ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

KENNETH J. COUNTS,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

CASE NUMBER: 51549
(District Court Case No. 212667)

FAST TRACK STATEMENT

1. **Name of party filing this fast track statement**: KENNETH J. COUNTS.

2. **Name, law firm, address, and telephone number of attorney submitting this fast track statement**:

KRISTINA WILDEVELD, ESQ.
Nevada Bar No. 5825
1100 S. 10th Street
Las Vegas, Nevada 89104
(702) 257-9500

3. **Name, law firm, address and telephone number of appellate counsel if different from trial counsel**: Same.

4. **Judicial district, county, and district court docket number of lower court proceedings**: Eighth Judicial District, County of Clark, Case Number 212667.

5. **Name of judge issuing decision, judgment, or order appealed from**: Valerie Adair, District Court, Department XXI.

6. **Length of trial. If this action proceeded to trial in the district court, how many days did the trial last**? Eight (8) days.

7. **Conviction(s) appealed from**: Count I - CONSPIRACY TO COMMIT MURDER

08-14566

(Category B Felony - NRS 199.480, 200.020, 200.030).

8. **Sentence for each count**: Count I - To a Maximum of Two Hundred Forty (240) months with a Minimum parole eligibility of Ninety-Six (96) months in the Nevada Department of Corrections with one thousand twenty-nine days (1,029) days credit for time served. Sentence to run consecutive to Defendant's California time.

9. **Date district court announced decision, sentence, or order appealed from**: March 20, 2008; Sentencing.

10. **Date of entry of written judgment or order appealed from**: March 3, 2008.

(a) **If no written judgment or order was filed in the district court, explain the basis for seeking appellate review**: N/A

11. **If this appeal is from an order granting or denying a petition for a writ of habeas corpus, indicate date written notice of entry of judgment/order was served by the court**: N/A.

12. **If the time for filing the notice of appeal was tolled by a post-judgment motion,**

(a) **specify the type of motion, and the date of filing of the motion**: N/A

13. **Date notice of appeal filed**: May 7, 2008.

14. **Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(b), NRS 34.560, NRS 34.575, NRS 177.015, or other**: NRAP 4(b).

15. **Specify statute, rule or other authority which grants this court jurisdiction to review the judgment or order appealed from**: NRS 177.015(3).

16. **Specify the nature of disposition below, e.g., judgment after bench trial, judgment after jury verdict, judgment upon guilty plea, etc.**: Judgment after jury verdict.

17. **Pending and prior proceedings in this court. List the case name and docket**

number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal (e.g., separate appeals by co-defendants, appeal after post-conviction proceedings): HIDALGO vs. DISTRICT COURT; 48233; 123 Nev. ___, 173 P.3d 1191 (2007).

18. **Pending and prior proceedings in other courts. List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., habeas corpus proceedings in state or federal court, bifurcated proceedings against co-defendants):** State of Nevada vs. LOUIS HIDALGO; 05-C-212667-C; Eighth Judicial District Court

19. **Proceedings raising same issues. List the case name and docket number of all appeals or original proceedings presently pending before this court, of which you are aware, which raise the same issues you intend to raise in this appeal:** N/A

20. **Procedural history. Briefly describe the procedural history of the case (provide citations for every assertion of fact to the appendix, if any, or to the rough draft transcript):** Appellant, KENNETH COUNTS, was charged by way of Information on June 20, 2005, in the Eighth Judicial District Court as follows: Count I, Conspiracy to Commit Murder; and Count II, Murder in violation of NRS 200.010, 200.030, 193.165. (A. App., Vol. 1, pp 171-174). In each count in the Information, KENNETH COUNTS was charged along with co-defendants, LUIS HIDALGO, ANABEL ESPINDOLA, DEANGELO CARROLL and JAYSON TAOIPU. (A. App., Vol. 1, pp. 171-174). Appellant was bound over on said charges after being arraigned on or about June 27, 2005, and was held to answer to those same charges in District Court. (A. App., Vol. 17, pp. 4158). The State filed Notice of Intend to Seek the Death Penalty on July 7, 2005 and Amended it on December 12, 2005. (A. App., Vol 1, pp.175-177 ; A. App., Vol. 2, pp 402-404). A Writ of Habeas

Corpus was filed on August 25, 2005 challenging amongst other things, Kenneth Counts' charge of Conspiracy to Commit Murder. (A.App., Vol. 2, pp. 292). The Writ was heard October 6, 2005 and the same was denied. (A. App., Vol. 1, pp.209A-219). A Capital Murder trial commenced on January 29, 2008. (A. App., Vol. 9, pp. 1991). Appellant was acquitted of the Murder charge after a jury trial but convicted of Conspiracy to Commit Murder on February 8, 2008. (A.App., Vol. 16, pp. 4070). The State filed Notice to Seek Habitual Criminal on February 11, 2008. (A.App., Vol. 16, pp. 4074-4076). Appellant filed a Motion for a New Trial which was heard on February 26, 2008 and denied. (A. App., Vol. 17, pp. 4102-4112). Appellant was sentenced March 21, 2008. (A. App., Vol. 17, pp. 4115-4131). The judgement of conviction was entered on March 31, 2008. (A. App., Vol. 17, pp. 4134). The Notice of Appeal was filed in the Supreme Court on May 7, 2008. (A. App., Vol. 17, pp. 4147). The Case Appeal Statement was filed on April 30, 2008. (A. App., Vol. 17, pp. 4149). This Fast Track Statement follows.

21. **Statement of facts. Briefly set forth the facts material to the issues on appeal**:

An employee of the Palomino night club, Timothy Hadland (hereinafter "Hadland"), was found dead near Lake Mead on May 19, 2005. (A. App., Vol. 1, pp.139-141). Detectives discovered that the killing was linked to the Palomino Club and began tracing back events leading up to Hadland's death. Everyone involved had been linked to the Palomino Club: Deangelo Carroll (hereinafter "Carroll") worked at the Palomino; Luis Hidalgo, Jr. (Hereinafter "Mr. H.") owned the club; and Anabel Espindola (hereinafter "Espindola") ran the club. (A.App. Vol 1, pp. 175-176; Vol. 11, pp. 2558).

Detectives made contact with Carroll. Carroll explained that Rontae Zone ("Zone") and Jayson Taoipu ("Taoipu") helped him at work passing out flyers. (A.App., Vol. 12, pp. 2813). On

the night of Hadland's demise, Louis Hidalgo, III (hereinafter "Little Lou") called Carroll telling him to come to the club and to bring baseball bats and garbage bags with him. (A. App., Vol. 12, pp. 2824). When they got to the club, Carroll spoke with Mr. H who told him to "take care of" Hadland, a former employee. (A. App., Vol. 12, pp.2820). According to the testimony of Zone, Carroll called Hadland to meet him out at Lake Mead for a purported drug deal. (A. App., Vol. 1, pp.2833). Zone claims that before driving out to Lake Mead, Carroll, Zone and Taiopu picked up a third, unknown individual, Kenneth Counts, a known marijuana dealer. (A. App., Vol. 12, pp. 2829) There was never any discussion about killing anyone on the way out to Lake Mead to meet Hadland.(A. App., Vol. 12, pp. 2834) Zone testified that when the Palomino Club's Astro van reached Hadland, Counts got out of the van and shot Hadland. (A.App., Vol. 12, pp. 2843).

The State alleged that Carroll, Zone, Taiopu and Counts drove back to the Palomino Club where Carroll met with Mr. H and Espindola to receive payment for killing Hadland. (A. App., Vol. 12, pp. 2848) Espindola, Mr. H and Carroll came up with a plan on what to tell police. (A.App., Vol. 16, pp. 4090). Carroll was later called by Mr. Lou who told him to pick up the Astro van and drive to Simone's Auto Plaza. Carroll, Zone and Taiopu were instructed how to get rid of the evidence in the van. (A. App., Vol. 12, pp. 2849-2852). They complied. Kenneth Counts was arrested May 21, 2005. (A. App., Vol. 14, pp. 3475)

Following Counts arrest, Carroll met with police for a second or third time to prepare to set up tape recorded conversations with his co-conspirators Mr. H, Little Lou and Espindola. (A.App., Vol. 15, pp. 4091). Police listened in as Carroll requested money on behalf of Zone and Taiopu. Little Lou gave Carroll more money and then the three devised a plan to get rid of Zone and Taiopu, the witnesses to Hadland's murder. (A.App., Vol. 16, pp.4092). Carroll was told that Espindola and

Little Lou would have an attorney paid for him should Carroll need one. On May 24, 2005, Carroll wore a wire. (A. App., Vol. 14, pp. 3477). On tape, Espindola can be heard confirming that Mr. H, Espindola and Little Lou hired Carroll to harm Hadland. In addition, more money was given to Carroll to keep him quiet. (A. App., Vol. 14, pp. 3487). Counts has never been alleged to have met either Mr. H, Little Lou or Espindola, and never met Taiopu or Zone prior to the night of May 19, 2005. (A.App. Vol. 16, pp. 4087-4096).

On February 1, 2008, day four of trial, Rontae Zone testified for the State that he and Taiopu were asked by Carroll around noon on May 19, 2005, whether they would hurt someone or would be "in to commit murder".(A. App., Vol. 12; pp. 2819). On or about the weekend of February 1, 2008, during the continuing Counts trial, co-Defendant Espindola met with the District Attorneys and Detectives. (A.App., Vol. 16, pp. 4087-4096). Espindola plead Guilty to one count of Voluntary Manslaughter in open court on the morning of February 4, 2008. On February 5, 2008, counsel for Mr. Counts asked the court for any and all statements derived from Ms. Espindola over the weekend. (A.App., Vol 17, pp. 4203). The State indicated that Counts was not entitled to any of the information. On February 5, 2008, the State presented as a final witness Detective Sean McGrath. (A.App., Vol. 14, pp.3469). During Detective McGrath's testimony, a tape containing conversations made between co-Defendants Deangelo Carroll, Anabel Espindola and Louis Hidalgo was played to the jury. (A. App., Vol. 14, pp. 3481) The recordings were admitted as a State exhibit and used as evidence of the existence of a Conspiracy between the co-defendants. (A. App., Vol. 14, pp.3480) Following the conclusion of the recording, the State rested their case.

In the Defendant's case in chief, Counts presented alibi witnesses before taking the stand. (A. App., Vol. 15., pp. 3546-3694). While on the stand, the State questioned Mr. Counts about phone

calls made between Mr.Counts and Espindola. (A. App., Vol. 15, pp. 3786). The Defense had no knowledge of such conversations. Counsel for Counts had requested a copy of the taped statement of Espindola prior to placing Mr. Counts on the stand. (A. App., Vol. 17, pp. 4203). This request was denied by the Court and the State indicated there was nothing in the papers related to Counts.

On Friday February 8, 2008, Mr. Counts was convicted of Conspiracy to Commit Murder. (A.App., Vol. 16, 4070-4073). On Tuesday, February 11, 2008, Defense counsel for Mr. Counts received a document entitled "Declaration of Warrant/Summons", a ten (10) page document outlining an interview that took place with Espindola on or about February 2, 2008. (A. App., Vol. 16, pp. 4087-4096). In this document, Ms. Espindola refers to phone calls made between her and Carroll on or about May 19, 2005 at 16:58 and again at 19:47 requesting Mr. Carroll to "take care of someone". (A. App., Vol. 16, pp. 4094). In addition, Espindola directed the State and Detectives to information that phone calls were made between Mr. Counts' cell phone and her phone number on May 19, 2008. (A. App., Vol. 16, pp. 4095). Finally, Espindola indicated that Mr. Carroll and Mr. H met alone. (A. App., Vol. 16, pp. 4095). Espindola could not hear what was being said" (A.App. , Vol., 16, pp. 4095). Later that evening, Carroll met with Mr. H and Espindola and received $5,000.00 cash.(A. App., Vol. 16, pp. 4095). Espindola indicated that she was unaware of what had actually taken place and only knew that Carroll was to beat up Hadland. This information is pertinent in that it not only directly contradicts the time line of events presented by State's witness Zone but also indicates that Espindola entered into a separate "conspiracy" with Carroll: One Mr. Counts could not have entered nor had any opportunity to enter. (A. App., Vol. 16, pp. 4087-4096). To date, the State has not delivered this document containing both exculpatory information and Brady material to Defense counsel.

22. **Issues on appeal. State concisely the principal issue(s) in this appeal**: The evidence presented was insufficient evidence to sustain the verdict of guilt on Count One, Conspiracy to Commit Murder; it was error for the State to withhold Brady material and newly discovered evidence from the Defense during a Capital Murder trial; the Denial of a New Trial as to these issues; the State sought and obtained Habitual Criminal following their failure to obtain not only a death verdict but also a guilty verdict in Count II, Murder with use of a Deadly Weapon; Mr. Counts was arbitrarily sentenced as a Habitual Criminal. Cumulative errors by the state mandate reversal.

23. **Legal argument, including authorities.**

The Evidence Presented was Insufficient to Sustain the Verdict of Guilt on Conspiracy to Commit Murder:

This Court has stated that in a criminal case where the jury has arrived at a guilty verdict, the relevant inquiry is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Origel-Candido, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998) quoting Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 37 (1984) (see also Jackson v. Virginia, 443 U.S. 307, 319; 1979). Appellant submits that no rational trier of fact, with the facts presented, without error, could have found Counts guilty of Conspiracy.

Appellant submits that the evidence adduced at his trial was insufficient to support the Conspiracy to commit Murder conviction especially in light of the fact that Appellant was acquitted of the Murder charge. The evidence properly introduced at Appellant's trial shows that there was never any conspiracy between Mr. Counts and any of the other defendants. Throughout the course of this trial, no mention was ever made of Mr. Counts entering into a Conspiracy with anyone.

Rather, the facts of this case show that Carroll entered into a conspiracy with Little Lou, Mr. H, Espindola, Taiopu and unindicted co-conspirator Zone, without Counts. Appellant submits that it was error to find him guilty of Conspiracy without any corroborating evidence whatsoever.

It Was Error for the State to Withhold Brady Material and Newly Discovered Evidence From the Defense During a Capital Murder Trial:

The State has an obligation to disclose all evidence to the Defendant which is material either to guilt or punishment. Brady v. Maryland, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963); United States v. Agurs, 427 U.S. 97, 100-12 (1975); Jimenez v. State, 112 Nev. 610, 918 P.2d 687, 692 (1996); Roberts v. State, 110 Nev. 1121, 881 P.2d 1 (1994). The Nevada Supreme Court recently explained in detail the analysis to be used when evaluating a specific request for Brady material and concluded that the State must comply with the request if there is a reasonable possibility that the requested evidence will affect the judgment of the trier of fact. Roberts, 110 Nev. at 1130. Moreover, "[i]t is well settled that evidence that would enable effective cross-examination and impeachment may be material and that non-disclosure of such evidence may deprive an accused of a fair trial." Id. See Giglio v. United States, 405 U.S. 150, 154 (1972) ("When the reliability of a given witness may well be determinative of guilty or innocence, non-disclosure of evidence affecting credibility falls within [Brady].").

Mr. Counts was in the midst of a Capital murder trial when co-defendant, Anabel Espindola, also facing capital murder charges, changed her plea and gave a ten page statement, Declaration of Warrant and Arrest to the State and detectives. In her statement, she gives times inconsistent with the State's main witness, unindicted co-conspirator, Zone. In addition, she provides information inconsistent with the conspiracy that Counts is alleged to have entered. In fact,

Counts could not have entered into a conspiracy with her or any other of the co-defendant's based on her statement. In addition, she provided information potentially linking Counts to this crime, to wit, a phone number and phone records. With the addition of this information, counsel for Counts could have advised him as such before testifying on his behalf, in his Capital Murder trial, and being blind-sided by the State with the new information. Counsel had a right to this information under Brady, counsel requested this information and not only was the request denied, but the information was also placed under seal and not opened until the day after Counts was found not guilty of murder but convicted on a conspiracy charge.

The Denial of a New Trial:

In Oliver v. State, 85 Nev. 418, 456 P.d. 431(1969), the Nevada Supreme Court set out criteria granting a new trial on the grounds of a new evidence:

> Appellant contends, and we agree, that in seeking a new trial the newly-discovered evidence must be (1) newly discovered, (2) material to movant's defense, (3) such that it could not with reasonable diligence have been discovered and produced for the trial, (4) not cumulative, and (5) such as to render a different result probable upon retrial. To which we add (6) that it does not attempt only to contradict a former witness or to impeach or discredit him, ***unless witness impeached is so important that a different result must follow***, While v. While, 36 Nev. 16, 131 P. 967 (1913); and (7) that these facts be shown by the best evidence the case admits, People v. Sutton, 15 P. 86 (Cal. 1887); People v. Beard, 294 P. d. 29 (Cal. 1956). (Emphasis added).

Id. At 424. In the instant matter, Counts meets all of the criteria. Zone, an unindicted co-conspirator, was the most important witness for the State. Zone's timeline of events was actually different than evidence obtained by the State in both Espindola's Declaration of Arrest and phone records obtained by the State in February 2008 based on Espindola's statement. The alleged "co-conspirator" had

actually entered into a different conspiracy than that alleged by the State in the same Declaration of Arrest that was not given to Counts.

The State argued that Espindola entered into a conspiracy with Mr. Counts which was consistent with the testimony of the State's informant witnesses, Zone, therefore all the witnesses were reliable. If the informants were to be believed, then Espindola's statement must fit the State's theory. Instead, their statements were inconsistent and Espindola's version differed.

This information could not have been produced with due diligence. The Defense had requested in open court, in the midst of trial, on February 5, 2008, any and all information, statements, evidence, obtained by the State from Anabel Espindola over the weekend of February 1, 2008 through February 4, 2008 when she changed her plea from Not Guilty to Guilty of a lesser charge. The request was fought by the State and denied by the Court. The State requested the "Declaration of Warrant" be placed under seal during Counts continuing trial. There is nothing the defense could have done to discover this information on their own as Mr. Counts maintained his innocence and insistence that he had never met Ms. Espindola or any other of the co-denfendants besides Carroll prior to being in court with them. Further, Ms. Espindola never revealed this information prior to taking a plea. With this evidence, a different result would have resulted as Zone would have been crossed differently regarding his inconsistencies and counsel would have advised Counts differently before taking the stand on his own behalf.

Zone was the only person present when Hadland was shot that was not given a "benefit" for his testimony, according to the State. Further, according to the State, he had nothing to gain by coming forward and testifying, except for not being charged. If the new evidence was known, and Zone testified regarding this information and the Defense had rebutted his testimony with

inconsistencies in his timeline, there would be sufficient doubt as to his ability to accurately portray the events of the evening as to what actually took place or what he witnessed.

In addition, from Espindola's statement to the police on February 2, 2008, there is evidence that she did not enter the same conspiracy that Mr. Counts was alleged to have entered. Counsel for Mr. Counts was entitled to this information and entitled to cross-examine the State's witnesses on it or to call their own.

Under NRS 174.295 the State has a continuing duty to disclose to the defense information that is relevant to the case. **NRS 174.295** reads as follows:

> "1. If, after complying with the provisions of NRS 174.235 to 174.295, inclusive, and before or **during the trial**, a party discovers additional material previously requested which is subject to discovery or inspection under those sections, he **shall promptly notify the other party or his attorney or the court of the existence of the additional material. (Emphasis added).**

The Defense had specifically and continuously requested and the Court had specifically Ordered that the State provide all discovery to the Defense. The new evidence obtained in February 2008 was never shared with the Defense.

The State Sought and Obtained Habitual Criminal Following Their Failure to Obtain Not Only a Death Verdict But Also a Guilty Verdict in Count II, Murder With Use of a Deadly Weapon and Mr. Counts was Arbitrarily Sentenced as Such.

The decision to adjudicate a person as a habitual criminal is not an automatic one. Walker v. Deeds, 50 F.3d 670 (9th Cir. 1995). *Citing* Clark v. State, 109 Nev. 426 (1993). In particular, "[h]aving committed three felonies does not, of itself, a habitual criminal make." Id. The sentencing judge is required to make "an actual judgment on the question of whether it is just and proper for [the defendant] to be punished as a habitual criminal." Id. The present case is similar to Walker in that

the court did not employ the required weighing, nor did it come to its sentence as a matter of "just and proper" determination.

This record is devoid of the trial court considering any factors against imposing habitual criminal status when at least some were obviously present, to wit: (a) the age of the two prior offenses were from six to twelve years old; (b) the record does not clearly reflect the nature of the underlying offenses, however, they are actually relatively minor; c) at least one of the offenses may not have been a felony in Nevada , possession of marijuana and (d) Counts was found not guilty on the murder charge. Instead, the trial court relied heavily on the fact that Mr. Counts was found not guilty of murder, facts not supported by any evidence in the record as shown in the following statement, regarding the trial court's determination before imposing the sentence: "to me, six years out of trouble really is not that long a time" and then the court went on to sentence him as a habitual. (A. App., Vol. 17, pp. 4129). There was no consideration with regard to the prior crimes which were non-violent, drug possession charges. It is obvious that this analysis falls far short of that required in Nevada.

Finally, the Court appears to be punishing Counts for maintaining his innocence and escaping a death sentence. In Counts Motion for A New Trial which was filed following the Conspiracy conviction, Counsel relied on the fact that a different outcome may have resulted if counsel was supplied with the new information. In addition, the State was using this questionable conviction to seek Habitual Criminal. At the suggestion that this conviction was improper, the Court stated: "this was a clear win any way you look at it and, frankly, there's nothing in that – I mean to now second guess your trial strategy to me is well... insulting ... laughable. . .you couldn't have hoped for a better result in this." (A. App., Vol. 17, pp. 4111). Mr. Counts who has maintained his

innocence throughout, spent three years in custody awaiting trial, was facing the Death Penalty, disagrees.

Cumulative Errors by the State Mandate Reversal:

Appellant's conviction and sentence are invalid due to the cumulative errors in the gross misconduct by state officials, witnesses and the trial judge and should be reversed for cumulative error. Here, the cumulative effect of the errors demonstrated in this petition was to deprive the proceedings against Appellant of fundamental fairness and to result in a constitutionally unreliable sentence. The totality of these multiple errors and omissions resulted in substantial prejudice to Appellant. The State cannot show, beyond a reasonable doubt, that the cumulative effect of these numerous constitutional errors was harmless. Rather, the totality of these constitutional violations substantially and injuriously affected the fairness of the proceedings and prejudiced Appellant. See, Kevin Allen Big Pond v. Nevada, 692 P.2d 1288, 101 Nev. 1, (1985).

24. **Preservation of issues. State concisely how each enumerated issue on appeal was preserved during trial. If the issue was not preserved, explain why this court should review the issue**: Constitutional issues can always be raised on appeal. In addition, timely objections were simultaneously made.

25. **Issues of first impression or of public interest. Does this appeal present a substantial legal issue of first impression in this jurisdiction or one affecting an important public interest?** No. **If so, explain**: N/A

DATED this 16th day of June, 2008.

Respectfully submitted,

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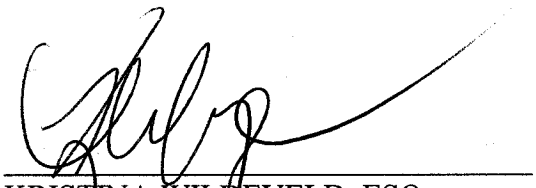
VERIFICATION

I recognize that pursuant to NRAP 3(c) I am responsible for filing a timely fast track statement and that the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track statement, or failing to raise material issues or arguments in the fast track statement, or failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the information provided in this fast track statement is true and complete to the best of my knowledge, information and belief.

DATED this 16th day of June, 2008.



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CERTIFICATE OF MAILING

I hereby certify and affirm that I mailed a copy of the foregoing FAST TRACK STATEMENT to the Appellant and the attorney of record listed below on June 16, 2008.

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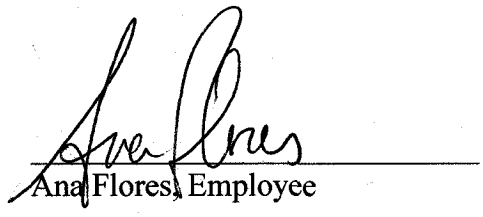

Ana Flores, Employee