No. 21-

IN THE
Supreme Court of the United States

MANUELA VILLA DE MORALES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the decision of the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit")–which affirmed the decision of the United States Magistrate Judge denying Ms. Villa de Morales' racial challenge to the Government's strikes at jury selection under *Batson v. Kentucky*, 476 U.S. 79 (1986) ("*Batson*")–conflicts with decisions of this Court on an important matter, and thus the decision by the Fifth Circuit calls for an exercise of this Court's supervisory powers such that a compelling reason is presented in support of discretionary review by this Honorable Court.

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption:

Manuela Villa de Morales:	Petitioner (Defendant-Appellant in the lower Courts)
United States of America:	Respondent (Plaintiff-Appellee in the lower Courts)

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PETITION FOR WRIT OF CERTIORARI

Petitioner, MANUELA VILLA DE MORALES, requests that this Honorable Court grant this petition and issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit. Ms. Villa de Morales submits the Magistrate Judge committed reversible error by denying her racial challenge to the Government's strikes at jury selection. Respectfully, the decision by the Fifth Circuit is in conflict with decisions of this Court and therefore a compelling reason is presented in support of discretionary review.

CITATIONS TO THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

From the Federal Courts:

> The Order of the United States Court of Appeals for the Fifth Circuit, *United States v. Manuela Villa de Morales*, No. 19-50666 (5th Cir. July 8, 2021), appears at Appendix A to this Petition and is unreported but published at 852 F. App'x 151 (5th Cir. 2021).
>
> The Judgment in a Criminal Case of the United States District Court for the Western District of Texas, Pecos Division, appears at Appendix B to this Petition and is unreported.

From the State Courts:

> None.

GROUNDS FOR JURISDICTION

This Petition arises from a direct appeal following a jury trial and sentence concerning, *inter alia*, a conviction for aiding and abetting the importation of more than 500, but less than 1,000, kilograms or marijuana into the United States. A copy of the Judgment appears at Appendix B. A copy of the decision by the United States Court of

Appeals for the Fifth Circuit appears at Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS

U.S. CONST. Amend. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. Amend. VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation: to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in this favor; and to have Assistance of Counsel for his defense.

STATEMENT OF THE CASE

Overview

The issue in this Petition is whether Ms. Villa de Morales' rights were violated as a result of the Court's denial of her *Batson* challenge. *United States v. Villa de Morales,* 852 F. App'x 151, 152 (5th Cir. 2021) (attached as Appendix A). In relevant part, the Fifth Circuit held that "because the Government's explanations [for strikes against Hispanic prospective jurors] were not based on race, the Government satisfied its minimal burden at the second

step of the *Batson* analysis." *Id.* at 571 (citing *United States v. Williams,* 264 F.3d 561, 571 (5th Cir. 2001)). The Fifth Circuit summarily explained:

> Villa de Morales asserts that the Government used six of its seven peremptory strikes against Hispanic prospective jurors, but she fails to establish a discriminatory motive. *See Hernandez v. New York,* 500 U.S. 352, 359 (1991).

Id. (full citation to *Hernandez* added) (emphasis added). Thus, the Fifth Circuit held that the Magistrate Judge's denial of Ms. Villa de Morales' *Batson* challenge was not clear error solely because she "fail[ed] to establish a discriminatory motive." *Id.*

Background

The indictment in this case alleged that Ms. Villa de Morales knowingly aided and abetted in the importation of 100 kilograms or more, but less than 1,000 kilograms, of marihuana. ROA.27-28. Jury selection was before United States Magistrate Judge David B. Fannin. ROA.474. At jury selection, the Court excused four of the potential jurors for medical reasons, to wit: panel members 2, 5, 7 and 13. ROA.1404. Juror numbers 8, 23, 24 and 28 were removed for cause. ROA.622, 626-29, 652. Thus, the Court duly noted "with the prosecution getting 7 peremptories and the defense getting 11," the strikes would reach panel member number 41. ROA.653, 655. Of those 23 available jurors, 12 were Hispanic and 11 were not. ROA.657-59.

At that point, Ms. Villa de Morales made a *Batson* challenge because 6 of the 7 peremptory strikes were on Hispanics. ROA.656. When the Court asked the Government to respond, the prosecutor did not contest defense counsel's statement that all but one of the Government's strikes were for Hispanic jurors. ROA.656-57.

The prosecutor claimed the Government struck juror number 6 because his son was caught with drugs and he seemed "a little wishy-washy" when he said "I guess" that "I could be fair to both sides." ROA.656-57. With regard to juror number 12, the Government pointed out that the juror said he had a grudge for many years against the Pecos Police Department. ROA.657. With respect to juror number 15, the Government justified the strike because he had a son who was employed at the port of entry where there was a "falling out" which resulted in something "subliminal." ROA.657-58. On juror number 21, the AUSA distinctly noted that he had "prosecuted his son." ROA.658. He then addressed juror number 30 and described him as "not paying attention" and "very aloof," and wishing marijuana was legal and hence would not take the case seriously. ROA.658.

Finally, the Government discussed juror number 31, Mr. Contreras, the sixth Hispanic the Government struck. The following exchange and ruling took place on the record:

> [AUSA] MR. MILLER: Mr. Contreras, from my 20 years' experience here–Mr. Contreras is from Ojinaga, and we have investigations of the various family members from that area like all the way up to Candelaria and San Antonio del Bravo.
>
> THE COURT: Thank you.
>
> [Defense Counsel] MR. O'NEAL: I don't have a response as to each individual one, except I think that Mr. Miller admits to the *Batson* challenge on 31. For a preservation-of-the-record issue, I'll say that–I don't know if I have to do this.
>
> But, no, I'll just make a *Batson* challenge. Never mind. Sorry.
>
> THE COURT: The Court finds that the defendant did not make a prima facie case for striking the jurors in question, which are numbers 6, 12, 15, 21, 30 and 31.

> Further, the Court finds that the Government has given legitimate reasons for striking these individual jurors and overrules the Defense objection as to *Batson versus Kentucky*.

ROA.659 (emphasis in original). The selected jury was empaneled. ROA.659-80.

The Jury Trial

This case involved an incident which took place on January 3, 2018, at the Rio Grande River on the Texas/Mexico border. ROA.253-55. Law enforcement witnessed a group of individuals bring duffle bags that contained marijuana across the river. ROA.253-55. The group put 238 pounds of marijuana in a white van and ran back across the border to Mexico. ROA.253-55. Law enforcement seized the drugs and the van. ROA.253-55. Ms. Villa de Morales was never close to the border where the van was found. ROA.253.

By using video from a convenience store that was some distance from the border, the Government showed that Ms. Villa de Morales, her husband, and their two children were at the store with the white van and a black vehicle. ROA.254-55. Subsequently, the Government determined Ms. Villa de Morales was a possible suspect in the attempted smuggling operation. ROA.254-55.

On October 27, 2018, more than nine months later, the DEA detained Ms. Villa de Morales at the border. ROA.254-55. Two agents went to interview her. ROA.255. The interview was not recorded and an interpreter was used because Ms. Villa de Morales is a Spanish speaker who does not speak English. ROA.255. Based on this unrecorded interview, Ms. Villa de charged with aiding and abetting the smuggling of marijuana by driving the white van close to the river where the drugs were seized.

Ms. Villa de Morales testified and explained she believed she was assisting in taking the van to be sold. ROA.1048-50. Thus, Ms. Villa de Morales argued she was only present to assist her husband with the sale of the white van and was not involved with smuggling marijuana. ROA.1081-88. She further testified the interrogation went on for two to three hours. ROA.1070. When she asked to use her cell phone for help, the agents made her put the call on speaker. ROA.1074-79.

Deliberations, Verdict and Sentence

After approximately three hours of deliberations, the jury sent the Court a note which provided: "We are unable to reach a unanimous decision." ROA.1179. The Judge told the jury to continue to deliberate. ROA.1179.

Two hours later, the jury returned with a verdict and found Ms. Villa de Morales guilty on both counts. ROA.1180-81. The Judge accepted the verdict and ordered a Presentence Investigation Report. Ms. Villa de Morales was subsequently sentenced to serve 78 months in the custody of the Bureau of Prisons. ROA.1201.

The Decision on Direct Appeal

As noted above, the Fifth Circuit affirmed the Magistrate Judge's denial of Ms. Villa de Morales' *Batson* challenge. *Villa de Morales*, 852 F. App'x at 152-53. The Appellate Court further denied relief on Ms. Villa de Morales' sufficiency of the evidence claim and affirmed. *Id.* This Petition for Writ of Certiorari follows.

ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I.
The Standard for Evaluating a *Batson* Challenge

"[T]he [Government] denies a [Hispanic] defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded." *Batson v. Kentucky*, 476 U.S. 79, 85 (1986). In *Batson*, this Court established a three-step process for addressing claims of race discrimination in the use of peremptory strikes. *Id.* at 96-98. The defendant first must make a prima facie showing of race discrimination in the prosecution's exercise of peremptory strikes. *Id.* at 96-98; *see also Snyder v. Louisiana,* 522 U.S. 472, 476 (2008). If this showing has been made, the process moves to the second step, at which the prosecution must offer a race-neutral explanation for the strikes in question. *Snyder*, 522 U.S. at 476-77. Finally, at step three, the Court must determine whether the defendant has established purposeful discrimination. *Id.* at 478.

Because the Fifth Circuit reached step three, the *Batson* analysis in this case hinged on whether Ms. Villa de Morales had established purposeful discrimination. The "decisive question" at the critical third step is "whether the Government's race-neutral explanation[s] . . . should be believed." *Miller-El v. Cockrell* ("*Miller-El I*"), 537 U.S. 322, 339 (2003) (quoting *Hernandez v. New York*, 500 U.S. 352, 365 (1991)). In consideration of that question, "all of the circumstances that bear upon the issue of racial animosity must be consulted." *Snyder*, 552 U.S. at 478; *see also Miller-El v. Dretke* ("*Miller-El II*"), 545

U.S. 231, 240 (2005) (requiring consideration of "all relevant circumstances"); *Batson*, 476 U.S. at 96 (same).

However, as explained herein, the Magistrate Judge and the Fifth Circuit failed to give meaningful consideration to "all relevant circumstances" when reviewing Ms. Villa de Morales' *Batson* claim. Consequently, they failed to apply the correct standard of review on evaluating the *Batson* claim in this case and thus failed to recognize the race discrimination that defined the prosecution's jury selection process.

II.
The Fifth Circuit Failed to Give Meaningful Consideration to "All Relevant Circumstances" as *Batson* Requires

A.
No Review by the Fifth Circuit

In ruling that Ms. Villa de Morales failed to prove a *Batson* violation, the Fifth Circuit observed that the Government used six of its seven peremptory strikes and, without any review of the circumstances surrounding those strikes, concluded that Ms. Villa de Morales had failed to establish "a discriminatory intent." *De Morales*, 852 F. App'x at 152. The Fifth Circuit did not review even a fraction of the evidence that was before the Magistrate Judge and thus failed to give full consideration to "all relevant circumstances" as required by *Batson*.

Importantly, a review of the evidence shows this Petition should be granted so that the proper standard of review can be applied in this case. Ms. Villa de Morales submits the Fifth Circuit did not review the totality of the circumstances as is required by this Court in evaluating *Batson* issues. Indeed, the ultimate question is not only whether the

prosecution's "race neutral" reasons were sufficient to show no discriminatory intent, but instead whether the stated reasons were a pretext for actual discriminatory intent. *See Miller-El II,* 545 U.S. at 240 ("If any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than *Swain [v. Alabama*, 380 U.S. 202 (1965), which placed a "crippling burden of proof" on defendants challenging race discrimination in jury selection, *Batson*, 476 U.S. at 92]). In fact, the Fifth Circuit failed to consider the ways in which a review of all of the circumstances undermines the credibility of the race-neutral reasons proffered by the Government for the strikes. As such, the Court failed to give meaningful consideration to "all relevant circumstances" and thus this Court should grant this Petition.

B.
The Totality of the Evidence Establishes that the Prosecution Discriminated on the Basis of Race in Violation of *Batson*

1.
The Prosecution Used 6 of its 7 Strikes on Hispanics

In the jury pool for selection, there were 12 Hispanics and 11 non-Hispanics. ROA.657-59. Fifty/fifty, so to speak. The prosecution changed all of this with 6 of its 7 strikes. The Government used more than 85% of its strikes to eliminate Hispanics, leaving only 1 strike for a non-Hispanic.

"Happenstance is unlikely to produce this disparity." *Miller-El II*, 545 U.S. at 241. These numbers are the starting point and must be evaluated in making the *Batson* evaluation. *See id.* Respectfully, the Fifth Circuit's mere observation of the use of 6 of 7 strikes was error because this observation was never reviewed as part of the totality of the

circumstances of discriminatory intent in this case. Indeed, Courts are required to inquire whether the stated reason for a strike was a pretext for discriminatory intent. *Miller-El II*, 545 U.S. at 230.

2.
Juror Number 31

"The 'Constitution forbids striking even a single prospective juror for a discriminatory purpose.'" *Foster v. Chatman*, 578 U.S. 488, ___, 136 S. Ct. 1747 (2016) (quoting *Snyder*, 552 U.S. at 478). Furthermore, this Court has explained that, "in considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted." *Id.* at 1747 (quoting *Snyder*, 552 U.S. at 478). The issue at this point is whether the striking of Juror Number 31 established the Government's alleged non-discriminatory basis for the strike was a pretext to discriminatory intent. *Miller-El I*, 537 U.S. at 328-29.

The Government's basis for striking juror member number 31 is within itself, and even more so in light of the evidence concerning of all the strikes, insufficient to establish a race-neutral reason for the strike and, even presuming it was facially sufficient, it was pretextual. This Court has explained that if the reason for the strike is "implausible or fantastic" it is probably pretextual. *Purkett v. Elem,* 514 U.S. 765, 768 (1995). The Government's single reason for striking juror number 31 was that he was from Ojinaga, Mexico, and "we have investigations of the various family members from that area like all the way up to Candelaria and San Antonio del Bravo." ROA.659. This reason is not plausible.

As argued to the Fifth Circuit, the remaining evidence makes the Government's claim on juror number 31 even more implausible. (Opening Brief, pages 34-36). As set forth in the Opening Brief, pursuant to the most recent count in 2015, Ojinaga had a population of 28,040. Https//www.citypopulation.de/php/mexico-admin.php?admin2id=08052 (last visited Aug. 15, 2020). The juror was born in Ojinaga 43 years prior to jury selection in this case. ROA.1366. He had lived in the State of Texas for 8 years and in Pecos County, Texas for 3 years. ROA.1366. This panel member was a welder, married and the father of 3 children. ROA.1366. In other words, there was no evidence the juror knew anything about certain people or certain groups in Ojinaga. The Government's argument is undermined even further in light of the Ojinaga's population and the fact that no one in the courtroom knew the last time this juror even visited the city.

Yet, the Government's conclusion becomes even less plausible. The one time the Government questioned this juror there was no evidence of connections to Ojinaga. The prosecution did not even ask juror number 31 about Ojinaga. If the Government was concerned about this issue, the prosecutor should have at least asked him. *Miller-El II*, 545 U.S. at 246 (explaining that failure to ask juror about basis for strike is evidence there basis is a sham and a pretext for discrimination).

In fact, juror number 31 is the type of juror usually wanted by the Government. During voir dire, juror 31 let the Court know he has a son who "was in prison for a year of joy riding.' ROA.572. His son pleaded guilty. ROA.572. When asked if his son was treated fairly by the Government, the juror responded: "Yes, sir." ROA.573. When asked if that

would cause bias to either the Government or the defense, he declared: "No sir. It was fair." ROA.573. More importantly, if the juror's son's experience with the criminal justice system was in some way the reason for the strike, the Government did not declare this response as the reason for the strike. *See* ROA.659. Thus, this shows the basis for the strike on juror number 31 was a pretext for discriminatory intent.

On appeal, the Government addressed the basis for the striking of Juror Number 31. (Government's Brief, page 30). Initially, the Government in its brief quotes the prosecutor's sole reason for the strike: that "from my 20 years' experience here–Mr. Contreras is from Ojinaga, and we have investigations from that area like all the way to Candelaria and San Antonio de Bravo." (Government's Brief, page 30). However, the Government then abandons its own prosecutor's justification for the strikes and next claims the following supports the strikes:

> Presidio/Ojinaga area is "well known for alien and narcotics smuggling [with] very few people living between Ruidosa [on the Mexican side of the Rio] and Presidio [on the Texas side]; the "region [is] dry, with little vegetation, and consist[s] largely of ranch land." *See United States v. Mark,* 481 F. App'x 899, 901 (5th Cir. 2012). The area that the prosecutor referenced cuts a 50-mile long swath on both sides of the river. Many jurors had family members who were, or had been, employed by law enforcement or involved with drugs. Villa's case itself illustrates the complicated, intertwined family relationships that exist on both sides of that border with regard to the drug trade.
>
> The prosecutor's explanation for striking Juror Contreras was not only based on the general realities of this isolated border region, but also upon his own experience that such relationships and activities while certainly possible, are almost impossible to discern explicitly on voir dire. *See Lewis v. Poole,* 114 F. App'x, 145 (5th Cir. 2004) ("the 'decisions of this court have made it plain that the process of choosing a jury may be influenced by the intuitive assumptions of the attorneys.'").

(Government's Brief, pages 30-31) (alterations in original) (footnote omitted).

Importantly, the Government did not cite to any portion of the record where it was established that any of these facts were relied upon for any of the prosecution's strikes on Hispanics. This is because such proposed facts and reasons for the strikes were never mentioned until the Government filed its brief. In fact, the trial attorney for the Government only focused on Ojinaga, where Juror Number 31 was "from," and made no observation about the "complicated intertwined relationships" on the border region based on his own personal experience. These facts were never claimed, much less mentioned, as a reason for striking any Hispanics and, hence, they are not even embellishments.

Finally, this case was tried in Pecos, Texas, and involves events that took place on the border between Mexico and the United States. ROA.253-55. In this regard, what the Government claims about this juror was true of the entire jury panel which encompasses Pecos, Texas, and down to the border. In other words, the basis for the strike was true of the entire demographics of the area from which the jury pool is drawn. Hence, the striking of this Hispanic juror, and 5 other Hispanics, was discrimination, and this Court should grant this Petition.

3.
Beyond 6 Hispanics and Juror Number 31

The Government characterized the prosecutor's peremptory strikes as a "mix" of ethnic diversity. (Government's Brief, page 29) (stating there was an "ethnically diverse mix of peremptory strikes by the Government"). The Government makes this argument despite its acknowledgment that it used 6 of its 7 strikes on Hispanics. (Government's Brief, page

4). As noted in the Opening Brief, 12 of the available jurors were Hispanic, and 11 were not. (ROA.657-59). Thus, the panel was slightly more than 50% comprised of Hispanics. Clearly, the Government's strikes were not an "ethnically diverse mix of peremptory strikes." (Government's Brief, page 29). This was contrary to the record, as well as basic arithmetic.

The Government also claimed the prosecutor's explanation for his strikes demonstrates that his position was actually "instinctual" based on his "objectively legitimate experience" and thus race-neutral. (Government's Brief, page 32). The Government relied on the *Jynes* case where this Court explained and held:

> In *Lewis v. Poole,* 114 Fed. App'x. 144 (5th Cir. 2004), an unpublished opinion, the court affirmed a district court finding of no *Batson* violation. In *Lewis*, defense counsel stated that the jurors had been struck because they were from an area of Louisiana that was notoriously plaintiff-friendly, and because they held lower income, traditionally subservient jobs. Further, the defense attorney relied on "instinct" as an explanation for the peremptory strikes. The court accepted this explanation, noting "the 'decisions of this court have made it plain that the process of choosing a jury may be influenced by the "intuitive assumptions" of the attorneys.'" *Id.* at 145 (citing *United States v. Bentley-Smith*, 2 F.3d 1368, 1372 (5th Cir. 1993)). As no discriminatory intent is inherent in defense counsel's explanation that he relied on "instinct," the explanation must be deemed race-neutral. *Id.* (referencing *Purkett* [*v. Elem*, 514 U.S. 765, 768 (1995)]. Like defense counsel in *Lewis,* the prosecution based its decision to strike, in part, on Hill and Price's residence in New Orleans, menial jobs, and their own instinct.

United States v. Jynes, 197 F. App'x 351, 354 (5th Cir. 2006) (full citation to *Purkett* added). Based on these observations and others, as discussed below, the Fifth Circuit in *Jynes* determined that the Government had met its burden under *Batson* and affirmed. *Id.*

However, this argument was of no help to the Government. In fact, it established the strikes in this case were discriminatory and the reasons used by the Government in this

case were actually pretextual. As noted in *Jynes*, "the prosecutor must give clear and reasonably specific explanations of his legitimate reasons for exercising peremptory challenges." 197 F. App'x at 354 (citing *Miller-El II*, 545 U.S. 231 (2005)). While the prosecutor in *Jynes* provided this type of information, the prosecutor in this case did not.

As set forth in *Jynes*, the Courts can rely on intuition when it is backed-up with trustworthy specific facts. *Id.* In this case, Juror Number 31 was a single Hispanic who used to live in a populous and suspect city in Mexico which was only a small part of the various matters the prosecutor had handled. The Government's argument in this case is only further diluted by the new and vague claim to the Fifth Circuit that somehow the strike was justified in light of drug smuggling which allegedly takes place along a 50-mile stretch of the border. (Government's Brief, page 30). As noted above, the observation applies to all of the jurors. Thus, this is further evidence that striking Juror Number 31, and the striking of the other 5 Hispanics, was discriminatory and the reasons provided by the Government for the strikes were pretextual.

A specific review of the remaining strikes only further establishes there was *Batson* error in this case. The Government used six of its seven strikes on Hispanics. ROA.657-59; *see also Miller-El II,* 545 U.S. at 240. Furthermore, juror number 15 was stricken because his son worked at the port and two witnesses for the Government who also worked at the port might be testifying. ROA.657. This led the Government to claim the juror may have something "subliminal," without expanding on that reason. ROA.658. This purportedly was significant to the Government based on the intuition of the prosecutor. The basis for

removing juror number 30 was unclear, as the Government described him as "very aloof" and complained about his desire to legalize marijuana. ROA.658. This basis for removal is questionable considering that numerous states have legalized marijuana. Therefore, this review of the jury selection establishes there was *Batson* error in this case and this Court should grant this Petition.

CONCLUSION

Ms. Villa de Morales respectfully submits that the decision of the United States Court of Appeals for the Fifth Circuit, which affirmed the decision of the Magistrate Judge overruling Ms. Villa de Morales' *Batson* objection, conflicts with decisions of this Court. Therefore the decision by the Fifth Circuit calls for an exercise of this Court's supervisory powers such that a compelling reason is presented in support of discretionary review by this Honorable Court.

WHEREFORE, PREMISES CONSIDERED, Petitioner, MANUELA VILLA DE MORALES. respectfully requests that this Court grant this petition and issue a Writ of Certiorari.

Respectfully Submitted,

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