April 7: The State provided the defense with a teletype copy of the arrest warrant for Anna Chavez.

April 11: The defense filed its Motion to Suppress, and it was noted for April 18.

April 18: The Motion to Suppress was continued to April 20.

April 20: The defense Motion to Suppress was struck because the prosecutor was in trial.

April 26: The date the matter was set for trial. Defense counsel stated his intent to call a witness at the 3.6 hearing who had not previously been on the witness list. Over defense objection, the trial was continued to May 3, and a new deadline date of June 2 was entered

April 27: The courtrooms were scheduled for trials. The clerk cancelled the 3.6 hearing. After witnesses had been released, a courtroom became available. The 3.6 hearing was called, and then struck. The court changed the trial date over defense objection.

April 27: The Court again changed the trial date over defense objection. The motion to suppress was continued to May 4.

May 3: This was the date set for trial in the April 26 scheduling order. The court did not have the case set on its calendar. The State filed an amended witness list, adding the two US Marshals.

No witness statements were provided to the defense, or made part of discovery; notice of the witnesses was not received by the defense counsel until May 6. “This was a breach of discovery under the Court Rules and directly contradicts Plaintiff’s certification that they had provided all discovery filed March 23.”

On May 4 the defense filed its Memorialization to Objection to the Continuance of the trial date set on April 26. Judge Sperline stated that the defense objection was preserved.

(CP 45-52).

On May 11, the court heard the suppression motion, and issued its oral ruling on May 16. (RP 36-138).

On May 17, the court heard and denied Mr. Arousa’s motion to dismiss for violation of speedy trial. (RP 139). The court made a record of why the trial date deadline had been continued, summarizing as follows;

“So it appears what the court did was, at the parties’ request, to continue the 3.5/3.6 hearing one week, --recognized the 3.5/3.6 hearing has to come before trial, case law does state that it’s contemplated that the hearing will actually be on a different date, so that you don’t have people not knowing at the time of trial what will be heard, that the court was actually required to continue the trial date to that date.” (RP 143).

Then made a record of why Mr. Arousa's trial would not occur on

May 17:

"Frankly, we do have, as I understand it, a courtroom available and a judge available such that—such that I can't extend the outside date. I do have – there's going to be a civil trial being run. And ... I understand that you do object to that, and you've made your record. As a result, I can't extend the outside date, and my cases start getting --... If I could make a record that I had a judge on vacation, or --... yeah, our criminal cases have to take --..."

So, -- we don't have – We do have a judge available and a courtroom available but we're deciding to go with the civil case instead. " (RP 149).

Defense counsel noted for the court, "I believe the court rule states that criminal cases take precedence over civil." The court responded, "They do. And that's why I have the administrator here, just confirm that we could have, but we didn't..." (RP 150-51).

A stipulated facts bench trial occurred on May 18, 2011, the 71<sup>st</sup> day after arraignment. (2RP 1-23).

#### B. 3.6 Suppression Hearing

At the 3.6 suppression hearing, the following evidence was presented.

On March 3, 2011, a deputy from the Grant County Sheriff's Department and two U.S. Marshalls had a felony arrest warrant for Anna Chavez. (RP 47). They had information from the Warden

Police Department that she lived at 306 East Fifth Street in Warden Washington. (RP 62). That evening, Deputy Harris and the marshals did some surveillance on 306 East Fifth Street, but could not remember how long they observed the residence. (RP 48, 69; 127). They saw “general movement” of people between the 38 - foot travel trailer on the property and the main residence. (RP 70). Because of darkness, officers never identified Anna Chavez as one of the individuals they saw, nor whether a vehicle belonging to her was on the property. (RP 68, 70, 71, 85).

The deputy and marshals knocked on the door of the trailer located about 50 feet away from the main house. No one answered. (RP 58- 60). Warden police had previously attempted to serve a warrant on Ms. Chavez in the past, and went to the trailer, rather than the home. (RP 82).

With no answer at the trailer, Deputy Harris then went to the main residence and knocked on the door. A male from inside the home asked, “Who is it?” Deputy Harris answered, “Joe.” (RP 50). Mr. Arousa opened the door. (RP 97).

The deputy asked Mr. Arousa if Anna Chavez lived there. (RP 97). He later testified Mr. Arousa told him Anna Chavez did live there, but she was not currently home. (RP 50). Mr. Arousa

testified he told officers that she lived in the trailer with him and was not home. (RP 92-93).

The deputy asked if he could enter the home and Mr. Arousa said, "I'll have to ask the boss" referring to his stepmother. (RP 52). The deputy again asked if they could enter, this time asking to talk with his stepmother, Cherri Roberts. (RP 53). Mr. Arousa said "yes" and they followed him through the house to her bedroom. (RP 53). Mr. Arousa denied that he granted officers permission to enter the home, but rather turned to go get his stepmother and officers entered behind him. (RP 90-91).

Ms. Roberts told officers that Anna Chavez did not live in the home, but rather in the trailer with Mr. Arousa. (RP 80). They slept there, had a television and VCR in the trailer. They were allowed to use the laundry facilities, which were detached and separate from the home. They were also allowed to use the toilet and kitchen in the main home. Occasionally, they ate with her in her residence. (RP 85-86).

The only person who lived in the home with Ms. Roberts was Pete Martinez, Mr. Arousa's father. (RP 78). She later testified that she had been fined by the Warden police department for allowing others to live in the trailer on her property. (RP 81-2).

According to his testimony, shortly into the conversation with Ms. Roberts, Deputy Harris he realized he had an arrest warrant for Mr. Arousa. (RP 63). Mr. Arousa was arrested and searched and found to be in possession of methamphetamine. (CP 1). The officers then abandoned their search for Ms. Chavez. (RP 63). In explaining the abandonment of the search for Ms. Chavez, Deputy Harris testified:

“As soon as we realized that he was one of the targets that had a warrant – an arrest warrant for. There’s only three of us and we’re now going to take someone into custody, it’s not a good use of our resources--- There’s only three of us there; we’re not going to try to arrest, you know, multiple people with just three of us. So it kind of changes the circumstances when we take him into custody.”  
(RP 56).

The court denied the defense motion to suppress the item found during the search of Mr. Arousa. (CP 78). In its findings of fact and conclusions of law, the court concluded (1) officers did not have authority to enter the home based on the warrant for Ms. Chavez because they had been informed she was not there at the time; (2) Officers did not have authority to enter the home based on “apparent authority” of Mr. Arousa because he explicitly told them he would have to “ask the boss” before they could enter to search for Ms. Chavez; (3) that Mr. Arousa had actual authority, as a joint

tenant, to allow officers to enter the main residence, making their entry lawful. (CP 77).

Mr. Arousa was found guilty of possession of methamphetamine after a stipulated facts bench trial. (2RP 22). He appeals. (CP 95).

### III. ARGUMENT

#### A. The Court Violated Mr. Arousa's Right To A Speedy Trial.

A defendant who is incarcerated must be tried within 60 days of his arraignment date, unless time is excluded or extended by rule. CrR 3.3(b)(1)(i); *State v. Saunders*, 153 Wn. App. 209, 216-17, 220 P.3d 1238 (2009). The granting of a continuance is within a trial judge's discretion. *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons; an abuse of discretion also occurs when the trial court bases its ruling on an erroneous view of the law. *State v. Ramirez-Estevez*, 164 Wn. App. 284, 289, 263 P.3d 1257 (2011). An alleged violation of the speedy trial rule is reviewed de novo. *State v. Kenyon*, 167 Wn.2d 130, 135, 216 P.3d 1024 (2009).

The Grant County Superior Court local rule 9 requires that at least one week prior to the date set in the Scheduling Order to hear motions, the defendant must serve on the prosecutor and file with the court a written motion for suppression.

Here, at arraignment, (March 8) the court set March 29<sup>th</sup> as the omnibus hearing date, April 26<sup>th</sup> as the trial date, and a trial deadline of May 9. At the omnibus hearing (March 29), defense counsel reserved the right to make a motion to suppress evidence. (CP 14). Once counsel received the awaited discovery, a motion to suppress was filed on April 11 and noted for April 18, per local rule 9. (CP 16-22).

The court granted two continuances of the 3.6 hearing (April 18 and April 20) because of the prosecutor's unavailability. On April 26, the scheduled trial date, the court continued the suppression hearing to the next day, the trial to the next week, and on its own motion reset the outside trial date to June 2.

A continuance, which is excluded from the time for trial period, may be granted under two circumstances: (1) by a written agreement of the parties, which is signed by the defendant; or (2) on the motion of the court or a party "when such continuance is required in the administration of justice and the defendant will not

be prejudiced in the presentation of his defense...” and “the court must state on the record or in writing the reasons for the continuance.” CrR 3.3(f)(1)(2). Rescheduling a trial date due to court congestion and unavailability of the government are not reasons that qualify as excluded periods under the rule. CrR 3.3(3). *State v. Lackey*, 153 Wn.App. 791, 799, 223 P.3d 1215 (2009).

Here, there was no written agreement between the parties for a continuance; rather, Mr. Arousa objected to any continuance and was adamant that he did not waive his speedy trial rights. The most significant issue here was the extension of the trial deadline. The court stated its reason for the extension of the trial deadline:

“But if we have to continue in order to conduct the 3.6 hearing, and unless it would do prejudice to the defendant in the presentation of a defense, *then we should -- it should result in a continuance of the outside date – under the rule.*” (RP 8). (Emphasis added).

Later, when the court again reviewed it’s reasoning for extending the trial deadline, it stated:

“...[It] recognized the 3.5/3.6 hearing has to come before trial, *case law does state that it’s contemplated that the hearing will actually be on a different date*, so that you don’t have people not knowing at the time of trial what will be heard, that *the court was actually required to continue the trial date to that date.*” (RP 143). (Emphasis added).

It is evident from the record that the court's sole reason for setting the new trial deadline was its belief that it was required to do so. This was error. Neither court rules nor case law require the court to reset the trial deadline after ordering a continuation for a 3.6 hearing.

The next day, April 27, court congestion precluded the 3.6 hearing. The state's unavailability prevented the 3.6 hearing on the 28<sup>th</sup> of April. On May 3, the case was not even assigned to a courtroom. On May 4<sup>th</sup>, again, the unavailability of the state prevented the 3.6 hearing. On May 10<sup>th</sup>, the day after the original trial deadline, the state again asked for a continuance, this time for the trial date. Court congestion is not an unavoidable or unseen circumstance.. *Kenyon*, 167 Wn.2d at 136-7. The 3.6 hearing finally occurred on May 11.

On May 17, 8 days after the original outside trial date, the court made a record of why the trial did not occur on that date: this time citing that there was a judge and a courtroom available, but the court had decided to try a civil case instead. Under CrR 3.3 (a)(2), criminal trials take precedence over civil trials.

Under CrR 3.3, once the time for trial date expires without a stated lawful basis for further continuances, the rule requires dismissal and the trial court loses authority to try the case. *Saunders*, 153 Wn.App. at 220 (citing CrR 3.3(b),(f)(2),(g) and (h)). Here, the basis for initially extending the trial deadline was error. There was no good cause to extend the trial deadline merely because the 3.6 hearing had not been held. Mr. Arousa's trial occurred 71 days after his arraignment. Mr. Arousa is not required to show prejudice. *State v. Swenson*, 150 Wn.2d 181, 186-7, 75 P.3d 513 (2003). The remedy is dismissal with prejudice. CrR 3.3(h).

B. The Court Erred When It Denied Defendant's Motion To Suppress Evidence.

A trial court's denial of a motion to suppress is reviewed to determine whether substantial evidence supports the factual findings, and if so, whether the findings support the conclusions of law. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). A trial court's conclusions of law on the suppression motion are reviewed de

novo. *State v. Acrey*, 148 Wn.2d 738, 745, 64 P.3d 594 (2003)  
(quoting *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722  
(1999), *overruled on other grounds by Brendlin v. California*, 551  
U.S. 249, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007)).

1. Substantial Evidence Does Not Support The Court's Finding That Anna Chavez And Pedro Arousa Came And Went Freely To The Travel Trailer Without Needing Permission From Cherri Roberts.

Testimony established that Ms. Roberts lived in the main residence with Mr. Martinez. Mr. Arousa and Ms. Roberts were both of the understanding that Mr. Arousa lived in the travel trailer. He slept there, watched television there, kept his clothing there, and considered it his residence. He occasionally ate some meals in the main residence with Ms. Roberts. He was allowed to use the laundry facilities, which were located in a detached section off the main residence. He was also allowed to use a bathroom in the main residence.

The State presented no evidence to establish that Mr. Arousa had a key to the home, allowing him access without permission. No evidence was presented to show whether Mr. Arousa could enter the home without knocking and being invited into the home. No evidence was presented as to whether Mr. Arousa stored any

personal belongings in the main residence. No evidence was presented as to whether Mr. Arousa could invite others into the home without first asking Ms. Roberts' permission. The fact that on one evening officers saw "activity" between the two residences does not establish that he had free access to the home, or could be considered a co-occupant. The evidence that was presented does not support the finding that Mr. Arousa could freely enter the main residence without asking permission from Ms. Roberts.

2. Mr. Arousa Did Not Have Actual Authority To Allow Officers Entry To The Home.

The court here concluded that (1) officers did not have authority to enter the home based on the warrant for Ms. Chavez because they had been informed she was not there at the time; (2) Officers did not have authority to enter the home based on "apparent authority" of Mr. Arousa because he explicitly told them he would have to "ask the boss" before they could enter to search for Ms. Chavez. The question is whether Mr. Arousa had *actual authority* to permit officers to enter Ms. Roberts' home.

Under *State v. Hatchie*, 133 Wn. App. 100, 113, 135P.3d 519 (2006), lawful entry into a dwelling to serve an arrest warrant requires that law enforcement have probable cause to believe (1)

that the person named in the arrest warrant resides in the home to be entered and (2) the arrestee is in the home at the time of entry. Here, officers were informed Ms. Chavez was not in the home. Thus, even if they believed Ms. Chavez did live in the main residence, the court rightly found they could not enter the home.

Officers then took the next step, that is, they sought consent from Mr. Arousa to enter and search the home for Ms. Chavez. Under Washington law, the standard for whether officers reasonably believe a party has apparent authority to consent to a search is an objective one: that is, whether the facts available to the officer at the moment would justify the belief of a person of reasonable caution that the consenting party had authority. *State v. Rison*, 116 Wn. App. 955, 962, 69 P.3d 362 (2003) (quoting *Illinois v. Rodriguez*, 497 U.S. 177, 188-89, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990)).

The officers were aware that Mr. Arousa did not have authority, for purposes of consent to allow their entry - which requires a sufficient relationship to or mutual use of the property by persons generally having joint access or control for most purposes. *Id.*

Here, the court specifically concluded that officers could *not* lawfully enter because Mr. Arousa explicitly told them he had to “ask the boss”, (his stepmother) thus he did not have “apparent authority” to allow them access to the home.

The officers then took the third step, to somehow gain entry into the home. That is, they asked Mr. Arousa if they could enter the home “to talk with” Ms. Roberts. Even though officers had received information seconds earlier, which led them to believe Mr. Arousa did not have authority to allow their entry to search for Ms. Chavez, the court concluded that Mr. Arousa had “actual authority” to allow their entry to talk with Ms. Roberts.

This conclusion is logically inconsistent with the court’s other legal conclusion: either Mr. Arousa had joint access and control of the property such that he had authority to consent to entry by officers to search for Ms. Chavez, or he did not have authority to allow entrance by others without her permission. Officers were obligated to wait at the door until they received permission from Ms. Roberts to enter. Their entry was not lawful and all evidence obtained because of that entry should have been suppressed. *State v. Le*, 103 Wn. App. 354, 12 P.3d 653 (2000).

#### IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Arousa respectfully requests this court to reverse and dismiss his conviction with prejudice.

Dated this 9<sup>th</sup> day of January, 2012.

Respectfully submitted,

s/ Marie Trombley  
WSBA 41410  
PO Box 28459  
Spokane, WA 99228  
(509) 939-3038  
Fax: None  
Email: [marietrombley@comcast.net](mailto:marietrombley@comcast.net)

CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Appellant Pedro Arousa, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Brief of Appellant was sent by first class mail, postage prepaid on January 9, 2012, to Pedro Arousa, PO Box 776, Warden, WA 98857, and by email per agreement between the parties to D. Angus Lee, Grant County Prosecutor, at [kburns@co.grant.wa.us](mailto:kburns@co.grant.wa.us)

s/ Marie Trombley  
WSBA 41410  
PO Box 28459  
Spokane, WA 99228

(509) 939-3038  
Fax: None  
Email: [marietrombley@comcast.net](mailto:marietrombley@comcast.net)