

1 This memorandum opinion was not selected for publication in the New Mexico Reports. Please  
2 see Rule 12-405 NMRA for restrictions on the citation of unpublished memorandum opinions.  
3 Please also note that this electronic memorandum opinion may contain computer-generated  
4 errors or other deviations from the official paper version filed by the Court of Appeals and does  
5 not include the filing date.

6 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

7 **STATE OF NEW MEXICO,**

8 Plaintiff-Appellee,

9 v.

**NO. 29,731**

10 **CODY LITTLE,**

11 Defendant-Appellant.

12 **APPEAL FROM THE DISTRICT COURT OF LEA COUNTY**

13 **William G. Schoobridge, District Judge**

14 Gary K. King, Attorney General

15 Santa Fe, NM

16 Francine A. Chavez, Assistant Attorney General

17 Albuquerque, NM

18 for Appellee

19 Hugh W. Dangler, Chief Public Defender

20 Mary Barket, Assistant Appellate Defender

21 Santa Fe, NM

22 for Appellant

23 **MEMORANDUM OPINION**

24 **VANZI, Judge.**

1 Defendant Cody Little appeals his convictions for one count of commercial  
2 burglary, in violation of NMSA 1978, Section 30-16-3(B) (1971), and one count of  
3 larceny over \$500, in violation of NMSA 1978, Section 30-16-1(D) (2006). On  
4 appeal, he argues that the trial court abused its discretion in granting the State's  
5 motion to continue to conduct further DNA testing and in allowing the results of the  
6 further DNA testing to come into evidence. We conclude that the trial court did not  
7 abuse its discretion in either granting the State's motion for continuance or in allowing  
8 the DNA evidence to come in at trial. We affirm.

#### 9 **BACKGROUND**

10 Police officers were dispatched to Marshall's Department Store in Lovington,  
11 New Mexico, at approximately 12:20 a.m. on June 24, 2008, after an alarm went off  
12 at the store. When officers arrived at the scene, they noticed a broken window on one  
13 side of the store. The officers, believing that a commercial burglary had occurred,  
14 called additional officers to locate pedestrians in the area.

15 After the store owner arrived and officers had secured the area, the officers  
16 investigated the inside of the store. Inside they found shoe prints and what they  
17 suspected were blood droplets.

18 Behind another business across the street, an officer located boxes containing  
19 a Tview mobile entertainment system with a touch screen and Bluetooth and a

1 Kenwood CD receiver. These items were identified by a Marshall's employee as  
2 Marshall's property, and the manager indicated that the items had a value of \$550.  
3 There were suspected blood droplets on these boxes as well. A detective collected  
4 four samples of the suspected blood from inside the store and from the boxes located  
5 across the street for DNA testing.

6 Defendant was found walking less than a block or so from Marshall's. Officers  
7 observed what they believed to be blood droplets on the white tank top he was  
8 wearing. Defendant claimed that the substance on his tank top was barbeque sauce.  
9 The officers questioned Defendant about whether he had been to a barbeque that day,  
10 as it had been raining and they suspected he had not; however, they released him  
11 without taking samples from the substance on his shirt.

12 The four samples of suspected blood were sent to the New Mexico Department  
13 of Public Safety Forensic Laboratory (Crime Lab) for DNA testing. On September  
14 8, 2008, the Detective who had sent the samples received a letter from the Crime Lab  
15 informing her that the crime scene samples matched Defendant in the New Mexico  
16 DNA Identification System (NMDIS).

17 Following the NMDIS match, an arrest warrant was issued, and Defendant was  
18 arrested. The State filed a criminal information on October 29, 2008. On that same  
19 date, the State disclosed a list of witnesses for trial, including Jennifer Otto from the

1 Crime Lab. A certificate of disclosure informed Defendant that all documents and  
2 reports that the State had were available for inspection and copying at the district  
3 attorney's office, and the record reflects that one of the items in the possession of the  
4 State was a letter indicating that Defendant was a NMDIS match.

5 The discovery deadline for the disclosure of lab reports, scientific analysis, and  
6 names of expert witnesses was set for February 16, 2009. The trial was initially set  
7 for April 7, 2009, on a trailing docket, however, Defendant's case was not called on  
8 that date.

9 On April 8, 2009, the day after the scheduled trial date, the State filed an  
10 opposed motion to continue the case for the purpose of obtaining more DNA  
11 standards from Defendant in order to compare with the blood found at the scene of the  
12 burglary. At a hearing on the motion on April 9, 2009, the State advised the trial court  
13 that it would take between two and three weeks for the Crime Lab to complete testing.  
14 The court granted the motion to continue, and reset the trial date for about a month  
15 later on May 5, 2009. The State received the results from the DNA test on April 29,  
16 2009. On either April 30, 2009, or May 1, 2009, the results were received by  
17 Defendant.

18 On the morning of trial, Defendant moved to dismiss the case, arguing that the  
19 State was not prepared for the original trial when it requested a continuance after the

1 original trial date. He also moved to exclude the DNA evidence from trial because it  
2 had been obtained and disclosed just days before trial. The trial court judge denied  
3 both motions.

4 At trial, Ms. Otto, a forensic DNA expert, testified for the State regarding the  
5 results of the DNA test. She testified that to a reasonable degree of scientific  
6 certainty, the DNA samples obtained from Marshall's matched those taken from  
7 Defendant. Based on this and other circumstantial evidence, a jury convicted  
8 Defendant of both burglary, in violation of Section 30-16-3(B), and larceny over \$500  
9 but less than \$2500, in violation of Section 30-16-1(D).

10 Defendant appeals his convictions, arguing that it was an abuse of discretion to  
11 grant the State's motion to continue and that the DNA evidence should have been  
12 excluded from trial.

### 13 **DISCUSSION**

#### 14 **Standard of Review**

15 We review both of Defendant's claims for an abuse of discretion. *See State v.*  
16 *Rivera*, 2009-NMCA-132, ¶ 43, 147 N.M. 406, 223 P.3d 951 (stating that we review  
17 the grant or denial of a motion to continue for abuse of discretion), *cert. denied*, 2009-  
18 NMCERT-011, 147 N.M. 463, 225 P.3d 793; *State v. Duarte*, 2007-NMCA-012, ¶ 14,  
19 140 N.M. 930, 149 P.3d 1027 (stating that a trial court's ruling on late discovery is

1 reviewed for an abuse of discretion). “An abuse of discretion occurs when the ruling  
2 is clearly against the logic and effect of the facts and circumstances of the case.” *State*  
3 *v. Moreland*, 2008-NMSC-031, ¶ 9, 144 N.M. 192, 185 P.3d 363 (internal quotation  
4 marks and citation omitted). A trial court abuses its discretion when the ruling is  
5 clearly untenable or not justified by reason. *Id.* If there are reasons that both support  
6 and detract from a court’s decision, there is no abuse of discretion. *Id.* It is  
7 Defendant’s burden to establish that the trial court abused its discretion. *State v.*  
8 *Torres*, 1999-NMSC-010, ¶ 10, 127 N.M. 20, 976 P.2d 20.

9 **The Trial Court Did Not Abuse Its Discretion in Granting the State’s Motion for**  
10 **Continuance**

11 The State filed a motion to continue on April 8, 2010, because “the [C]rime  
12 [L]ab need[ed] additional standards from [D]efendant to compare with blood found  
13 at the scene of the burglary.” At the April 9, 2009, hearing, the trial court granted the  
14 State’s motion and reset trial for May 5, 2009. Defendant contends that it was an  
15 abuse of discretion for the trial court to grant the State’s motion, because the State  
16 provided no justification for its failure to obtain additional DNA standards prior to the  
17 hearing and because the delay was unreasonable.

18 In *Torres*, our Supreme Court set forth a number of factors to consider in  
19 determining whether a trial court abused its discretion in granting or denying a motion  
20 to continue. *Id.* ¶ 10. The factors that a trial court must consider are (1) the length of

1 the delay; (2) the likelihood that the delay would accomplish the movant's objectives;  
2 (3) the number of previous continuances in the same matter; (4) the degree of  
3 inconvenience to the parties and the court; (5) the legitimacy of the motive for the  
4 request to delay; (6) whether the needed delay is movant's fault; and (7) the prejudice  
5 to the movant if the motion is denied. *Id.* If the trial court applies the factors in a  
6 logical and balanced way and finds that they supported granting the motion, then there  
7 is no abuse of discretion. *State v. Salazar*, 2007-NMSC-004, ¶ 27, 141 N.M. 148, 152  
8 P.3d 135.

9       The only arguments Defendant makes on the issue of whether the trial court  
10 abused its discretion when it granted the State's continuance is that the delay was the  
11 State's fault, the State did not put forth a justification for that delay, and the State's  
12 motive was not legitimate. We agree with Defendant that the delay was the State's  
13 fault, and therefore, conclude that the sixth *Torres* factor would weigh against a  
14 continuance. However, we disagree with Defendant that the State's motive was not  
15 legitimate. Here, the State was seeking conclusive DNA evidence to tie Defendant to  
16 the scene of the burglary and larceny. We cannot say that this was not a legitimate  
17 reason to ask for the continuance. Nevertheless, we analyze the remaining factors  
18 according to *Torres*.

1 In this case, several factors support the trial court judge's decision to grant the  
2 State's motion to continue. The State only asked for a delay long enough to get DNA  
3 results back from the Crime Lab. The State indicated that this would take  
4 approximately two to three weeks. The trial court set a new trial date for May 5, 2009,  
5 which was approximately one month after the hearing on the motion to continue. The  
6 State's objective was to obtain DNA results prior to trial. The delay was likely to  
7 accomplish the State's objective as the extension requested by the State was tailored  
8 to the time it was expected to take for the Crime Lab to provide the results. At the  
9 hearing on April 9, 2009, the State indicated that it would execute a search warrant for  
10 more DNA standards on Defendant the same day. Thus, the parties were likely to  
11 have the results before the new trial date. Additionally, it was the first continuance  
12 requested in Defendant's case, and it was not inconvenient to the parties or to the  
13 court because the court was able to reschedule the case one month after the original  
14 trial date in spite of the court's heavy docket. *See Torres*, 1999-NMSC-010, ¶ 17  
15 (holding that for inconvenience to become a factor for consideration, there must be  
16 some significant or substantial inconvenience, which should be demonstrated by the  
17 record). Finally, if the trial court had denied the State's motion to continue, it would  
18 have prejudiced the State from obtaining evidence that tied Defendant to the scene of  
19 the crime.



1           Therefore, despite the fact that one of the factors may have weighed against  
2 granting the continuance, we conclude that the trial court did not abuse its discretion.  
3 Based on a balancing of all of the *Torres* factors, the trial court had sufficient reasons  
4 to justify its decision. *See Salazar, 2007-NMSC-004, ¶ 27* (holding that a motion to  
5 continue should be granted if a balanced and logical application of the factors support  
6 the motion).

7 **The Trial Court Did Not Abuse Its Discretion in Denying the Motion to Exclude**  
8 **New DNA Evidence**

9           Defendant also contends that the trial court erred in denying his motion to  
10 exclude the results from the new DNA evidence that the State obtained after the  
11 original trial date was continued. Although he frames this argument as a suppression  
12 issue, we understand it to be an argument regarding exclusion, as suppression  
13 arguments are for claims that evidence was illegally obtained. *See McCray v. State*  
14 *of Ill.*, 386 U.S. 300, 307 (stating that the purpose of a motion to suppress is “as a  
15 sanction to compel [law] enforcement officers to respect the constitutional security of  
16 all of us under the Fourth Amendment”). Defendant asserts that the evidence should  
17 have been excluded because its late disclosure violated his right to present a defense  
18 and prejudiced him because he did not have time to obtain his own expert or to  
19 adequately prepare for cross-examination.

1           When we review a ruling on late disclosure of evidence for a reversal, we  
2 consider the following factors:

3           (1) whether the State breached some duty or intentionally deprived the  
4 defendant of evidence; (2) whether the improperly non-disclosed  
5 evidence was material; (3) whether the non-disclosure of the evidence  
6 prejudiced the defendant; and (4) whether the trial court cured the failure  
7 to timely disclose the evidence.

8 *Duarte*, 2007-NMCA-012, ¶ 15.

9 **1.     The State Did Not Breach Its Duty to Disclose or Intentionally Deprive**  
10 **Defendant of DNA Evidence**

11           We first consider whether the State breached a duty or intentionally deprived  
12 Defendant of either the initial or the new DNA evidence. In October 2008, the State  
13 disclosed a letter from the Crime Lab stating that DNA samples collected from the  
14 crime scene were a match in the NMDIS to Defendant. The State also disclosed the  
15 name of its expert, Ms. Otto, in a witness list that same month. Defendant did not  
16 dispute that this information was provided to him, and he does not contest the  
17 existence of any documents or reports that were not disclosed to him. Thus, with  
18 regard to the initial DNA evidence, the State did not breach any duty to disclose, and  
19 it did not deprive Defendant of evidence. *See* Rule 5-501(A)(4), (5) NMRA (stating  
20 that the state must make an initial disclosure of witnesses that the prosecution intends  
21 to call at trial and of any results of any scientific tests or experiments to the defendant  
22 and make those available for examination by the defendant).

1           There was similarly no breach with respect to the further testing and late  
2 disclosure of new DNA evidence. Following the February 16, 2009, deadline for  
3 disclosure of lab reports, scientific analysis, and the names of expert witnesses, the  
4 State requested a continuance so that further analysis could be done on the DNA  
5 evidence. When the State moved for a continuance, it was requesting time for further  
6 testing of DNA evidence that was already at issue in the case. Although this request  
7 might have suggested that the original evidence was lacking, the trial court, in its  
8 discretion, granted the State the relief that it requested. The State had results from the  
9 further testing on April 29 or April 30, 2009, and those results were received by  
10 Defendant on April 30, 2009 or May 1, 2009. *See State v. McDaniel*, 2004-NMCA-  
11 022, ¶ 10, 135 N.M. 84, 84 P.3d 701 (holding that the duty to disclose established by  
12 Rules 5-501(A) and 5-505(A) NMRA was not violated where disclosure occurred “as  
13 soon as” the prosecutor obtained the material in question). This complied with the  
14 State’s continuing duty to disclose evidence and information to Defendant. *See* Rule  
15 5-505(A) (stating that if “a party discovers additional material or witnesses which he  
16 would have been under a duty to produce or disclose at the time of” compliance with  
17 Rules 5-501 and 5-502 NMRA, then he has a duty to “give written notice to the other  
18 party or the party’s attorney of the existence of the additional material or witnesses”).

1           Lastly, there was no misconduct by the State. While we would not approve of  
2 the State purposefully delaying testing of scientific evidence until after the discovery  
3 deadlines had passed if the delay was done as a trial tactic, here, the trial court  
4 concluded that the State did not act intentionally to deprive Defendant of the new  
5 DNA evidence. Defendant does not point to and there is no evidence in the record  
6 that this was a dilatory tactic by the State in this case. Therefore, the State did not  
7 breach a duty to disclose or intentionally deprive Defendant of the new DNA  
8 evidence.

9 **2. The Late-Disclosed New DNA Evidence Was Not Material**

10           The second factor is the materiality of the late disclosed evidence. “The test for  
11 materiality . . . is whether there is a reasonable probability that, had the evidence been  
12 disclosed to the defense, the result of the proceeding would have been different. A  
13 reasonable probability is a probability sufficient to undermine confidence in the  
14 outcome.” *Duarte*, 2007-NMCA-012, ¶ 15 (internal quotation marks and citation  
15 omitted).

16           Defendant asserts that there was a “reasonable probability that the result could  
17 have been different,” because he was unable to effectively challenge the new DNA  
18 evidence. He contends that if he had been given an opportunity to effectively

1 challenge the evidence, he would have been able to “exercise his constitutional right  
2 to present a defense.”

3 Defendant further argues that he would have obtained his own expert to review  
4 the results or to testify on his behalf, but he has not shown how that expert would have  
5 made a difference to his case. *See State v. Boyett*, 2008-NMSC-030, ¶¶ 35-36, 144  
6 N.M. 184, 185 P.3d 355 (holding that the denial of a motion for a new trial was not  
7 an abuse of discretion when the defendant did not demonstrate “that, with sufficient  
8 time, he could have presented an expert to testify” in his favor). Thus, we are not  
9 persuaded that the evidence was material to Defendant, as he has not met his burden  
10 to demonstrate that the result of the proceeding would have been different.

### 11 **3. Defendant Was Not Prejudiced**

12 In considering the prejudice to Defendant, the court must consider whether  
13 Defendant’s case “would have been improved by an earlier disclosure or how the  
14 defense would have prepared differently.” *Duarte*, 2007-NMCA-012, ¶ 15 (alteration  
15 omitted) (internal quotation marks and citation omitted). However, because  
16 Defendant failed to request a continuance, he effectively waived his claim that he was  
17 prejudiced by this late disclosure of the new DNA results. *See State v. Barraza*, 110  
18 N.M. 45, 48-49, 791 P.2d 799, 802-03 (Ct. App. 1990) (holding that a defendant’s  
19 failure to seek a continuance undermines his claim of unfair surprise and may waive

1 a complaint that evidence was not timely disclosed). Defendant reasons that he did  
2 not request a continuance because he did not want to sacrifice his right to a speedy  
3 trial as guaranteed by both the Federal and State Constitutions. He cites to a  
4 Washington Supreme Court case to establish that it is possible that a defendant's right  
5 to a speedy trial or his right to be represented by effective counsel could be prejudiced  
6 when a State fails to exercise due diligence. We are not persuaded by Defendant's  
7 argument. Even if he had been forced to request a continuance, it is not necessarily  
8 true that it would have endangered his right to a speedy trial, because the court  
9 analyzes several factors for speedy trial violations. *See State v. Garza*, 2009-NMSC-  
10 038, ¶ 13, 146 N.M. 499, 212 P.3d 387 (establishing that the four factors to be  
11 balanced in a speedy trial analysis are (1) length of delay, (2) reasons for delay, (3) the  
12 defendant's assertion of his right, and (4) the actual prejudice to the defendant). Even  
13 if the court found that the reason for delay could have been attributed to him when  
14 he requested a continuance, it may have only weighed slightly against him in the  
15 analysis and would not by itself endanger his speedy trial right. *See State v. Tortolito*,  
16 1997-NMCA-128, ¶ 14, 124 N.M. 368, 950 P.2d 811 (holding that a two-month delay  
17 requested by the defendant to prepare to defend against DNA evidence only weighed  
18 slightly against him in a speedy trial analysis). Accordingly, Defendant fails to  
19 demonstrate that his right to a speedy trial was a valid reason for failing to request a

1 continuance if more time was, as he claims, necessary in order to prepare an effective  
2 defense.

3       Furthermore, there is sufficient evidence in the record to establish that  
4 Defendant was on notice that DNA evidence would be at issue in the case and that he  
5 would need to prepare for it. The State disclosed Ms. Otto as a witness in its October  
6 29, 2008, witness list, and the State's motion for continuance was granted for the  
7 purpose of obtaining new DNA results from the State Crime Lab one full month  
8 before the reset trial date. Even though Defendant contends that he was prejudiced  
9 because he did not know of the actual results of the test until a few days before trial,  
10 we note that he was notified of the results very near to the time the State obtained the  
11 results. We conclude that Defendant should have known that he might need his own  
12 expert to review the results once he obtained them, and he was not prejudiced by the  
13 late disclosure when he should have anticipated that he would need to cross-examine  
14 Ms. Otto. *See McDaniel*, 2004-NMCA-022, ¶ 15 (holding that the defendant was not  
15 prejudiced where he was on notice of the substantive testimony of a late-disclosed  
16 witnesses testimony when that testimony had been contained in other reports disclosed  
17 to him).

18 **4. The Trial Court Cured the Late Disclosure of New DNA Evidence**

1 Finally, we consider whether the trial court cured the late disclosure of the new  
2 DNA evidence. Defendant argues that the trial court did not sufficiently cure or  
3 properly sanction the State for the late disclosure of new DNA evidence by merely  
4 allowing Defendant “some leeway” in cross-examination of Ms. Otto. He contends  
5 that this cure for the late disclosure denied him “the right to present a defense, . . . the  
6 right to challenge the State’s evidence, and . . . the need to have his own expert review  
7 the results” where an effective challenge would have required having his own defense  
8 expert review to the results. We disagree.

9 “Remedies for violation of discovery rules or orders are discretionary with the  
10 trial court[,]” and we are unpersuaded that the trial court’s cure in this case “was  
11 against logic and not justified by reason.” *McDaniel*, 2004-NMCA-022, ¶ 6 (internal  
12 quotation marks and citations omitted). Here, the trial court correctly concluded that  
13 Defendant had notice that DNA evidence would be at issue in the case because the  
14 State had identified Ms. Otto as a witness in October 2008, and the State’s  
15 continuance was granted to obtain more conclusive DNA results. We believe that  
16 allowing greater latitude in cross-examination, where Defendant failed to either obtain  
17 his own expert or request more time to obtain such a witness, was a reasonable cure  
18 for the late disclosure of the new DNA results. *See State v. Vallejos*, 2000-NMCA-  
19 075, ¶¶ 33-34, 129 N.M. 424, 9 P.3d 668 (holding that a cure that required the



1 prosecution to make a witness available to the defendant a few days before trial was  
2 reasonable and within the trial court's discretion as a cure for late disclosure of that  
3 witness to the defendant).

4 Defendant cites to an Eighth Circuit case to contend that the denial of his  
5 motion to exclude new DNA evidence from trial was an abuse of discretion. In *United*  
6 *States v. Davis*, 244 F.3d 666, 671 (8th Cir. 2001), the Eighth Circuit held that the trial  
7 court did not abuse its discretion when it granted the defendant's motion to exclude  
8 DNA evidence that was disclosed late to both the trial court and the defendant. In  
9 *Davis*, several defendants robbed a bank. *Id.* at 669. At the time of their arrests, hair  
10 and saliva samples were taken from them, which were later sent to the state crime lab.  
11 *Id.* The trial court set a discovery deadline for February 28, 2000. *Id.* at 668. Trial  
12 was originally set for April 3, 2000. *Id.* On March 30, 2000, for the first time, the  
13 prosecution notified the defendants and the court that it had DNA evidence and that  
14 the evidence might cause some delay. *Id.* at 669. On March 31, 2000, the prosecution  
15 provided a written report on the DNA evidence. *Id.* at 670. The court heard and  
16 granted a motion to exclude the DNA evidence from the trial. *Id.* at 669. The trial  
17 court concluded that it would not "condone the government's last-minute production  
18 of evidence by allowing the evidence to be introduced at trial and thereby forcing the  
19 defense to seek a continuance." *Id.* at 670. The prosecution then filed a motion to

1 reconsider, or alternatively, sought a one-week continuance to allow the defendant  
2 time to respond to the DNA evidence; both of which were denied by the trial court.  
3 *Id.* at 669. On appeal, the prosecution argued that it had not acted intentionally or in  
4 bad faith and that the defendants were not prejudiced by the late disclosure when the  
5 defendants could have sought a continuance and that the time would have remedied  
6 the late disclosure. *Id.* at 670. The Eighth Circuit held that it was not an abuse of  
7 discretion “to sanction the government for what was an obvious discovery violation.”  
8 *Id.* at 671.

9 Defendant contends that *Davis* should inform our decision and that we should  
10 similarly conclude that the State breached its duty to disclose and that the late  
11 disclosure prejudiced him. However, *Davis* is distinguishable from our case because  
12 of the issue of notice. In *Davis*, the court and defendants learned for the first time,  
13 days before trial, that DNA evidence had been tested and would be at issue in the case.  
14 *Id.* at 669. Here, Defendant had notice for several months before the initial trial date  
15 that DNA evidence would be at issue in the case because the initial NMDIS match  
16 letter was made available to him and because he knew that the State had an expert.  
17 Even though Defendant has repeatedly asserted that the initial DNA evidence would  
18 not warrant his obtaining an expert, he has not adequately demonstrated why that is  
19 so. Even more importantly, we remind Defendant that we review for an abuse of

1 discretion and “where a trial court must exercise discretion in deciding between two  
2 possible rulings, either of which would be reasonable, we will not reverse the court’s  
3 decision.” *Mayeux v. Winder*, 2006-NMCA-028, ¶ 43, 139 N.M. 235, 131 P.3d 85.  
4 Here, the trial court’s decision to admit the evidence was reasonable and we therefore  
5 find no abuse of discretion. *Moreland*, 2008-NMSC-031, ¶ 9 (stating that we do not  
6 hold that the trial court abused its discretion unless its decision was “clearly untenable  
7 or not justified by reason” (internal quotation marks and citation omitted)).

8 **CONCLUSION**

9 For the foregoing reasons, we affirm the decision of the trial court.

10 **IT IS SO ORDERED.**

11 \_\_\_\_\_  
12 **LINDA M. VANZI, Judge**

13 **WE CONCUR:**

14 \_\_\_\_\_  
15 **JAMES J. WECHSLER, Judge**

16 \_\_\_\_\_  
17 **CELIA FOY CASTILLO, Chief Judge**