STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE

 SUPERIOR COURT DIVISION

COUNTY OF XXXXXXX FILE NOS. XXXXXXX

STATE OF NORTH CAROLINA )

 )

v. )

 )

DEFENDANT , )

 Defendant. )

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**MOTION TO QUASH JURY VENIRE**

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**NOTE: THIS DRAFT MOTION IS WRITTEN TO LEAVE ROOM FOR TWO SCENARIOS – 1.) THAT YOU WERE DENIED THE INFORMATION ABOUT THE JURY FORMATION PROCESS AND THE RACE DATA OF THE POTNEITAL JURORS THAT YOU PREVIOUSLY YOU REQUESTED; 2.) THAT YOU WERE PROVIDED THIS INFORMATION AND THERE IS AN UNDERREPRESENTATION OF A DISTINCTIVE GROUP PRESENT IN YOUR CASE. IN BOTH SCENARIOS, PLEAD THE 3-STEPS OF *DUREN* AS BEST YOU CAN, AND ARITCULATE WHERE YOU CANNOT PROVIDE MORE DETAILS DUE TO INSUFFICIENT INFORMATION. CONTACT HANNAH AUTRY,** **HAUTRY@CDPL.ORG** **FOR CONSULTATION IF DESIRED.**

**PURSUANT TO N.C.G.S. 15A-1211(c), THIS MOTION MUST BE MADE AND DECIDED PURSUANT TO THE QUESINONING OF ANY JUROR.**

NOW COMES Defendant, by and through counsel, moves to quash the jury venire in this case. This motion is made pursuant to Defendant’s rights under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 24 and 26 of the North Carolina Constitution.

A criminal defendant is entitled to a jury that comes from a cross section of the community. *Taylor v. Louisiana*, 419 U.S. 524 (1975); *State v. McNeill*, 326 N.C. 712 (1990). In order to establish a prima facie violation of the fair cross-section requirement, a defendant must show: (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process. *Duren v. Missouri*, 439 U.S. 357, 364 (1979). If Defendant succeeds in making out a prima facie fair cross-section violation, the burden shifts to the State to prove that “a significant state interest [is] manifestly and primarily advanced by those aspects of the jury selection process…that result in the disproportionate exclusion of a distinctive group.” *Id*. at 367-68.

The questions of disproportionate representation is determined on a case-by-case basis. *State v. Golphin*, 352 N.C. 364, 393 (2000). To show “systematic exclusion” of a protected group, Defendant does not have to show that any party acted with discriminatory motive or intent. Underrepresentation is “systematic” if it was an “inherent” product of the jury selection mechanism that was used or if it resulted from a rule or practice over which the state actor had no control. *Duren*, 439 U.S. at 366. Defendant does not have to be a member of the excluded group of the excluded group to have standing to raise a Sixth Amendment fair cross-section challenge. *Taylor*, 419 U.S. 522 (1975) (male could challenge systematic exclusion of females); *Holland v. Illinois*, 493 U.S. 474 (1990) (white person has standing to challenge exclusion of African-Americans). The number of the distinctive group members in the community usually may be demonstrated with census data reflecting the total population. *Teague v. Lane*, 489 U.S. 288, 301 n.1 (1989); *Duren*, 439 U.S. 357, 365. *Castaneda v. Partida*, 430 U.S. 482, 495–96 (1977) (equal protection case in which the Supreme Court relied on total population figures in reviewing a challenge to grand jury composition); *U.S. v. Rodriguez-Lara*, 421 F.3d 932, 942 (9th Cir. 2005) (“the Supreme Court’s acceptance of comparisons using total population figures clearly indicates that a defendant is not required to gather data reflecting the age-eligible population of the distinctive group in question”), *overruled on other grounds, United States v. Hernandez-Estrada*, 749 F.3d 1154 (9th Cir. 2014); *Azania v. State*, 778 N.E.2d 1253, 1259 (Ind. 2002) (noting that courts generally uphold the use of census figures in challenges to jury procedures).

**STATEMENT OF FACTS**

 [IF GRANTED INFORMATION ABOUT THE JURY FORMATION PROCESS AND RACE DATA OF POTENTIAL JURORS – INCLUDE A DISCUSSION OF WHAT INFORMATION WAS PROVIDED AND WHAT THE INFORMATION SHOWS AND PROVIDE EXHIBITS FOR SUPPORT. CONSIDER CONSULTING WITH AN EXPERT WHO CAN ASSIST WITH ANALYZING THIS INFORMATION.]

 [At the time of the filing of this motion, the information provided shows…]

 [Include a discussion of the percentages of the distinctive group at issue at each step of the formation process – including but not limited to the breakdown of the jurors on DMV list originally provided to the clerk, the breakdown of the master list for the county, the breakdown of the jurors who were summonsed but did not appear, and the breakdown of the jurors who appeared for jury service].

[IF DENIED INFORMATION ABOUT THE JURY FORMATION PROCESS AND RACE DATA OF POTENTIAL JURORS, OR IF SUCH INFORMATION IS NOT AVAILABLE, INCLUDE A DISCUSSION OF WHAT ALL HAS BEEN DONE TO ACCESS THAT INFORMATION]

[At the time of the filing of this motion, Defendant has insufficient information to adequately investigate and develop a prima facie case pursuant to *Duren*. Because Defendant was denied access to the information sought, Defendant moves to quash his jury venire. Defendant states the factual basis with as much information as he currently has. Defendant reserves the right to supplement this motion with any additional information that is learned throughout the jury selection process and throughout trial.]

**LAW AND ARGUMENT**

 **A. Distinctive group**

The first prong of the *Duren* test requires that Defendant show that the group alleged to be excluded is a "distinctive" group in the community. Black jurors, Latino jurors, and female jurors represent “distinctive” groups in the community. *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975); *see State v. Golphin,* 352 N.C. 364, 393 (2000) (noting that “[t]here is no question . . . that defendants satisfied the first prong . . . because African-Americans are unquestionably a ‘distinct’ group for purposes of [this] analysis”); *see also* Paula Hannaford-Agor, *Systematic Negligence In Jury Operations: Why The Definition Of Systematic Exclusion In Fair Cross Section Claims Must Be Expanded*, 59 DRAKE L. REV. 761, 763 (2011) (“It is fairly well-settled that the first prong of *Duren* refers to gender, race, and ethnicity, or in rare circumstances, religious affiliation and national origin.” (footnotes omitted)). The distinctive group at issue in this case is [insert distinctive group].

 **B. Unfair and unreasonable representation of the distinctive group**

As to the second prong of the *Duren* test, that the representation of this group in the venires from which Defendant’s jury will be selected is not fair and reasonable in relation to the number of such persons in the community, Defendant provides the information available below.

Based on the information provided on the juror questionnaires, it appears that the potential jurors comprise the following racial and ethnic groups: White (X); Black/African-American (X); Hispanic (X); Asian (X); and Unknown (X). Out of X responses on the jury questionnaires, the racial makeup of the potential jurors correlate to: White (X%); Black/African-American (X%); Hispanic (X%); Asian (X%); Unknown (X%). According to U.S. Census Data most recently collected, available at XXXXX, persons who identify as White Alone comprise X% of the XXXXXX County population, followed by X% Black or African American, X% Hispanic or Latino Origin, X% some Other race alone, X% Asian Alone, X% Two or more races, X% American Indian and Alaska native alone, and X% Native Hawaiian and Other Pacific native alone (Exhibit X).

With the information provided, it appears there is an absolute disparity of X when comparing the number of distinctive group members that identify as [insert distinctive group at issue] in the community and the number of distinctive group members that identify as [insert distinctive group at issue] in Defendant’s pool. The apparent underrepresentation is more pronounced when the comparative disparity is calculated. It appears that the comparative disparity between the representation of [insert distinctive group at issue] venire members and [insert distinctive group at issue] community members is XX%. Comparative disparity, a calculation that measures the percentage by which the number of distinctive group members in the venire undercounts the number of distinctive group members in the community, is a useful tool for measuring underrepresentation, especially when the distinctive group at issue is a relatively small group in the community. In *Berghuis v. Smith*, 559 U.S. 314, 329 (2010), the U.S. Supreme Court stated that there is no perfect test for underrepresentation, and quoted with approval the Michigan Supreme Court’s holding that, “[p]rovided . . . the parties proffer sufficient evidence . . . the results of all of the tests [of underrepresentation, including absolute disparity, comparative disparity, and standard deviation,] should be considered.” *Id*. (internal quotations omitted).

**C. Systematic exclusion**

 As to the final prong of the *Duren* test, Defendant must show evidence of systematic exclusion. *See* *State v. Bowman*, 349 N.C. 459 (1998) (“[d]efendant’s only evidence in the instant case consisted of the statistical makeup of this particular jury venire”; court found that evidence failed to show systematic exclusion under third prong of *Duren* test). Systematic exclusion could occur at any stage of the jury process that is invisible to Defendant preceding when potential jurors enter the courtroom. When evaluating this prong, North Carolina courts have focused on the venire in the defendant’s case, and considered composition of the venires over time in analysis of the third prong as opposed to the second prong. *See State v. Jackson*, 215 N.C. App. 339, 343-44 (2011) (noting that the *Duren* court considered composition of venires over time in analysis of third prong).

 [If you have the information you requested, detail as best you can why the underrepresentation is systematic. Examples would include if the source lists (the DMV list of licensed drivers and BOE list of registered voters) disproportionately excludes distinctive groups; if distinctive groups are disproportionately removed during the editing process to form the master list; if distinctive groups appear for jury service at lower rates because members of those groups move more frequently and therefore are less likely to receive a summons that was based on a stale address. Additionally, if underrepresentation is happening consistently over a period of time, there is an argument that the underrepresentation must be systematic, as it was in *Duren*.]

[If you don’t have the information you requested, detail why you cannot meet this prong because defendant’s constitutional right to this information was not provided]

In order to provide evidence of systematic exclusion to make a prima facie case under *Duren*, Defendant must be provided with information about the jury formation process the race data the of potential jurors at each step of the jury formation process, and must have access to demographical data of jury pools in XXX County over a period of time. Defendant has insufficient information to support such claim because requests for such information was denied/the race of the list of potential jurors at each step of the jury formation process was no longer available because it was not preserved.

“Systematic exclusion” may occur as a result of any number of typically invisible steps in the jury formation process: for example, a glitch in a software system that inadvertently removes residents living within a certain zip code from the juror list. *See United States v. Jackman,* 46 F.3d 1240, 1242-43 (2d Cir. 1995)(citing *United States v. Osorio*, 801 F. Supp. 966, 972-73) (D. Conn. 1992)). Or "systematic exclusion" may occur as it did in *Duren* where an inherent product of the jury selection mechanism results in underrepresentation, or if the underrepresentation results from a rule or practice over which the state actor had control. *Id.,* 439 U.S. at 366 (violation found where Missouri’s jury selection process systematically excluded women from the jury pool). Without the opportunity to examine the process by which the juror list is formed, systematic factors producing underrepresentation remain hidden and their effect on the jury list unabated. "One denial leads to another: denial of the motion for disclosure leaves [defendant] with no way to prove his…jury did not represent a cross-section of the community, and that would be a denial of due process." *Garrett*, 594 S.W.2d at 608. The Supreme Court has recognized that access to jury formation records is necessary for enforcing the fair cross-section guarantee: “Without inspection, a party almost invariably would be unable to determine whether he has a potentially meritorious jury challenge.” *Test v. United States*, 420 U.S. 28, 30 (1975). Federal law guarantees access to such information by statute through the Jury Service and Selection Act (“JSSA”). 28 U.S.C. §§ 1861-1878 (2012). While North Carolina does not have a parallel statute, Defendant nevertheless has a constitutional right to information related to his fair cross-section challenge. Courts in other states that do not have statutory equivalents to the JSSA nonetheless have granted the defendant’s requests for jury formation discovery on constitutional grounds, recognizing that such access is necessary to the enforcement of the fair cross-section right. Most recently in Iowa, the state’s highest court recognized that while it had a similar statutory counterpart to the JSSA, it nevertheless found a constitutional right to the defendant’s requests for information about the jury panel for the prior six month period. *State v. Plain*, 898 N.W.2d 801, 828 (2017). (“[T]he constitutional fair-cross section purpose alone is sufficient to require access to the information necessary to prove a prima facie case.”). The court further stated, “[t]o the extent Plaindid not meet his prima facie case with respect to the third prong of the test, we conclude he lacked the opportunity to do so because he was not provided access to the records to which he was entitled.” *Id.*

Courts in three other jurisdictions have similarly affirmed the constitutional right to access the information Defendant is seeking, without any threshold showing of a fair cross-section violation. *See Garrett*,594 S.W.2d at 608 (finding “[t]he court is bound…by the United States Supreme Court's determination of a state court defendant's constitutional right to have his case considered by a grand jury drawn from a fair cross-section of his community” where a defendant requested data maintained by the circuit clerk relating to the master grand jury list that he could use to determine race and ethnicity data.); *Afzali v. State*, 326 P.3d 1, 3 (Nev. 2014) (finding “this court is bound by Supreme Court precedent, and... a defendant has a constitutional right to a grand jury drawn from a fair cross-section of the community” when defendant made a pretrial request for information that would identify the racial composition of the grand jury); *State v. Ciba-Geigy Corp*., 573 A.2d 944, 946 (N.J. Super. Ct. App. Div. 1990) (affirming defendants' claim to right to information based “upon both federal and state constitutional precepts” when he requested information concerning the race and ethnic background of the grand jurors.) As stated in *Garrett,* "[t]his cross-section requirement would be without meaning if a defendant were denied all means of discovery in an effort to assert that right." 594 S.W. 2d at 608. While these cases involved the request for information about the grand jury lists, the request for information also invariably applies to the formation of the venire for the trial jury, as the law is clear that Defendant has a federal and state right to a petit jury drawn from a fair cross section of the community. As such, Defendant similarly has a constitutional right to access the requested information in order to preserve and ensure his constitutional right to a fair trial.

Defendant has suffered prejudice from the denial/lack of availability of the requested information detailing the jury formation process and showing the race data of the potential jurors, because without it, he is unable to effectively investigate and litigate challenges to his constitutional right to have a jury drawn from a fair-cross section of the community. Without the requested information, and without the time and the opportunity to effectively develop his evidence using that discovery, Defendant is deprived of the ability to fully, fairly, and effectively litigate his challenge.

**CONCLUSION**

Wherefore, Defendant requests that this jury be discharged.

Respectfully submitted, this the \_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.

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**CERTIFICATE OF SERVICE**

 THIS IS TO CERTIFY that the undersigned attorney served a copy of the foregoing Motion on the State of North Carolina by hand delivery:

DISTRICT ATTORNEY’S OFFICE

This, the \_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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