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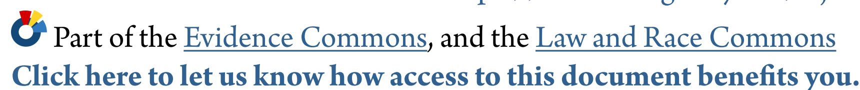

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Clifford v. Commonwealth: Admission of Racial Voice Identification Testimony, Regressive or Progressive?

D. Christopher Robinson[1]

I. Testimony

THE voice "'*sounded as if it was of a male black* [sic].'"[2]

The previous statement was the testimony of a Caucasian police officer in the recent Kentucky drug trafficking case, *Clifford v. Commonwealth*. In *Clifford*, the prosecution's case hinged on the quoted testimony of the police officer concerning the race of the defendant,[3] and the officer's testimony about the caller's vocal characteristics helped to identify the defendant as the perpetrator of the crime. The trial court, and later the Supreme Court of Kentucky, allowed a jury to hear the testimony of the witness. Consequently, the jury convicted the defendant of drug trafficking in the first degree, and the court sentenced him to prison for a total of twenty years in conjunction with another conviction.[4]

At first glance, the decision of the Supreme Court of Kentucky appears to be racially motivated. To many, identifying someone's race merely by hearing his voice inevitably entails racial stereotyping. Critics point out the evidentiary shortcomings and uncertainties of this approach, asking, "What does an African-American's voice sound like?" Alternatively, "How does a Caucasian voice sound?" "How does a person who is partially of African-American descent and partially of western European descent sound?"

Although criticized by many in both the legal and lay communities, the court in *Clifford* arrived at the correct determination. Exclusion of the kind of testimony admitted in *Clifford* would require a complete overhaul of the current Kentucky evidentiary system. No pressing reason exists to change the evidentiary scheme in such a drastic way. Several factors described in this Note, demonstrate that contrary to the critics' contentions,

1 J.D. expected 2006, University of Kentucky College of Law; B.S. in Mathematics, University of Kentucky, 2003. The author would like to thank Professor Robert Lawson for his help with the evidentiary issues of this Note.

2 Clifford v. Commonwealth, 7 S.W.3d 371, 373 (Ky. 1999) (emphasis added).

3 *See infra* notes 11–30 and accompanying text (discussing the facts of *Clifford v. Commonwealth*).

4 *Clifford*, 7 S.W.3d at 373, 377.

admittance of such testimony will not inevitably lead to racial profiling and stereotyping.

After a brief description of the facts of *Clifford v. Commonwealth* in Part II of this Note,[5] Part III analyzes the admissibility of racial voice identification testimony from a purely rules-based analysis.[6] The subsequent sections consider the possibility of prejudice to the defendant[7] and to society[8] if a court allows the jury to hear racial-identification testimony. Finally, Part VI addresses several main criticisms of *Clifford* and defends the judgment of Kentucky's highest court.[9] This Note will show that the court weighed the relevant factors and, in accordance with the interests of the current evidentiary system, correctly admitted the testimony of the officer.[10] The court's decision does not reflect racism, but rather presents a reasonable analysis based on current evidentiary trends.

II. Description of *Clifford v. Commonwealth*

A brief description of the facts is essential to better understand the issues presented in *Clifford*. In May of 1996, Detective William Birkenhauer—a representative from the Kentucky Drug Strike Force—arranged a drug "sting" involving Gary Vanover, a police informant.[11] Birkenhauer and Vanover planned to initiate a drug transaction with the defendant Clifford at Vanover's home. Upon arrival, Birkenhauer requested a quarter ounce of crack cocaine, but Clifford informed him he only had a smaller amount of cocaine.[12] Birkenhauer said he would take whatever Clifford had and would be back to get the rest later. Vanover and Clifford then went into another room to get the drugs. When they emerged, Vanover, not Clifford, carried a small bag of cocaine.[13] The parties completed the transaction and Birkenhauer left the premises.

Vanover later admitted that the drugs sold were actually his and that he, not Clifford, completed the sale to Birkenhauer. Vanover contended that Clifford was not involved in the transaction at all.[14] However, police officers listened to the transaction between Birkenhauer, Vanover, and Clifford through a wire placed on Birkenhauer. The officers outside taped the

5 *See infra* notes 11–30 and accompanying text.

6 *See infra* notes 31–69 and accompanying text.

7 *See infra* notes 70–92 and accompanying text.

8 *See infra* notes 93–121 and accompanying text.

9 *See infra* notes 122–156 and accompanying text.

10 *Clifford*, 7 S.W.3d at 375–77.

11 *Id.* at 373.

12 *Id.*

13 *Id.*

14 *Id.*

conversation, but the trial court determined that the tapes were inaudible and therefore inadmissible at trial.[15] Even so, the court did allow one officer, Smith, to testify as to his opinion of who participated in the transaction. Officer Smith, who had never seen or met the defendant, stated at trial that he heard the voice of a "male black" complete the cocaine transaction with Detective Birkenhauer.[16]

In giving his opinion, Officer Smith stated that he had contact with African-American males on numerous occasions. Due to Smith's experience and exposure to African Americans,[17] the court ruled that a "proper foundation was laid for [his] testimony."[18] Therefore, the court overruled objections regarding the admissibility of Officer Smith's statements and allowed the jury to hear his testimony. Because only one African-American male, Clifford, was present during the drug sale and Officer Smith's testimony identified a black male as the perpetrator, the jury convicted Clifford of participating in the drug transaction.[19]

On appeal, the Kentucky Supreme Court likened Smith's testimony to that of a witness identifying the smell of gasoline[20] or describing someone as intoxicated.[21] As long as the witness is "personally familiar with the general characteristics" of the evidence suggested, he or she can give his or her opinion without being an expert.[22] Therefore, the court affirmed the lower court's admittance of the testimony and affirmed the jury's conviction.

Clifford later brought a petition for writ of habeas corpus in federal court alleging insufficient evidence to warrant his conviction.[23] Clifford stated that admission of evidence concerning racial voice identification invited misidentification and was a violation of his due process rights.[24] Citing the Supreme Court case *Neil v. Biggers*, Clifford argued that racial voice iden-

15 *Id.*

16 *Id.* at 373–74.

17 *Id.* at 373, 376.

18 *Id.* at 376; *see also infra* notes 31–69 (discussing the Kentucky rules of evidence).

19 *Clifford*, 7 S.W.3d at 373.

20 *Id.* at 374 (citing King v. Ohio Valley Fire & Marine Ins. Co., 280 S.W. 127 (Ky. 1926)). "[T]he average man would have great difficulty in telling just how coal oil or gasoline smells, though acquainted with their odors, and perhaps the best description the witness could give was to say he knew their odors, and he could smell coal or oil, or he could smell gasoline." *King*, 280 S.W. at 130.

21 *Clifford*, 7 S.W.3d at 374 (citing Howard v. Ky. Alcoholic Beverage Control Bd., 172 S.W.2d 46 (Ky. 1943)).

22 *Id.* at 375; *see infra* notes 31–69 and accompanying text (discussing how various courts have applied the collective facts rule to admit the opinions of non-expert witnesses as evidence).

23 Clifford v. Chandler, 333 F.3d 724, 726 (6th Cir. 2003), *cert. denied*, 541 U.S. 905 (2004).

24 *Id.* at 730–31.

tification is unconstitutional because it is unreliable.[25] However, the Sixth Circuit concluded that Smith had not in fact identified defendant Clifford's voice, but rather merely opined that he heard a black male's voice.[26] Furthermore, the court stated that the overwhelming admissibility of such evidence in jurisdictions across the country indicates that racial voice identification may meet the requisite reliability standard.[27]

Although the court warned that prosecutors cannot use such testimony in an unconstitutional manner[28]—e.g., to inflame the jury—its use is not inherently unconstitutional.[29] Due to Clifford's constitutional election not to testify, the court's refusal to admit the evidence would exclude the best evidence available. Consequently, the court ruled that the prosecution presented sufficient evidence at trial to warrant conviction and that the trial court's admission of the voice identification evidence did not violate the defendant's constitutional rights.[30]

III. Evidentiary Rules in Kentucky

Historically, courts in Kentucky only allowed witnesses to testify as to facts, not opinions.[31] A strong fear existed that witness testimony regarding opinion would be a waste of time or useless to the jury.[32] However, throughout the twentieth century, courts adopted a more inclusionary view of lay testimony, which allowed more opinion evidence into trial.[33] Consequently, judges have begun to allow the jury to hear certain lay opinion testimony as

25 *Id.* at 731 (citing Neil v. Biggers, 409 U.S. 188, 198 (1972)). *Neil* does not fully support Clifford's contention. In *Neil*, a woman was raped in a wooded region, where visibility was very low. She identified the defendant as the rapist after police told him to repeat the words that the attacker spoke at the time of the assault. The Court stated that situations involving racial voice identification must be decided on a case-by-case basis. In this instance, the Court decided that there was no substantial likelihood of misidentification, and the evidence could properly go to the jury. *Neil*, 409 U.S. at 201.

26 *Chandler*, 333 F.3d at 731.

27 *Id.* (citing United States v. Card, 86 F. Supp. 2d 1115 (D. Utah 2000); State v. Smith, 415 S.E.2d 409 (S.C. Ct. App. 1992); State v. Kinard, 696 P.2d 603 (Wash. Ct. App. 1985); Rhea v. State, 147 S.W. 463 (Ark. 1912)).

28 *Id.* (citing Donnelly v. DeChristoforo, 416 U.S. 637 (1974)) (describing unconstitutional arguments which make racial statements).

29 *Chandler*, 333 F.3d at 731–32.

30 *Id.*

31 Robert G. Lawson, The Kentucky Evidence Law Handbook § 6.00, at 401 (4th ed. Matthew Bender 2003).

32 *Id.* (citing 7 John Henry Wigmore, Evidence in Trials at Common Law § 1918, at 11 (James H. Chadbourn Rev. 1978).

33 Lawson, *supra* note 31, at § 6.00, at 401.

long as the opinions are "helpful" to the jury.[34] In determining the admissibility of lay opinions, judges rely on the requirements of Rule 701 of the Kentucky Rules of Evidence.

A. *Rule 701 Analysis*

According to Rule 701, a non-expert witness can only give opinions or inferences which are "(a) [r]ationally based on the perception of the witness; and (b) [h]elpful to a clear understanding of the witness' testimony or the determination of a fact in issue."[35] Furthermore, scholar Robert Lawson states in his *Kentucky Evidence Law Handbook* that if there is no other way for a particular fact to be determined, the "collective facts rule" permits a lay witness to give his or her opinion of the situation.[36] Lawson emphasizes that although the Kentucky General Assembly has not codified the "collective facts rule," it remains part of the analysis of courts interpreting Rule 701.[37]

In accordance with Rule 701 and the "collective facts rule," the court in *Clifford v. Commonwealth* determined that the police officer's testimony was both rationally based on his perception and helpful in determining an issue of fact.[38] Because the identity of the individual on the tape was the main issue of fact, the "helpful" requirement of Rule 701 was clearly satisfied. As the "collective facts rule" states, if the only way to determine a certain question of fact requires the admission of certain evidence, courts should admit that evidence if it is reliable.[39] Because his testimony described characteristics of the perpetrator, the Officer Smith's testimony proved extremely helpful to the jury. However, the major issue in Clifford's case concerned whether the opinion of Officer Smith was "rational." Without a finding of rationality, the first requirement of Rule 701 would not be satisfied.

The Court in *Clifford* cited several similar situations where lay testimony was admissible as long as the witness had sufficient exposure to make a reasonably accurate description.[40] For example, in the case of *Howard v.*

34 *Id.*

35 KY. R. EVID. 701.

36 LAWSON, *supra* note 31, at § 6.05, at 410–11. The collective facts rule allows for the admission of opinions in certain instances where no other means exist for admission of those opinions. For instance, where the combined effect of many different factors leave an impression on the witness that can only be conveyed through an opinion, the non-expert witness may state the opinion rather than enumerating the factors. *Id.*

37 *Id.* at 411 (citing Clifford v. Commonwealth, 7 S.W.3d 371, 374 (Ky. 1999)).

38 *Clifford*, 7 S.W.3d at 375–76.

39 LAWSON, *supra* note 31, at § 6.05, at 410–11; *see also* King v. Ohio Valley Fire & Marine Ins. Co., 280 S.W. 127, 130 (Ky. 1926) (allowing witness to testify that he smelled gasoline when no other evidence existed of the presence of gasoline. The fact that the witness could not describe the actual smell, besides being gasoline, was of no consequence).

40 *See Clifford*, 7 S.W.3d at 374–75 (citing Clement Bros. Constr. Co. v. Moore, 314 S.W.2d

Kentucky Alcoholic Beverage Control Bd., the Court faced the issue of whether testimony regarding the intoxication level of a person was admissible.[41] In holding that a lay witness was competent to testify about the intoxication level of another individual, the court stated that those with experience with intoxicated people can identify the characteristics of inebriation.[42] The attributes of the individual's speech—slurred words, stuttering cadence, improper English—all can give rise to an inference of drunkenness.[43] Although it may be impossible to define "intoxicated," witnesses can still testify as to their opinion on an individual's sobriety.

Furthermore, in the case of *Commonwealth v. Sego*, the court confronted the question of whether to admit lay testimony concerning the mental and emotional state of another.[44] The court explained that the collective facts rule allows a witness to testify about the mental state of another although the witness is not an expert in emotional distress.[45] The court cited a previous case, *Emerine v. Ford*, in which it was held that a nonexpert witness could give his or her opinion concerning the mental state of another.[46] The *Emerine* court further noted, "the question of the weight and the value of such opinion [is left] for the jury."[47] As long as the witness was able to perceive the emotions and actions exhibited by the individual, and the defendant has the opportunity to cross-examine the witness concerning those perceptions, the court will consider the witness competent to testify.[48]

Whether considering perceptions of the intoxication of another[49] or the mental state of another,[50] the court in *Clifford* stated that lay opinion *can* be

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526 (Ky. 1958)) (admitting evidence concerning layman's opinion of speed of a moving vehicle); Zogg v. O'Bryan, 237 S.W.2d 511 (Ky. 1951) (admitting evidence concerning opinion of physical suffering endured by another); King v. Ohio Valley Fire & Marine Ins. Co., 280 S.W. 127 (Ky. 1926) (admitting evidence concerning smell of gasoline).

41 *See* Howard v. Ky. Alcoholic Beverage Control Bd., 172 S.W.2d 46 (Ky. 1943) (admitting evidence concerning age of person and whether that person was intoxicated).

42 *See id.* at 49 (citing Gourley v. Commonwealth, 131 S.W. 34, 36 (Ky. 1910) ("Drunkenness or intoxication in more or less degree is so common that there are few adult males who have not witnessed the intoxicating effect of liquor on other people, and therefore a person who has drunk a liquor or beverage said to be intoxicating may testify whether or not it intoxicated him, and he may also testify as to its intoxicating effect upon other persons that he knew had drunk the same kind of liquor or beverage."))

43 *See id.* at 48. The court admitted testimony of a witness concluding the intoxication level of individuals partially from their slurred and disjunctive speech patterns. *Id.*

44 *See* Commonwealth v. Sego, 872 S.W.2d 441 (Ky. 1994) (admitting evidence concerning the mental state of another).

45 *See id.* at 444.

46 *See id.* (citing Emerine v. Ford, 254 S.W.2d 938, 941 (Ky. 1953)).

47 *Emerine*, 254 S.W.2d at 941.

48 *See id.*

49 *See* Howard v. Ky. Alcoholic Beverage Control Bd., 172 S.W.2d 46 (Ky. 1943).

50 *See Sego*, 872 S.W.2d at 441.

admitted as long as it is founded on the witness's prior experience.[51] Officer Smith's thirteen years of service exposed him to African Americans on a daily basis. Just as courts allow people to testify about their perception of a car's speed,[52] courts should allow individuals to testify about the race of a person whose voice they heard. In the trial and appellate courts' opinion, prior experience of a witness was sufficient to satisfy the "rational" requirement of Rule 701.[53]

Clifford asserted in his writ of habeas corpus that testimony regarding racial voice identification is inherently irrational and unreliable due to the "likelihood of misidentification."[54] Clifford's reliance on *Ledbetter v. Edwards* and *Manson v. Brathwaite* is misplaced because those cases involved pretrial procedures used by law enforcement that were highly prejudicial to the defendant.[55] The Sixth Circuit Court of Appeals stated that the current case is distinguishable from those relied upon by Clifford because he was not involved in any suggestive procedure, such as a lineup or fingerprinting. Rather, Officer Smith merely averred that the voice of the perpetrator sounded African American.[56]

B. Relevancy Requirements of Rules 401 and 402

In addition to Rule 701's requirements for admissibility, Rule 402 requires that the evidence be relevant for it to be admissible.[57] Relevant evidence is defined in Rule 401 as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[58] The prosecution might use racial voice identification evidence in a manner not related to a question of fact in the trial,[59] but this was not the case in *Clifford*. For example, there is no indication that the prosecution used the evi-

51 *See Clifford*, 7 S.W.3d at 374–75 (discussing the admittance of lay testimony).

52 *See id.* at 374.

53 *See id.* at 376.

54 Clifford v. Chandler, 333 F.3d 724, 731 (6th Cir. 2003), *cert. denied*, 541 U.S. 905 (2004) (citing Manson v. Brathwaite, 432 U.S. 98, 112 (1977); Ledbetter v. Edwards, 35 F.3d 1062, 1070 (6th Cir. 1994)). A high probability of misidentification leads to inherent violation of a defendant's due process rights. *Id.*

55 *See Chandler*, 333 F.3d at 731.

56 *See id.*

57 KY. R. EVID. 402.

58 KY. R. EVID. 401.

59 *See* State v. Watkins, 526 N.W.2d 638 (Minn. Ct. App. 1995) (declaring a new trial after irrelevant racial statements concerning defendant were made in court).

dence to inflame the jury[60] and no intimation that the judge inappropriately referenced that evidence to cause undue prejudice to the defendant.[61]

However, the possibility that such impropriety could occur is not a substantial reason to implement a per se bar to admissibility. If an attorney uses evidence in a manner not related to a question of fact in the case, the relevance test of Rule 401 would preclude admission of the evidence. In *Clifford*, the trial court ruled that evidence concerning the race of the perpetrator was relevant because it allowed identification of the perpetrator after the crime.[62] Under the Kentucky evidence law, relevance decisions are discretionary matters for the trial court. An appellate court may therefore only overturn a decision to admit evidence by showing that the trial court abused its discretion.[63]

Even if relevant, a Kentucky judge can exclude evidence under Rule 403 due to the danger of "undue prejudice, confusion of the issues, or misleading the jury."[64] Admission of racial voice identification evidence will lead to relatively minimal prejudice. Consequently, judges should simply rely on the standard requirements of evidence law—Rules 401, 402, and 403—instead of implementing a per se bar to admission.

C. Hearsay Analysis

At first glance, Officer Smith's testimony appears to fall within the prohibition of hearsay contained in the Kentucky Rules of Evidence,[65] as Smith testified about the out-of-court statements he heard while listening to the drug transaction. Initially, Smith testified about the characteristics of the speaker's voice, and that it sounded like that of a black male. The Supreme Court thereafter coupled this testimony with Birkenhauer's testimony that the defendant was the only African-American male present to preliminarily conclude that the defendant was the speaker.[66]

Subsequently, the court asserted that the statements fell squarely within Kentucky Rule of Evidence 801A(b)(1),[67] which allows a court to admit statements by a third party "even though the declarant is available as a wit-

60 *Cf. id.* at 640. Several jury members referred to the perpetrator as a "darkie" during voire dire; the court ruled that the racial comments harmed the defendant's right to a fair trial and ordered a mistrial. *Id.*

61 *See Chandler*, 333 F.3d at 732.

62 *See Clifford*, 7 S.W.3d at 376.

63 *See* Partin v. Commonwealth, 918 S.W.2d 219, 222 (Ky. 1996).

64 KY. R. EVID. 403.

65 *See* LAWSON, *supra* note 31, at § 8.00, at 549.

66 *See Clifford*, 7 S.W.3d at 376.

67 *See id.* (citing KY. R. EVID. 801A(b)(1) (allowing statements of a party to be admitted if the statement is offered against the party)).

ness."[68] As long as the party against whom the evidence is offered has the opportunity to explain the pertinent background of the statement, admission of these statements is not a violation of the Due Process Clause of the Fourteenth Amendment.[69] Because Clifford was present in the courtroom, Smith did not violate the hearsay prohibition when he was allowed to testify about the actual statements themselves and not just the characteristics of the voice.

IV. Possibility of Undue Prejudice to an Individual Defendant

In admitting racial voice identification evidence, a court must examine the possibility of undue prejudice to the defendant. *Clifford* provides a suitable example for analysis as to whether racial voice identification leads to undue prejudice. Readers should first note that Officer Smith—the officer who heard Clifford over the wire transmission—did not attempt to identify Clifford in the trial. Rather, he only gave his opinion that the voice he heard was that of a black male.[70] A witness who merely identifies the race of a voice is held to a lower standard of prior knowledge then a witness who identifies the speaker; the first witness must have familiarity with voices of that race, not the defendant's particular voice.[71] Because Smith had never heard Clifford's voice outside the wire transmission,[72] he did not have any personal knowledge upon which to identify Clifford as the speaker recorded on the wire. However, in this case, Smith only stated that he heard the voice of a "male black."[73] Smith's general familiarity with African-American voices is considered sufficient prior knowledge.

Furthermore, Clifford was protected, as is every defendant, by the relevancy requirements of Kentucky Rules of Evidence 401 and 402. The race of the defendant may not be relevant in some cases because of the circumstances surrounding the crime. For instance, in a situation where multiple African-American males and no Caucasian males were present during a recorded drug transaction, the race of the alleged perpetrator is irrelevant.[74] Rule 401 requires that the evidence have some tendency to

68 Ky. R. Evid. 801A(b)(1).

69 *See* Lawson, *supra* note 31, at § 8.15[3], at 588.

70 *See Clifford*, 7 S.W.3d at 374.

71 *See* State v. McDaniel, 392 S.W.2d 310 (Mo. 1965).

72 *See Clifford*, 7 S.W.3d at 376.

73 *Id.* at 374.

74 *See* Ky. R. Evid. 401. If multiple African-American males and no Caucasian males were present in the room during the drug transaction, evidence of the race of the perpetrator would not "make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.* Even if the perpetrator were determined to be African American, the identity of the perpetrator would still

make the existence of any relevant fact more probable or less probable than it would be without the evidence.[75]

The protections of Kentucky Rule of Evidence 403 operate in conjunction with the relevancy requirements of Rules 401 and 402. If the prosecution attempts to use evidence in any inappropriate or prejudicial manner, the court can properly exclude the evidence. In *Clifford*, the defendant presented no evidence that the prosecutor inappropriately used Officer Smith's testimony to incense the jury.[76] Rather, the court objectively admitted the testimony, and gave the jury the discretion to weigh the evidence and draw its own conclusions based on that evidence.[77] Moreover, the jury could have disregarded Smith's testimony and still convicted Clifford based solely on Detective Birkenhauer's testimony.[78] If, in the opinion of the trial court, the testimony had been used to inflame the jury, the court could have properly excluded such testimony under Rule 403.[79] However, there was no evidence in this case that the racial voice identification was improperly used to inflame the jury or was inappropriately referenced by the judge or other court personnel.[80]

Perhaps the most persuasive argument that Smith's testimony did not prejudice Clifford is that Clifford's attorney had the opportunity to cross-examine Smith. As the court stated, a witness must base his or her opinion of racial identification through voice on logical, personal experience.[81] Once this foundation is laid, the witness is able to testify about his or her opinions. However, cross-examination allows the defendant to show that the witness is not familiar enough with a particular race to know the speech characteristics of members of that race. According to a prior Kentucky case, *Louisville & N. R. Co. v. Gregory*, the purpose of cross-examination is to "test the accuracy of the knowledge of the witness, his source of information, his motives, interest and memory."[82] By questioning the witness, the defense is able to assay the credibility of that particular witness to the point where the jury might disregard his or her testimony.[83]

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be unascertainable. *Id.*

75 *See id.*

76 *See Chandler*, 333 F.3d at 732.

77 *See* Commonwealth v. Collins, 933 S.W.2d 811 (Ky. 1996).

78 *See* Commonwealth v. Benham, 816 S.W.2d 186 (Ky. 1991).

79 *See* KY. R. EVID. 403; *see also* State v. Watkins, 526 N.W.2d 638 (Minn. 1995) (ruling that the bailiff's referral to the defendant as a "darky" in presence of the jury was sufficiently prejudicial to the defendant's case and ordering a new trial).

80 *See Chandler*, 333 F.3d at 732; *see also* McCleskey v. Kemp, 481 U.S. 277 (1987) (asserting that racial identification could be a factor for some juries in deciding whether to sentence a defendant to capital punishment).

81 *See Clifford*, 7 S.W.3d at 376.

82 Louisville & N. R. Co. v. Gregory, 144 S.W.2d 519, 521 (Ky. 1940).

83 *See* Welch v. Commonwealth, 63 S.W. 984, 986 (Ky. 1901).

In *Clifford v. Commonwealth*, after the court ruled as a matter of law that the racial identification testimony was admissible, the defense cross-examined Officer Smith. Clifford's counsel questioned Smith about his experience in dealing with people of African-American heritage to reveal whether he had a rational basis for his conclusions.[84] Through this questioning, the defense was able to attack the credibility and motives of Officer Smith. The jury was then free to draw a conclusion they wished from their perceptions. Ultimately, they chose to believe Smith's testimony and convict Clifford of drug trafficking.

Several types of questions could be used to cross-examine a witness regarding racial voice identification. First, as the court in *Clifford* noted, a proper foundation must be laid in order for a witness to testify.[85] Defense counsel could attack the foundation presented by the witness by asking questions about their prior experience with the racial group in question. If they have not had extensive experience, then that particular witness's credibility would be diminished in the eyes of the jury. A question such as "What does an African-American's voice sound like?" would greatly challenge the witness's ability to differentiate between the people of different races. Secondly, the defense counsel could ask the witness about what particular features of the perpetrator's voice were identifiable with the specific race in question. Such questions will lead the jury to think about the witness's credibility to testify on the subject of the perpetrator's race. Finally, the attorney could question the witness about his or her opportunity to perceive and his or her memory regarding the statements in question.

As previously discussed, a court might hold some racial voice identification evidence inadmissible by applying the relevancy requirements of Rules 401 and 402 before admitting such evidence.[86] Furthermore, in those instances where the evidence is relevant but counsel has used it in an inflammatory or improper manner, the judge still has discretion to decide if the prejudice is too great under Rule 403 to allow admission.[87] Finally, the practice of cross-examination allows the defendant to expose any weaknesses of the witness in identifying race through voice. Due to these three factors, admission of racial identification evidence will not automatically lead to conviction of a defendant merely on his or her race instead of his or her actions.

Contrary to admission, exclusion of racial identification evidence on a per se basis could cause prejudice to the defendant. Just as racial voice identification testimony can be used to identify the defendant as the speaker, such evidence can be used to effectively exculpate the defendant.

84 *See Clifford*, 7 S.W.3d at 374.

85 *See id.* at 376.

86 *See* KY. R. EVID. 401; KY. R. EVID. 402.

87 *See* KY. R. EVID. 403.

For instance, in the New York case of *People v. Castillo*, racial voice identification evidence helped to absolve the defendant. The trial court convicted defendant Castillo of robbery, burglary, and sexual assault largely based upon the testimony of the victim.[88] The girl initially told investigators that her attacker was an African-American boy of about 18 years of age. She did not mention anything concerning his accent. The defendant was a twenty-eight-year-old Guatemalan native who spoke halting English.[89]

The Supreme Court of New York reversed these convictions because of the probable misidentification of the defendant as the perpetrator of the crime.[90] The court noted, "Miss B. [the witness] made no mention of an [sic] Hispanic accent, whereas the defendant here had a marked Spanish accent, normally speaks Spanish, has difficulty using English, and required an interpreter in order to stand trial."[91] Obviously, the court considered the voice of the defendant when making the decision to vacate the convictions of the trial court. A per se bar to admission of evidence pertaining to the speech pattern of a perpetrator would not only affect the prosecutions' cases in certain instances, but would detrimentally affect some defendants as well.

How would critics react if the situation had been reversed in *Clifford*, and the defendant tried to use racial voice identification to prove that the person committing the crime was a Caucasian male instead of a "male black"?[92] Clifford's race, coupled with the testimony of the witness saying the perpetrator was Caucasian, would likely prove his innocence. A per se bar to admission of such racial voice identification evidence, however, would keep Clifford from using the best evidence available for his defense.

V. POSSIBILITY OF PREJUDICE TO SOCIETY IN GENERAL IF EVIDENCE ALLOWED

Not only does admission of racial voice identification evidence lead to little possibility of prejudice to the individual defendant in a trial, there is also little possibility of prejudice to the general public. Some commentators believe that if courts continue to admit such evidence, prosecutors will perpetuate racial stereotypes not just in the courtroom, but also in society.[93] Nonetheless, the possibility of prejudice to society is minimal if courts

88 *See* People v. Castillo, 403 N.Y.S.2d 746 (N.Y. App. Div. 1978), *rev'd on other grounds*, 391 N.E.2d 997 (1979).

89 *See id.* at 746–47.

90 *See id.* at 747.

91 *Id.*

92 *Clifford*, 7 S.W.3d at 373.

93 *See* Lis Wiehl, *"Sounding Black" in the Courtroom: Court-Sanctioned Racial Stereotyping*, 18 HARV. BLACKLETTER L.J. 185, 203–09 (2002).

continue to admit racial voice identification testimony in a proper manner. Until *Clifford*, the state of Kentucky had not made a decision regarding the admissibility of such evidence.[94] In fact, a survey of other jurisdictions reveals that states rarely face this question.

There are several possible reasons why the issue of racial voice identification does not arise more often. First, there is little likelihood that a witness only heard the voice and did not perceive any other characteristic of the criminal perpetrator. Moreover, the relevancy requirements of the rules of evidence will often preclude the admission of voice identification testimony. As previously discussed, Kentucky Rule of Evidence 401 states that relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[95] Rule 402 states that, "[e]vidence which is not relevant is not admissible."[96] These rules largely incorporate the universally accepted principles codified in the Federal Rules of Evidence.[97]

The relevancy requirements of Rules 401 and 402 are inclusive of both evidence of the prosecution and evidence of the defense. Just as the prosecution could use racial voice identification evidence to identify the defendant in some cases, the defense could use racial voice identification evidence to absolve the defendant in other situations. Inclusionary notions in evidence law are universal and not constructed to give the prosecution the best opportunity to convict, as many critics believe. Rather, they are designed to give the jury an opportunity to see the best evidence possible, for both the prosecution and the accused.

Many times, the issue of the defendant's race will not play a role in his identification. In *Clifford*, there were four people present during the drug transaction, but only one was African American.[98] Only in rare instances, such as *Clifford*, would the evidence be useful in making a question of fact more probable or less probable as required by Rule 401. This relevancy requirement, along with the unlikely occurrence of only hearing the voice of a perpetrator without seeing him or her, leads to the conclusion that the issue of racial voice identification will not face courts often. Therefore, any possible prejudice from admission of this evidence will not lead to widespread racial profiling in society, as claimed by some critics of *Clifford*.[99]

Furthermore, there is considerable evidence that individuals are reasonably accurate when determining the race of a person after only hearing

94 *See Clifford*, 7 S.W.3d at 375.

95 KY. R. EVID. 401.

96 KY. R. EVID. 402.

97 LAWSON, *supra* note 31, at § 2.00, at 77.

98 *See Clifford*, 7 S.W.3d at 373.

99 *See generally* Dawn L. Smalls, *Linguistic Profiling and the Law*, 15 STAN. L. & POL'Y REV. 579 (2004); Wiehl, *supra* note 93.

their voice. In a study conducted by researchers at the University of Wisconsin—Madison, University of Delaware, and Stanford University, 421 test subjects were required to identify the race and gender of twenty different speakers. The test subjects correctly identified the race of the speaker eighty-six percent of the time.[100] More surprising is the fact that individuals were able to identify the race of the speaker ninety-seven percent of the time when that speaker was an African-American male.[101]

Based on these test results, the reliability of racial voice identification is actually quite high. According to Kentucky Rule of Evidence 701, a layman's testimony is admissible in court if there is a rational basis for his or her perception.[102] As long as the witness has experience dealing with people of the race he or she is identifying, the evidence tends to show that his or her perception of the identity of the perpetrator is a rational conclusion. Only in those rare instances when the opinion of the race of the speaker is relevant will the court allow the jury to hear the testimony. However, even in those situations, prejudice will not likely occur because of the likelihood that the opinion is accurate.

Although some argue that race identification through voice prejudices defendants, not many object to the admission of lay opinions in other areas of the law. For example, courts often allow juries to hear testimony regarding lay opinions of the gender[103] or age of the perpetrator.[104] However, are these opinions any more accurate than opinions regarding race? In one study, linguistics Professor Elizabeth Strand of Ohio State University sought to determine if stereotypes played a role in the identification of gender based on voice.[105]

After studying the perceptions drawn from certain speech, Professor Strand found that listeners subconsciously make decisions about gender based on features of the individual's pronunciation.[106] However, the size of the speaker's vocal tract often determines the way an individual pronounces syllables.[107] What happens when an individual tries to identify a female who has a large vocal tract or a male who has a small vocal tract? Obviously, there is a possibility of mistake involved in identifying an individual's gender when there is so much variation among vocal tract sizes of people. Courts nonetheless have held that gaining the best evidence pos-

100 *See* Thomas Purnell, William Idsardi, & John Baugh, *Perceptual and Phonetic Experiments on American English Dialect Identification*, 18 J. LANGUAGE & SOC. PSYCHOL. 10, 20 (1999).

101 *See id.*

102 *See* KY. R. EVID. 701.

103 *See* State v. Smith, 415 S.E.2d 409 (S.C. Ct. App. 1992).

104 *See* Howard v. Ky. Alcoholic Beverage Control Bd., 172 S.W.2d 46 (Ky. 1943).

105 *See* Elizabeth A. Strand, *Uncovering the Role of Gender Stereotypes in Speech Perception*, 18 J. LANGUAGE & SOC. PSYCHOL. 86 (1999).

106 *See id.* at 87.

107 *See id.* at 88.

sible is an overriding factor.[108] Courts should analyze the issue of prejudice symmetrically in cases involving race and/or gender. The pursuit of the best evidence possible should similarly be the overriding factor in race-related cases. After admitting the evidence, the court should allow the jury to perform their function of weighing the evidence to determine the correct outcome.

Current practices in many jurisdictions further underscore the improbability of prejudice involved with racial identification testimony. Courts across the country have predominantly agreed with the Supreme Court of Kentucky in *Clifford*, stating that racial voice identification evidence is admissible. Washington State,[109] South Carolina,[110] Missouri,[111] and Arkansas[112] all adhere to the idea that the opinions of lay witnesses are sufficiently reliable in voice identification situations to allow the jury to weigh the testimony's credibility.

In *State v. Kinard*, the Court of Appeals of Washington ruled that challenges to the admissibility of racial voice identification evidence are analogous to challenges of in-court identifications—e.g., lineups, fingerprints, and show-ups.[113] With challenges to in-court identifications, the court said that as long as there are no "impermissibly suggestive procedures, the question of reliability goes only to the weight of the testimony and not its admissibility."[114] Racial voice identification should be treated the same as the in-court identifications. If the evidence satisfies the relevancy, foundation, and prejudice requirements of the rules of evidence, any questions of reliability should be left for the jury.[115]

Although for different reasons than the court in *Kinard*, the Supreme Court of Missouri came to the same conclusion in *State v. McDaniel*.[116] *McDaniel* involved the question of whether a witness can testify that voices heard during a robbery had an African-American accent.[117] Instead of analo-

108 *See Chandler*, 333 F.3d at 731 ("To [exclude the evidence] would result in the perverse result of not allowing the best evidence to be presented to the jury when the danger of impermissible prejudice is remote.").

109 *See* State v. Kinard, 696 P.2d 603 (Wash. Ct. App. 1985) (holding that witness was able to testify as to her opinion that the perpetrator sounded black).

110 *See* State v. Smith, 415 S.E.2d 409 (S.C. Ct. App. 1992) (holding that witness could testify as to voice identification statements, leaving credibility to the jury).

111 *See* State v. McDaniel, 392 S.W.2d 310 (Mo. 1965) (stating that if proper foundation is laid, racial voice identification testimony can carry a robbery case to the jury).

112 *See* Rhea v. State, 147 S.W. 463 (Ark. 1912) (concluding that witnesses can provide relevant and probative testimony concerning identification through hearing the perpetrator's voice).

113 *See Kinard*, 696 P.2d at 605.

114 *Id.* at 604.

115 *See generally id.*

116 *See McDaniel*, 392 S.W.2d at 315.

117 *See id.*

gizing racial-voice identification to other forms of identification in criminal proceedings, the court in *McDaniel* simply applied the general rules of evidence. *McDaniel* held that courts should allow the jury to hear racial voice identification testimony as long as counsel lays the proper foundation and the testimony does not try to identify the defendant specifically.[118] According to the court, the jury is the proper evaluator for credibility and weight.

Day-to-day occurrences expose courts to possible prejudice to defendants, but courts overwhelmingly agree that admitting such evidence outweighs any possible detrimental outcomes. The fact that a majority of courts do allow such evidence does not necessarily show that no prejudice is involved. The overwhelming admission is a significant supporting factor.

Why would a court preclude evidence concerning the race of the perpetrator simply because of a possibility that there might be a mistake? The prejudice involved is no less significant when a witness testifies that the perpetrator was an eighteen-year-old male than if the witness said the perpetrator was an African-American male.[119] *Howard v. Kentucky Alcoholic Beverage Control Board* involved the admissibility of testimony regarding age and intoxication level of bar patrons. The appellate court ruled that a witness could testify on both age and intoxication issues as long as he or she had "adequate opportunities for observation."[120]

Courts have chosen to disregard the possible bias involved with giving opinions on gender and age in favor of the pursuit of the best possible evidence. Race identification should be no different. To hold otherwise would, in the words of the Sixth Circuit Court in *Clifford v. Chandler*, "result in the perverse result of not allowing the best evidence to be presented to the jury when the danger of impermissible prejudice is remote."[121]

118 *See id.*

119 *See generally* Howard v. Ky. Alcoholic Beverage Control Bd., 172 S.W.2d 46 (Ky. 1943) (holding that witness could testify as to age and condition of patrons because that opinion did not require any specific scientific knowledge and there was no other way to convey the impressions).

120 *Id.* at 49. "The courts are practically agreed that a nonexpert witness who has had adequate opportunities for observation may, after describing a person as fully as possible, give his opinion as to such person's age. This rule has been applied in criminal, as well as civil, cases—as, for example, on prosecutions for selling liquors to minors or for rape, expert medical testimony being also admissible in the last mentioned class of cases to prove the age of the prosecutrix." *Id.*

121 Clifford v. Chandler, 333 F.3d 724, 731 (6th Cir. 2003), *cert. denied*, 541 U.S. 905 (2004).

VI. DISCUSSION OF CRITICISMS OF *CLIFFORD V. COMMONWEALTH*

As a result of the decision to admit the testimony, Kentucky's Supreme Court has faced severe criticism from both academia and the general public. In a scathing article in the *Louisville Courier-Journal* titled *State's High Court Turns to the Racist Right*, David Hawpe argues that the Court's decision will pave the way for increased racism due to racial profiling.[122] In likening the decision to that of a modern-day *Plessy v. Ferguson*, Hawpe states that granting the use of such testimony in trial will permit juries to convict based on "prejudice and inference" instead of reasoning and justice.[123] Hawpe views the decision as an unneeded tumble towards a system where courts throw individual rights out the window in pursuit of convictions.[124] He contends that admitting such inflammatory testimony at trial "allows racism to block the path to justice."[125]

After the Court of Appeals for the Sixth Circuit affirmed the district court's denial of Clifford's motion for a writ of habeas corpus, Hawpe again attacked the decision. He stated that the use of testimony such as that of Officer Smith in the original criminal trial will lead to "abuse and injustice."[126] Hawpe is concerned that prosecutors and courts across the state will be able to use this tool of prosecution as a means of persecution.

Hawpe does not give the justices on the Kentucky Supreme Court a fair examination. Instead of investigating the reasoning behind the decision thoroughly, Hawpe simply labeled the judgment a digression to times of racial turmoil. Hawpe fails to recognize that the *Clifford* decision reflects a trend towards a more inclusionary role for lay testimony[127] throughout Kentucky's evidence law and evidentiary systems across the country. The role of the court is to make sure only relevant information reaches the jury;[128] the triers of fact must then weigh the credibility of such evidence. Obviously, with only one person in the room being African-American, *Clifford* represents a situation where the race of the perpetrator is relevant to identification. As the Sixth Circuit stated, the jury was free to disbelieve the statements of Officer Smith if they wished.[129] The per se exclusion of the

122 *See* David Hawpe, *State's High Court Turns to the Racist Right*, COURIER-JOURNAL (Louisville, Ky.), Jan. 30, 2000, at D1.

123 *Id.*

124 *See id.*

125 *Id.*

126 David Hawpe, *Conviction Based on 'Sounding Black' Elevates Stereotype to Evidence*, COURIER-JOURNAL (Louisville, Ky.), July 9, 2003, at 10A, Metro Edition.

127 *See* LAWSON, *supra* note 31, at § 6.00, at 401.

128 *See* KY. R. EVID. 402.

129 *See* Clifford v. Chandler, 333 F.3d 724, 728 (6th Cir. 2003), *cert. denied*, 541 U.S. 905 (2004).

testimony Hawpe proposes, however, "would result in the perverse result of not allowing the best evidence to be presented to the jury."[130]

Not only is Hawpe unable to identify the trend towards the more inclusionary approach to lay testimony, he also fails to see that admission of such evidence will have a minimal prejudicial effect on both individuals and society as a whole. Relevancy requirements and cross-examination are instrumental in preventing prejudice to any defendant, especially a defendant in a criminal proceeding involving race. Furthermore, the fact that situations involving *Clifford*-like testimony will rarely arise means that admission in those few instances will have insignificant effects on society as a whole. Certainly the repercussions of *Clifford* will not be nearly as pervasive as those associated with the "separate, but equal" doctrine of *Plessy v. Ferguson*. Hawpe simply attacked the decision without understanding the underlying reasoning.

Along with lay commentators such as Hawpe, some academic commentators have also argued against the decision handed down in *Clifford*. In the article *Linguistic Profiling and the Law*, published in the *Stanford Law and Policy Review*, Dawn Smalls argues that Officer Smith was unqualified to speak as to the race of the voice he heard.[131] Although the scope of evidentiary rules concerning lay testimony is broad, Smalls argues that all laymen are unable to reliably detect differences between the manner of speech of different races.[132] She implies that the foundation for Officer Smith's knowledge on the subject matter was specious.[133] If Officer Smith's limited knowledge provides an adequate foundation for testimony, Smalls argues "it is unclear if anyone would be unqualified to testify to the race or nationality of any speaker."[134] Due to the unreliable nature of identification and the "prejudicial effect" of racial identification evidence, courts should complete serious evaluation of the circumstances before presenting such testimony to the jury.[135]

Although Smalls makes many valid points in her article, she fails to recognize the importance of cross-examination. If a witness is unqualified to speak on a particular topic—e.g., they have no experience in dealing with people of the race they are identifying—the defense attorney will impeach that witness on cross-examination. Smalls simply states that a surprisingly large number of cases involving identification by voice do not mention cross-examination at all.[136] The failure of an appellate opinion to

130 *Id.* at 731.

131 *See* Smalls, *supra* note 99, at 590.

132 *See id.* at 592.

133 *Id.* at 590.

134 *Id.*

135 *See id.* at 603–04.

136 *See id.* at 595–96.

mention cross-examination does not automatically support the inference that defense attorneys are not properly conducting cross-examinations at trial. Many events occurring at the trial level are not discussed in appellate opinions. If, however, cross-examinations have not been taking place, the result should not be a per se bar to all racial voice identification testimony. Rather, the result should be serious malpractice investigations of those particular attorneys.

Smalls also identifies what she believes to be an inherent problem with allowing racial identification testimony: the possibility that people could change the dialect of their voice to avoid identification.[137] She argues that evidence proves many people have "considerable linguistic elasticity"[138] and can therefore present challenges to correct identification. However, people are also incredibly talented at feigning intoxication or insanity. Nevertheless, courts consistently allow lay testimony regarding those opinions although there is a possibility of mistake. Race should be no different—courts should allow the jury to hear the opinion and then let it weigh that evidence in their search for truth.

In *"Sounding Black" in the Courtroom: Court-Sanctioned Racial Stereotyping*—an article similar to Smalls' published in the *Harvard Blackletter Journal*—Lis Wiehl argues that individuals often have deep-seated racist beliefs that manifest themselves in situations such as racial identification.[139] Therefore, witnesses are unable to objectively determine the race of the voice heard without allowing intrinsic biases to play a role.[140] Wiehl contends that allowing a police officer to testify that he heard a black man's voice unconsciously legitimizes "racial discriminatory practices as a whole."[141] According to Wiehl, discrimination could lead to juries convicting defendants based on race instead of relevant evidence. In her opinion, judges should exclude such testimony from trial in order to prevent unconstitutional prejudice in the criminal process.[142]

Wiehl and Smalls fail to see that subconscious beliefs permeate areas of evidence law apart from racial issues. People inevitably have certain unsubstantiated beliefs about age and gender, but, as the court in *Clifford v. Commonwealth* stated, no one questions the admissibility of evidence pertaining to identification of gender or age.[143] Why should courts treat race differently?

137 *See id.* at 598–99.

138 *Id.* at 599 (quoting John Baugh, *Linguistic Profiling, in* BLACK LINGUISTICS: LANGUAGE, SOC'Y, & POLITICS IN AFRICA AND THE AMERICAS 155, 155–63 (Sinfree Makoni et. al eds., 2003).

139 *See* Wiehl, *supra* note 93, at 210.

140 *See id.* at 194–95.

141 *Id.* at 210.

142 *See id.* at 203.

143 *See Clifford*, 7 S.W.3d at 375.

There is no doubt that prosecutors could use racial voice identification evidence in a prejudicial manner if there were no systematic checks to prevent them from doing so. The relevancy requirements of Rule 402, anti-prejudice tools of Rule 403, and cross-examination each provide the court with mechanisms to diminish the prejudice incurred by a criminal defendant. With these powers, the court can admit the proper evidence, and maintain a fair criminal trial, as required by the Constitution.

Perhaps the most compelling criticism of the decision in *Clifford* was the dissent written by Justice Stumbo.[144] Stumbo stated that Officer Smith's testimony was incredibly prejudicial and the trial court should have excluded it under Kentucky Rule 403.[145] Justice Stumbo asserted her deeply rooted belief that individuals are incapable of identifying someone simply from their voice. In her opinion, a variety of factors, not including race, determine the sounds and cadence of someone's voice.[146] "[H]ow a person's parents speak, the countries, regions or even neighborhoods in which he has lived, the schools he has attended, the languages he speaks, his social class, and even whom he admires" all contribute to the uniqueness of a person's voice.[147] Stumbo says that there is no "rationality to the notion that one can hear a person's skin color."[148] Without any rational basis for his conclusions, Officer Smith's testimony did not increase the probability that Clifford was the speaker as required by the relevancy requirements of Rule 401.[149]

Justice Stumbo's argument is more legally based than Hawpe's statements. She reasoned that Officer Smith's testimony had no rational basis and therefore did not satisfy Rule 401. Justice Stumbo failed to address evidence gathered by linguistic researcher John Baugh, however, which shows that racial voice identification is surprisingly accurate.[150] She simply asserted that the way people speak has nothing to do with the color of their skin. She also did not question the admissibility of gender identification evidence in courts, even though researchers have shown that there is a certain level of unpredictability with auditory sex identification.[151]

144 *See* Clifford, 7 S.W.3d 371 (Stumbo, J., dissenting).

145 *See id.* at 377–79 (Stumbo, J., dissenting).

146 *See id.* at 378 (Stumbo, J., dissenting).

147 *Id.* (Stumbo, J., dissenting) (emphasis omitted).

148 *Id.* (Stumbo, J., dissenting).

149 *See id.* at 379 (Stumbo, J., dissenting).

150 *See* Purnell, Idsardi, & Baugh, *supra* note 100, at 20 (finding that subjects correctly identified African-American males through voice 97% of the time).

151 *See* Strand, *supra* note 105, at 88. Variability in vocal tract size is one major distinction between different voices. Strand also argues that gender stereotypes play a role in how we perceive speech, stating that these stereotypes "can often induce false perceptions of reality" in the listener. *Id.* at 94. Gender-based voice identification can be unreliable because "bottom-up processing of acoustic information directly interacts with higher level information related

Furthermore, Justice Stumbo asserted that the trial court should have excluded the questionable evidence under a Rule 403 analysis of prejudice. She stated that the only African American in the courtroom was the defendant, and that fact would lead to an impermissible inference from the jury.[152] The Kentucky Supreme Court held that Rule 403 gives "'substantial' discretion to balance probative worth against harmful effects."[153] Reversal is only appropriate if a trial judge's decision is determined to be an abuse of discretion.[154] The Court recently defined "abuse of discretion" as any act that is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles."[155] The trial judge's decision in this case was not an abuse of discretion as defined by the court, considering the highly reliable nature of the testimony and that his decision was supported by precedent from almost every jurisdiction. Although Justice Stumbo makes valid points regarding the Rule 403 analysis, the discretion given to trial judges is very high in this area.[156]

VII. Conclusion

The conclusion that a court should admit racial voice identification testimony in certain instances does not open the gate to admission of all types of racial comments during a trial. Constitutional notions of due process in criminal proceedings will still require courts to preclude some evidence in trials. Kentucky Rule of Evidence 402 maintains that evidence is inadmissible unless it is relevant to the proceedings.[157] There are instances where evidence concerning the race of the perpetrator would not be relevant and would therefore be inadmissible. For example, in *Minnesota v. Watkins*, several jurors referred to the defendant as a "darky" during jury deliberations.[158] The court ruled that the racial comments harmed the defendant's right to a fair trial and ordered a new trial.[159] However, in *Clifford*, the prosecution did not use the racial voice identification evidence in a prejudicial manner. They merely introduced evidence of the perpetrator's race for identification purposes.[160] Moreover, would commentators object

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to people's socially constructed stereotypes about gender." *Id.* at 87.

152 *See Clifford*, 7 S.W.3d at 378 (Stumbo, J., dissenting).

153 Brock v. Commonwealth, 947 S.W.2d 24, 29 (Ky. 1997); *see also* Lawson, *supra* note 31, at § 2.10[7], at 96.

154 *See, e.g.*, Sanborn v. Commonwealth, 754 S.W.2d 534, 540 (Ky. 1988).

155 *See* Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999).

156 *See* Lawson, *supra* note 31, at § 2.10[7], at 96.

157 *See* Ky. R. Evid. 402.

158 *See* Minnesota v. Watkins, 526 N.W.2d 638 (Minn. 1995).

159 *See id.* at 639.

160 *See Clifford*, 333 F.3d at 732.

if racial voice identification evidence were used, as in *People v. Castillo*,[161] to show that the defendant was not the perpetrator? Rules 401 and 402 are inclusionary for both prosecution and defense evidence.[162] In making the decision to admit the evidence, the court in *Clifford* was simply following the inclusionary system of evidence that legislators have established in Kentucky.

Without a per se exclusion of racial voice identification evidence, courts will continue to have an obligation to protect the rights of defendants in criminal trials. However, in cases such as *Clifford*, admitting evidence concerning racial voice identification is not likely to prejudice the defendant. Furthermore, prejudice to society as a whole is unlikely. Therefore, it is completely unfair to state that the Justices of the Supreme Court of Kentucky failed to properly exclude the evidence under Rule 403.

Clearly, the admission of testimony in *Clifford* has sparked controversy over the practices employed by courts around the country with racial identification. However, the decision made by the Supreme Court of Kentucky is not completely groundless, as David Hawpe contends in his article. Certainly, the decision does not mark an extreme digression to the judicially sanctioned racism of the *Plessy v. Ferguson* "separate but equal" doctrine of the late nineteenth century. Contrary to Mr. Hawpe's beliefs, the justices on the Kentucky Supreme Court, like many courts across the country, weighed the advantages of admitting the evidence with the *possible* prejudice and concluded that admission was the best option. That decision in no way makes them racists.

161 *See* People v. Castillo, 403 N.Y.S.2d 746 (N.Y. App. Div. 1978).

162 *See* KY. R. EVID. 401.