STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF GENERAL SESSIONS FOR THE FIFTH JUDICIAL CIRCUIT
State of South Carolina, vs. Defendant	)	Indictment Number: MOTION FOR A JURY VENIRE COMPRISED OF A FAIR CROSS-SECTION OF THE COMMUNITY

The Defendant, [NAME], by and through his counsel, moves for this Court to dismiss the current jury venire and to call another comprised of a fair cross-section of the community. This request is necessary to protect the Defendant's right to a fair trial and his rights under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 3 and 14 of the South Carolina Constitution. This motion is not an attempt to unnecessarily delay the Defendant's trial, nor does it constitute an attempt to waive the Defendant's previously-asserted right to a speedy trial under the United States and South Carolina Constitutions. The Defendant states as follows in support of this motion.

I. THE DEFENDANT HAS THE RIGHT TO TRIAL BY A JURY DRAWN FROM A VENIRE THAT REPRESENTS A FAIR CROSS-SECTION OF THE COMMUNITY.

The Sixth Amendment of the United States Constitution guarantees the Defendant the right to trial by a jury of his peers. In *Taylor v. Louisiana*, the Supreme Court clarified that this right encompassed "the opportunity to have the jury drawn from venires representative of the community." *Taylor v. Louisiana*, 419 U.S. 522, 537, 95 S. Ct. 692, 701 (1975). Shortly after the Court reached its decision in *Taylor*, it established the test for determining whether this obligation is met—that is to say, whether the jury venire is comprised of a "fair cross section of the community." *Duren v. Missouri*, 439 U.S. 357, 99 S. Ct. 664 (1979). In order to establish that this right has been denied, the Defendant must show the following:

> (1) [T]hat 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.

Id. at 364, 9 S. Ct. at 668.

A group is distinctive for the purposes of the first prong if its membership is limited by a clearly identifiable factor; a commonality of attitude, ideas, or experiences exists within the group; and there is such a strong community of interests among its membership that the group's interests cannot be adequately represented if the group is excluded from the venire. The most commonly recognized distinctive classes are race and sex, although the fair cross-section requirement is not explicitly limited to these groups. *See Taylor*, 419 U.S. at 528, 531–32, 95 S. Ct. at 696–97 (1975); *but see State v. Stanko*, 402 S.C. 252, 281, 741 S.E.2d 708, 723 (2013), *overruled on other grounds by State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019) (holding that age is not a distinctive class for the purposes of the fair cross-section analysis).[1]

The second prong, fair and reasonable representation, has not been further clarified by the Supreme Court, but lower courts have taken a common-sense approach to determining whether the representation of a certain demographic within a jury venire is fair and reasonable in relation to that demographic's presence within the community at large, as demonstrated by census figures. Courts tend to use one of three tests: the "absolute disparity" test, whereby the percentage of members of a certain demographic within the jury pool is subtracted from the percentage of

[1] The Court in *Stanko* stated that "[p]ersons aged sixty-five or older obviously share a quality that limits membership in the group, but Appellant cannot demonstrate that this group as a whole possesses a cohesiveness of ideas, attitudes, or experiences that distinguishes them from the rest of society, or that these persons share a community of interest not represented in other segments of the population." *Id.* at 402 S.C. at 281, 741 S.E.2d at 723. While this statement is true on its face, it is equally true of women, African Americans, and others held to be members of a distinctive class. Existence as a monolith is not, nor can it be, a requirement for recognition as a distinctive group for purposes of the fair cross-section analysis. There is a legitimate legal basis for the Court to consider individuals aged sixty-five and older a distinctive class, given the wisdom and experience that come with age and render their participation on jury panels uniquely insightful.

members of that demographic in the "local, jury-eligible population"; the "comparative disparity" test, whereby "the absolute disparity . . . is divided by the percentage of" the identified demographic "in the jury-eligible population;" or the "standard deviation" test, which "seeks to determine the probability that the disparity between a group's jury-eligible population and the group's percentage in the qualified jury pool is attributable to random chance." *Berghuis v. Smith*, 559 U.S. 314, 314–15, 324 n. 1, 130 S. Ct. 1382, 1385, 1390 n.1 (2010). The Supreme Court, in hearing a case in which all three tests were considered by the lower court, found "no cause to take sides here on the appropriate method or methods for measuring underrepresentation." *Id.* at 316, 130 S. Ct. at 1386. Therefore, the Defendant urges the Court to consider each method, as did the Court in *Berghuis*, to determine whether the jury venire fairly and reasonably represents the community at large.

To satisfy the third prong, the defendant must show that the exclusion of members of a certain demographic is systematic. In *Duren*, the Court held that women's exclusion from jury pools was systematic when women were entitled to opt out of jury service by virtue of their gender. *Duren*, 439 U.S. at 359-360, 99 S. Ct. at 666. In *Taylor*, the Court held that exclusion is systematic when a demographic is excluded as a class or "given automatic exemptions." *Taylor*, 419 U.S. at 537, 95 S. Ct. at 701. The Court has not restricted the finding of a system of exclusion to such egregious and obvious cases, however.

Once the Defendant establishes a *prima facie* case that the jury venire is not comprised of a fair cross-section of the community, the burden shifts to the Government to show that "a significant state interest be manifestly and primarily advanced by those aspects of the jury-selection process, such as exemption criteria, that result in the disproportionate exclusion of a distinctive group." *Duren*, 439 U.S. 357 at 367–68, 99 S. Ct. at 670 (1979). This burden is

substantially higher than that permitted by rational basis review. *Id.* If the Government is unable to meet this burden, the Defendant is entitled to relief.

II. THE DEFENDANT'S RIGHTS UNDER *TAYLOR* AND *DUREN* HAVE BEEN COMPROMISED BY THE SELECTION OF A JURY VENIRE WITH AN UNFAIR AND DISPROPORTIONATE REPRESENTATION OF [DEMOGRAPHIC].

[Plug in the numbers, make your argument]

III. THE DEFENDANT IS THEREFORE ENTITLED TO RELIEF.

Much of the case law pertaining to the fair cross-section analysis was decided on appeal, when the relief is limited to reversal of the appealed conviction and remand for a new trial. Because this case has not yet been tried, it is not yet too late to take less drastic, costly, and time-consuming action. In light of the ongoing novel coronavirus pandemic, members of certain populations are opting out of jury service before appearance in the jury venire at higher rates than others due to the impact of the virus upon those communities. To ensure that the jury venire is selected from a fair cross-section of the community, the Defendant requests that additional jury summonses be sent to members of the excluded population.

[You can really ask for a multitude of remedies. We wanted forced equalization on a new jury pool as quickly as possible. However, this was a speedy trial situation. It also can make sense to say you just don't want a trial until there isn't a disparity anymore. That might be when there is a vaccine, when the numbers go way down, or some other factor.]