Bradbury, Mark and George W. Dougherty and J. Randy Beck (2003) "Race and the Georgia court: Implications of the Georgia public trust and confidence survey for *Batson v. Kentucky* and its progeny." ***Georgia Law Review***, vol. 37, num. 3 (2003), pp. 1021-1037. Published by the University of Georgia. A record of this article can be found at: http://digitalcommons.law.uga.edu/fac_artchop/174 [ISSN: 0016-8300]

Race and the Georgia Courts: Implications of the Georgia Public Trust and Confidence Survey for Batson v. Kentucky and its Progeny

George W. Dougherty
Piedmont College Dept. of Public Administration and Political Science

J. Randy Beck
University of Georgia School of Law

Mark D. Bradbury
University of Georgia Carl Vinson Institute of Government

RACE AND THE GEORGIA COURTS: IMPLICATIONS OF THE GEORGIA PUBLIC TRUST AND CONFIDENCE SURVEY FOR *BATSON V.KENTUCKY* AND ITS PROGENY

George W. Dougherty
J. Randy Beck
Mark D. Brad bury

At the request of the Georgia Supreme Court, two of the authors recently conducted research concerning public trust and confidence in the Georgia court system. Questions were modeled on a national survey conducted in 1999 for the National Center for State Courts. [1] Among the more striking findings in both the Georgia and national surveys were those disclosing the impact of racial identity-both the race of those responding to the survey and the race of groups identified in particular questions-on public views of the judicial system. Put simply, there is a perception among many Georgians that the court system treats minorities worse than whites.

• George W. Dougherty is Director of the MPA Program and Assistant Professor of Public Administration and Political Science at Piedmont College. He was the primary investigator for the Georgia Public Trust and Confidence Survey, which was commissioned by the Georgia Supreme Court and performed under the auspices of the Carl Vinson Institute of Government.

•• J. Randy Beck is an Associate Professor at the University of Georgia School of Law.

••• Mark D. Bradbury is a Research Coordinator with the Vinson Institute and a candidate for the Doctorate in Public Administration at the University of Georgia. He will be joining the Masters of Public Administration faculty at Binghamton University in the Fall of 2003.

1 *See* NAT'L CTR. FOR STATE COURTS, How THE PUBLIC VIEWS THE STATE COURTS: A 1999 NATIONAL SURVEY (1999), *available at* http://www.ncsconline.org/WC/Publications/Res_Amt PTC_PublicViewCrtsPub.pdf Oast visited Feb. 11, 2003) [hereinafter NATIONAL SURVEY].

While judges are shielded in some respects from the political process, they are rightly concerned with maintaining public confidence in the courts. Justice Sandra Day O'Connor of the United States Supreme Court has said that, "[i]n the last analysis, it is the public we serve, and we do care what the public thinks of us."[2] Public confidence plays a significant role in the ability of courts to perform their function effectively. It has been noted that "courts must rely for enforcement of their decisions on retaining sufficient respect from individual citizens so that the vast majority will comply voluntarily."[3]

This Essay considers implications of the Georgia findings for a line of United States Supreme Court decisions designed to prevent racial discrimination by trial lawyers in the selection of trial juries. In *Batson v. Kentucky,*[4] the Supreme Court concluded that a government lawyer prosecuting an African-American criminal defendant violates the Equal Protection Clause if the prosecutor uses peremptory challenges for the purpose of excluding African-Americans from the jury. [5] The *Batson* principle has been extended in a series of subsequent decisions, so that the prohibition on racially discriminatory peremptory challenges now extends to all trial attorneys, regardless of the nature of the case or the identity of the client.[6]

The importance of public confidence in the court system was a foundational assumption underlying the *Batson* line of cases.[7] Thus, it should come as no surprise that the findings of the Georgia Public Trust and Confidence survey bear in a number of ways on issues raised by *Batson* and its progeny. This Essay will discuss some of

---

[2] Sandra Day O'Connor, Address to the National Conference on Public Trust and Confidence in the Justice System, *quoted in* James Podgers, *Confidence Game,* AB.A. J., July 1999, at 86.

[3] Susan M. Olson & David A. Huth, *Explaining Public Attitudes Toward Local Courts,* 20 JUST. SYS. J. 41, 42 (1998).

[4] 476 U.S. 79 (1986). .

[5] *Id.* at 136.

[8] *Seegenerally* Georgia v. McCollum, 505U.S. 42 (1992); Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991); Powers v. Ohio, 499 U.S. 400 (1991).

[7] *Powers,* 499 U.S. at 411 (discriminating racially in jury selection "damages both the fact and the perception" that juries can guard against wrongful exercise of state power); *Batson,* 476 U.S. at 87 (stating that "(s]election procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.").

the survey's findings and trace out various respects in which the data speaks to the rationale, the implications, and the effectiveness of *Batson.*

I. *BATSON V.KENTUCKY* AND ITS PROGENY

The *Batson* opinion must be understood against the background of the United States Supreme Court's earlier decision in *Swain v. Alabama.* [8] In *Swain,* an African-American defendant was convicted of rape and sentenced to death by an all-white jury. [9] While six African-Americans were initially part of the jury venire, the prosecutor removed all six through the use of peremptory strikes. [10] Surveying the history of peremptory challenges and emphasizing their value in securing an impartial jury, the Supreme Court concluded that an equal protection claim could not be based on a prosecutor's use of peremptory challenges in a particular case:

> In the light of the purpose of the peremptory system and the function it serves in a pluralistic society in connection with the institution of jury trial, we cannot hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case. The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes. Any other result, we think, would establish a rule wholly at odds with the peremptory challenge system as we know it. [11]

---

[8] 380 U.S. 202 (1965).
[8] *Id.* at 203.
[10] *Id.* at 2015.
[11] *Id.* at 222.

The Court did leave open the possibility that an equal protection violation could be shown if a prosecutor removed African-Americans from juries "in case after case," regardless of the circumstances, so that no African-American ever served on a petit jury. [12] But apart from such claims based on systematic discriminatory use of jury strikes in a broad range of cases, *Swain* barred the door to equal protection arguments premised on use of peremptory challenges.

In *Batson,* the Supreme Court overruled this aspect of *Swain,* permitting equal protection claims based upon use of peremptory challenges by the prosecutor in a particular case. [13] *Batson* involved an African-American criminal defendant convicted by an all-white jury. [14] The prosecutor removed four African-Americans from the jury venire. [15] The Court noted that removing potential jurors on account of race harmed not only the criminal defendant and excluded jurors, but also the community's perception of the court system since "[s]election procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." [16]

The Court in *Batson* established a three-step framework for evaluating equal protection claims based on peremptory challenges. Initially, based on all relevant circumstances, the defendant must establish a prima facie case raising an inference that the prosecutor removed veniremen on account of race. [17] The prima facie case might be based, for instance, on evidence of a "pattern" of strikes exercised against members of a particular race or on the prosecutor's comments or questions during *voir dire.* [18] If the defendant establishes a prima facie case, the burden then shifts to the prosecution to present "a neutral explanation for challenging black jurors." [19] Finally, the trial court must make a factual determination as to whether "the defendant has established purposeful discrimination," *i.e.,* whether the race-neutral reason offered by the prosecutor was

---

[12] *Id.* at 223.
[18] 476 U.S. 79, 92-93 (1986).
[14] *Id.* at 82-83.
ta *Id.*
•a *Id.* at 87.
[17] *Id.* at 96.
[18] *Id.* at 96-97.
[19] *Id.* at 97-98.

the true reason for the challenges, or was merely a pretext for removal of jurors on account of race.[20]

Batson involved exclusion of African-Americans from a jury trying an African-American defendant.[21] In a series of subsequent cases, the Supreme Court extended the *Batson* principle to other contexts. In *Powers u. Ohio*,[22] the Court held that a white criminal defendant could assert the rights of African-Americans excluded from service on a jury. [23] The Court noted that a jury "acts as a vital check against the wrongful exercise of power by the State and its prosecutors," and that racial discrimination in jury selection "damages both the fact and the perception of this guarantee."[24] In *Ed monson u. Leesville Concrete* Co.,[25] the Court extended the *Batson* rule to peremptory challenges exercised by private attorneys in civil cases.[26] And in *Georgia u. McCollum*,[27] the Court applied *Batson* to peremptory challenges exercised by a criminal defendant.[28]

The Court also has elaborated on *Batson's* framework for evaluating equal protection claims. *Hernandez u. New York*[29] involved a prosecutor who excused Latino jurors from a trial involving a Latino defendant and Latino victims. [30] The prosecutor explained that some of the testimony would be offered in Spanish and, based upon the *uoir dire* responses of the two jurors in question, he doubted their ability to accept the official translation of Spanish-language testimony.[31] Since the prosecutor's explanation potentially could apply to both Latino and non-Latino jurors, the

---

[20] *Id.* at 98.

[21] *Id.* at 82-83.

[22] 499 U.S. 400 (1991).

[23] *Id.* at 410.

[24] *Id.* at 411.

500 U.S. 614 (1991).

[28] *See generally id.* The Court concluded that a private attorney is a "state actor" when exercising peremptory challenges in the context of jury selection. *Id.* at 619-28.

[27] 505 U.S. 42 (1992).

[28] *Seegenerally id.* The Court has also applied the *Batson* rule to prohibit jury challenges exercised on the basis of the venireperson's gender. J.E.B. v. Alabama, 511 U.S. 127, 130-31 (1994).

[29] 500 U.S. 352 (1991).

[90] *See generally id.*

[31] *Id.* at 356.

Court concluded that it satisfied the requirement of race-neutrality.[32]

On the ultimate factual issue of whether the explanation was pretextual, the Court deferred to the trial court's finding that the prosecutor had not engaged in intentional discrimination.[33] Significantly, however, *Hernandez* emphasized that a court considering the third step of the *Batson* inquiry should give appropriate weight to any "disparate impact" associated with the prosecutor's explanation: [34]

> If a prosecutor articulates a basis for a peremptory challenge that results in the disproportionate exclusion of members of a certain race, the trial judge may con· sider that fact as evidence that the prosecutor's stated reason constitutes a pretext for racial discrimination.[35]

This focus on the evidentiary value of disparate impact in the *Batson* context was simply a particular application of a principle applied more generally in equal protection analysis. The Court had previously stated that "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the [classification] bears more heavily on one race than another."[96]

The Court returned to the nondiscriminatory explanation requirement in *Purkett u. Elem,*s[7] where it reiterated that a prosecutor's explanation for a peremptory challenge will be deemed race neutral unless it inherently involves racial discrimination.[98] To satisfy the second step of the *Batson* inquiry, the explanation for a peremptory challenge need not be "persuasive, or even plausible." [39] The Court therefore found the requirement of race neutrality satisfied where the prosecutor explained that a juror was struck

---

[32] *Id.* at 357 n.2.
[83] *Id.* at 360.
a.c *Id.* at 362.
[85] *Id.* at 363.
[88] *Id.*
[37] 514 U.S. 765 (1995) (per curiam).
[38] *Id.* at 768.
[39] *Id.* at 767-68.

"because he had long, unkempt hair, a mustache, and a beard."[40] The persuasiveness of the justification only becomes relevant at the third stage of the *Batson* inquiry, at which point "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination."[41]

The Supreme Court considered a *Batson* claim most recently in *Miller-El v. Cockrell.*[42] In that case, a capital defendant introduced evidence that the prosecution had excluded 10 of 11 potential African-American jurors. In addition, the prosecutors had engaged in disparate questioning of African-American panel members during voir dire and had invoked a "jury shuffle" procedure when African-Americans were seated in the front of the panel. There was also evidence that the district attorney's office had a prior history of excluding minority jurors. In light of this record, the Supreme Court indicated that the. state trial court committed "clear error" when it ruled that the defendant had not established a prima facie case of discrimination in the jury selection process.[49]

II. RACE AND PERCEPTIONS OF THE GEORGIA COURTS

The United States Supreme Court's decision seventeen years ago in *Batson* was premised in part on a desire to bolster public confidence in the fairness of the court system. One finding that clearly emerges from the Georgia Public Trust and Confidence survey, however, is that a large segment of the population believes minorities, and especially African-Americans, are treated worse than others by the court system. Significantly, more than one-third of all Georgians see African-Americans and Hispanics as receiving worse treatment. The Georgia Public Trust and Confidence survey asked three questions concerning treatment by the courts. The questions were "How are people like you treated in the courts?," "How are African-Americans treated in the courts?," and "How are

---

[40] *Id.* at 769.

[41] *Id.* at 768.

[42] No. 01-7662, 2003 WL 431659 (U.S. Feb. 25, 2003).

[48] *Id.* at •14.•16. The Supreme Court ultimately concluded that the *Batson* issue was sufficiently debatable that a certificate of appealability should have been granted to permit appellate review of the denial of federal habeas corpus relief. *Id.* at •17.

Hispanics treated in the courts?" Results from those questions are presented below.

As Table 1shows, African-Americans and Hispanics were much more likely to indicate that people like themselves received "somewhat worse" or "far worse" treatment by the courts. While only 9.3% of whites indicated worse treatment for people like themselves, 39.1% of African-American and 30.1% of Hispanic respondents chose those options. These results clearly show that race matters in perceptions of the Georgia courts.[44]

TABLE 1: How Do COURTS TREAT PEOPLE LIKE You?

	FAR BETTER TREAT· MENT	SOMEWHAT BETTER TREAT· MENT	SAME TREAT· MENT	SOMEWHAT WORSE TREAT· MENT	FAR WORSE TREAT· MENT
African American (N=212)	1.9%	15.6%	43.4%	27.8%	11.3%
Hispanic (N=183)	2.2%	8.2%	59.6%	23.0%	7.1%
White (N=430)	3.5%	19.1%	68.1%	7.2%	2.1%
Total (N=825)	2.8%	15.8%	59.9%	16.0%	5.6%

The level of disappointment with treatment by the courts among African-American Georgians is more apparent from the question concerning how the courts treat African-Americans. Once again, as Table 2 indicates, race matters with over 71% of African-American respondents indicating that members of their race receive "somewhat worse" or "far worse" treatment from the courts and 28.1%

« All relationships identified as statistically significant were determined using Pearson's Chi-square. All are significant at the .10 level or greater.

In the national survey, nearly half of all respondents believed that African-Americans (46.6%) and Hispanics (46.9%) were treated worse than other groups. *See* NATIONAL SURVEY, *supra* note 1, at 37. Furthermore, over two·thirds of African-Americans feel that people like them are treated worse than others. *Id.* at 38.

choosing the "far worse" option. Only 36.5% of whites and 40.0% of Hispanics indicated that African-Americans receive "somewhat worse" or "far worse" treatment by the courts.[45]

TABLE 2: HOW DO COURTS TREAT AFRICAN-AMERICANS?

	FAR BETTER TREAT-MENT	SOMEWHAT BETTER TREAT-MENT	SAME TREAT-MENT	SOMEWHAT WORSE TREAT-MENT	FAR WORSE TREAT-MENT
African American (N=231)	1.3%	4.3%	22.9%	43.3%	28.1%
Hispanic (N=185)	5.9%	11.9%	42.2%	24.9%	15.1%
White (N=427)	4.0%	9.6%	49.9%	28.8%	7.7%
Total (N=843)	3.7%	8.7%	40.8%	31.9%	14.9%

When asked how the courts treat Hispanics (Table 3), African-American and Hispanic respondents were much more likely to choose the "somewhat worse" and "far worse" treatment options. Interestingly, a larger proportion of African-Americans indicated "somewhat worse" or "far worse" treatment for Hispanics than Hispanic respondents. [46] Whites were slightly more likely to indicate poor treatment of Hispanics than when asked about the treatment of African-Americans. [47]

---

[45] In the national survey, 68.1% of African-American respondents said that, as a group, African-Americans received worse treatment from the courts. *Id.* at 37. Over 42% of whites and Hispanics concurred. *Id.*

[48] Among African-Americans, 61.4% indicated "somewhat worse" or"far worse" treatment for Hispanics, while the comparable figure for Hispanic respondents was only 57.2%. *See infra* Table 3.

[47] Among white respondents, 49.4% indicated that Hispanics receive "somewhat worse" or "far worse" treatment by the courts. *See infra* Table 3.

TABLE 3: How Do COURTS TREAT HISPANICS?

	FAR BETTER TREAT-MENT	SOMEWHAT BETIER TREAT-MENT	SAME TREAT-MENT	SOMEWHAT WORSE TREAT-MENT	FAR WORSE TREAT-MENT
African American (N=210)	1.0%	11.9%	25.7%	38.1%	23.3%
Hispanic (N=l94)	0.5%	5.2%	37.1%	35.6%	21.6%
White (N=382)	2.4%	5.2%	42.9%	41.9%	7.5%
Total (N=786)	1.5%	7.0%	36.9%	39.3%	15.3%

Whatever the effect of *Batson* has been in Georgia, it has not magically convinced the public that race is irrelevant to one's experience in the Georgia courts. These results show that there are significant differences in how members of different racial and ethnic groups perceive treatment in the court system. Given that African-Americans make up approximately twenty-nine percent of Georgia's population, and the Hispanic population is expected to grow significantly, these findings become particularly relevant to the *Batson* decision and the makeup of Georgia trial juries.

III. JURY SERVICE AND PERCEPTIONS OF THE GEORGIA COURTS

While *Batson* has not produced a general public consensus that all races receive equal treatment in the court system, that does not necessarily mean the decision has been completely ineffective, or that it is somehow fundamentally misguided. By striking at the use of racial stereotypes as the basis for peremptory challenges, one expected outcome of the *Batson* decision would be to increase the number of minorities serving on petit juries. Such an outcome could play a potentially significant role in improving public confidence in the court system. Data from the Georgia survey suggests that, in certain respects, those who have served as jurors tend to have

greater trust in the court system than other citizens, and this holds true when minority jurors are examined.

The Georgia survey asked respondents how much trust or confidence they have in various institutions, including the courts in their community. Half of the sample were asked how much confidence they have in their community courts, and half were asked how much trust they have in their community courts. The wording of the question led to noticeable differences in responses. Analysis of the data shows that, while service on a jury did not significantly increase *confidence* in the courts, respondents who had served on a jury indicated higher levels of *trust* in their community courts.[48]

Seventy-nine percent of those who had served as jurors chose the "great deal of trust" or "some trust" options when asked about the courts in their community. Over 31% of respondents who had not served as a juror indicated "little trust" in the courts compared to 12.9% of former jurors. These findings become more relevant to the *Batson* issue when one separates the data based on the respondents' race. Among the respondents in the Georgia survey, 38.8% of whites, 27.5% of African-Americans, and 4.3% of Hispanics had served as jurors. [49] *As* shown in Table 4, approximately 83% of whites and 64% of African-Americans who served on juries indicated a "great deal of trust" or "some trust" in community courts compared to 77% among whites and 57% among African-Americans who had not served as jurors.

TABLE 4: How MUCH TRUST Do You HAVE IN YOUR COMMUNITY COURTS?

	JURY DUTY	GREAT DEAL OF TRUST	SOME TRUST	LITTLE TRUST	NO TRUST
African American (N=105)	Yes	22.7%	40.9%	18.2%	18.2%
	No	4.8%	51.8%	36.1%	7.2%

[48] No significant differences were found between "trust" and "confidence" on this, or any, question in the national survey.

[49] Only nine of the 211 Hispanic Georgians surveyed indicated prior service as a juror.

Hispanic	Yes	14.3%	71.4%	14.3%	0.0%
(N=174)	No	10.8%	35.3%	42.5%	11.4%
White	Yes	33.3%	50.0%	10.8%	5.9%
(N=229)	No	20.55	56.7%	15.7%	7.1%
Total	Yes	30.2%	48.8%	12.9%	7.9%
(N=531)	No	13.3%	46.7%	31.1%	8.9%

The survey also asked respondents whether they felt judges were fair and honest. Table 5 illustrates that, of those who served on juries, 85.2% agreed or strongly agreed that judges are fair and honest. Approximately 76% of respondents who had not served on a jury agreed or strongly agreed that judges are fair and honest. Ninety percent of whites who had served as jurors indicated that judges are fair and honest compared to 83% of non-jurors. For African-American respondents, 72.5% of former jurors agreed that judges are fair and honest, while 65% of African-Americans with no prior jury service agreed or strongly agreed.

TABLE 5: JUDGES IN YOUR COMMUNITY COURTS ARE FAIR AND HONEST

	JURY DUTY	STRONGLY AGREE	SOMEWHAT AGREE	SOMEWHAT DISAGREE	STRONGLY DISAGREE
African American	Yes	29.0%	43.5%	21.0%	6.5%
(N=225)	No	13.5%	51.5%	24.5%	10.4%
Hispanic	Yes	25.0%	37.5%	12.5%	25.0%
(N=174)	No	27.0%	46.6%	19.7%	6.7%
White	Yes	37.2%	53.0%	5.5%	4.4%
(N=457)	No	30.7%	52.2%	10.9%	6.2%
Total	Yes	34.1%	51.1%	9.1%	5.7%
(N=903)	No	25.2%	50.5%	16.7%	7.5%

Another survey item asked Georgians to respond to the statement "judges follow public wishes, not the law." Table 6 indicates that, while 70.4% of respondents who had served as jurors disagreed or strongly disagreed with the statement, 61% of those without prior jury service disagreed or strongly disagreed.

TABLE 6: JUDGES FOLLOW PUBLIC WISHES, NOT THE LAW

	JURY DUTY	STRONGLY AGREE	SOMEWHAT AGREE	SOMEWHAT DISAGREE	STRONGLY DISAGREE
African American	Yes	8.1%	22.6%	40.3%	29.0%
(N=221)	No	15.7%	30.2%	27.7%	26.4%
Hispanic	Yes	25.0%	37.5%	12.5%	25.0%
(N=183)	No	8.6%	30.3%	21.7%	39.4%
White	Yes	7.9%	19.8%	36.7%	35.6%
(N=442)	No	7.2%	27.9%	35.1%	29.8%
Total	Yes	8.2%	21.4%	36.2%	34.2%
(N=880)	No	9.8%	29.2%	29.1%	31.9%

Perhaps the survey item in the Georgia survey most relevant to our purposes here required a response to the statement "most juries are not representative of the community." Table 7 shows that only 46.7% of African-Americans with previous jury service agreed with the statement, compared to 66.7% of African-Americans who had not served as jurors. White respondents with prior jury service, however, were more likely to agree with the statement (57.3%) than those without jury service (53.5%).

TABLE 7: MOST JURIES ARE NOT REPRESENTATIVE OF THE COMMUNITY.

	JURY DUTY	STRONGLY AGREE	SOMEWHAT AGREE	SOMEWHAT DISAGREE	STRONGLY DISAGREE
African American	Yes	21.7%	25.0%	38.3%	15.0%

(N=219)	No	22.0%	44.7%	22.6%	1037%
Hispanic	Yes	33.3%	22.2%	22.2%	22.2%
(N=170)	No	14.3%	46.6%	27.3%	11.8%
White	Yes	19.7%	37.6%	20.8%	20.2%
(N=439)	No	13.4%	39.1%	32.2%	15.3%
Total	Yes	20.9%	33.7%	25.2%	20.2%
(N=880)	No	16.4%	42.6%	27.9%	13.1%

Taken together, these results reaffirm that jury service tends to improve public perception of the courts. The statistically significant differences between African-Americans who have served as jurors and those who have not provides evidence to support the Court's concern in *Batson* that excluding African-Americans from juries undermines perceptions of fairness in our system of justice. [150] Participation in the courts as a juror arguably increases trust and perceptions of fairness, especially for African-Americans. [151]

IV. PEREMPTORY CHALLENGES BASED ON PERCEIVED UNFAIRNESS TO MINORITIES

A recent Georgia case applying *Batson* highlights the importance of the findings of the Georgia survey. In *Brown v. State,*[152] the defendant in a voluntary manslaughter and aggravated assault prosecution established a prima facie case under *Batson.*[153] Thus, the court asked the prosecutor to explain her reasons for exercising a peremptory challenge against a particular African-American juror. [154] One reason offered by the prosecutor was that the juror

---

110 Batson v. Kentucky, 476 U.S. 79, 87 (1986).

[51] One rival explanation is that the peremptory challenge system or other factors tend to lead to selection of juries more favorable toward judges and courts than the general population.

[52] 568 S.E.2d 62 (Ga. Ct. App. 2002).

[53] *Id* at 63.

м *Id*.

lived in the area where the crime occurred. [55] She also gave a second reason, which the court discussed in the following passage:

> Also, the prosecutor said that the juror, "when asked about the system being prejudiced against one based on race, he said, yes, it was. And I said, well, what do you base that opinion on? [Answer:] Living in America. So he has [sic] a black man, already indicates that he believes the system is unfair toward blacks. And in this case the defendant is black. That was a great concern to the state." The prosecutor went on to state: "And when you talk about a person feeling the system is racially prejudiced, you're not talking about racially prejudiced to a victim, you're talking about racially prejudiced to the person who is on trial or against the person who is on trial[,] who in this case is a black male, which is the same race and gender of the party that we struck." The prosecutor stated that a belief that the system was unfair to blacks was "particularly relevant when the party who is saying the system is prejudiced based on race is the same race as the defendant. That's when it becomes an issue, your honor."[56]

The Georgia Court of Appeals reversed the conviction, finding a *Batson* violation. [57] It concluded that the reason offered by the prosecutor for the peremptory challenge was not "race neutral."[58] Indeed, the prosecutor identified the juror's race as a factor "particularly relevant" to her decision to exercise the peremptory challenge.[59]

A comparable case from another jurisdiction is *Minnesota v. McRae*.[60] There the prosecutor struck the only African-American member of the jury venire after questioning her extensively about

---

м *Id.*

118 *Id.*

5т *Id.*

118 *Id.*

ae *Id.*

60 494 N.W.2d 252 (Minn. 1992).

her views of the fairness of the judicial system.[61] The prosecutor sought to justify the strike under *Batson* on the ground that the juror believed the system was unfair to minorities and might therefore be biased in favor of the defendant.[62] As in *Brown,* the prosecutor referenced the race of the juror as a relevant consideration.[63] The Minnesota Supreme Court reversed the conviction, concluding that the trial court had not properly followed the three-step inquiry required by *Batson.*[64]

Cases like *Brown* and *McRae* raise the interesting question of whether an attorney may exercise a peremptory challenge based on a juror's views concerning the courts' treatment of minorities. Suppose the prosecutors in these cases had not identified the juror's race as a factor relevant to their peremptory challenges. What if instead they had purported to exercise challenges purely on the ground that the juror believed the system was unfair to African-Americans? How should such a case be analyzed under *Batson?*

The Georgia survey suggests that, if a prosecutor explained a strike on the ground that a juror believed the system was unfair to minorities, this reason should be deemed "race neutral" as that term is used in the *Batson* line of cases. As noted above, more than one-third of Georgians of all races feel African-Americans and Hispanics are treated less favorably by the courts.[65] Since this view is held in large numbers by people in all major racial groups in the state, one cannot conclude that peremptory strikes exercised against jurors holding this view would be inherently discriminatory.

However, as the Court emphasized in *Hernandez* and *Purkett,* even after the prosecutor offers a race-neutral explanation for a peremptory challenge, the trial court may still find a *Batson* violation if it concludes that the prosecutor's explanation is pretextual and that the peremptory challenge was really exercised on account of race. One piece of evidence that can weigh in favor of a finding of pretext is the fact that the reason offered by the prosecutor has a racially disproportionate impact.

---

[61] *Id.* at 253-57.
[62] *Id.* at 257.
[63] *Id.*
[64] *Id.*
[66] *See supra* Tables 2, 3.

The Georgia findings suggest that this rationale for a peremptory challenge is one that would disproportionately exclude minorities from jury service. In cases involving African-American defendants, about 36.5% of whites would be excluded using this argument, whereas approximately 71% of potential African-American jurors could be struck on this ground. For Hispanic defendants, over 57% of all minority jurors could be struck. The result would be fewer minority jurors in cases with minority defendants.[66] Thus, while a challenge based upon the courts' perceived unfavorable treatment of minorities is formally race-neutral under *Batson,* the data suggests a trial court facing such an argument should be more inclined to find this explanation pretextual than other possible explanations that would exclude people of all races in equal proportions.

Furthermore, excluding minorities on this formally race-neutral ground could further "undermine public confidence in the fairness of our system of justice." [67] If observers perceived the state as removing any potential jurors concerned about the treatment of minorities in the courts, that could further reduce confidence in the judicial system. The result could be less trust and diminished perceptions of fairness in the courts among minorities in Georgia.

· V. CONCLUSION

The Georgia courts, like other courts in the nation, suffer a crisis of public confidence when it comes to treatment of minorities. While *Batson* alone cannot resolve the crisis, the data suggests that the *Batson* principle may play a valuable role in addressing the problem.

---

[86] African-Americans would be most likely to be struck in all minority defendant cases (61.4%), followed by Hispanics (57.2%) if the defendant is Hispanic. *See supra* Table 3.

[67] Batson v. Kentucky, 476 U.S. 79, 87 (1986).