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In-Court Racial Voice Identifications: They Don't All Sound the Same

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IN-COURT RACIAL VOICE IDENTIFICATIONS:

THEY DON'T ALL SOUND THE SAME

I. INTRODUCTION

In *Clifford v. Chandler*,[1] the Sixth Circuit recently held that the admission of a witness's racial voice identification testimony—that a drug dealer sounded like a Black male—did not violate the Due Process clause of the Fourteenth Amendment.[2] In so holding, the court relied on cases from other jurisdictions admitting similar testimony, but applied them out of context to the distinguishable facts of this case. In applying inconsistent rationales, the court improperly evaluated the admissibility of the voice identification evidence under Federal Rule of Evidence 403, thus allowing substantially prejudicial testimony to bolster the prosecution's testimony, and leading to Clifford's conviction.

By comparing only the testimony itself to that held admissible in other jurisdictions, the court set the dangerous precedent of admitting such statements without considering the particular facts of the case that determine the probativeness and prejudicial effect of the evidence, and would otherwise call for its exclusion under Rule 403.

II. THE PROCEDURAL HISTORY OF *CLIFFORD*

A. Facts

1. The "Sting"

On May 20, 1996, Detective William Birkenhauer of the Northern Kentucky Drug Strike Force set up a drug "sting" operation

1. 333 F.3d 724 (6th Cir. 2003).

2. U.S. CONST. amend. XIV, § 1 (no State shall "deprive any person of life, liberty, or property, without due process of law").

with the assistance of police informant Gary Vanover.[3] Vanover arranged a meeting at his apartment, at which time Birkenhauer was to purchase a quarter ounce of crack cocaine from Vanover's friend, Charles Clifford.[4]

2. The Competing Testimonies

a. Detective William Birkenhauer

At trial, Birkenhauer testified that when he arrived at the apartment for the meeting, Vanover was accompanied by a female friend, and Clifford was in the bedroom.[5] Clifford emerged from the bedroom and told Birkenhauer that he only had seventy five dollars worth of crack cocaine, but could supply the rest later that afternoon.[6] Birkenhauer stated he would "take the '75' and return later for the rest."[7] Clifford then went back to the bedroom with Vanover, and Vanover returned alone with the crack cocaine and gave it to Birkenhauer.[8]

b. Informant Gary Vanover

Gary Vanover contradicted Birkenhauer and testified that he, not Clifford, made the sale to Birkenhauer.[9] Vanover stated that the cocaine belonged to him, it was he who promised to supply the rest, and that there was no drug transaction between Clifford and Birkenhauer.[10]

c. Officer Darin Smith

Unknown to either Clifford or Vanover, Birkenhauer was wearing a hidden "wire" transmitter that enabled another police officer, Darin Smith, to listen from a nearby apartment.[11] The tape recording of the drug transaction was barely audible and was not

3. Clifford v. Commonwealth, 7 S.W.3d 371, 373 (Ky. 2000).
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *See id.*
10. *Id.*
11. *Clifford*, 7 S.W.3d at 373.

admitted into evidence, but Smith testified as to what he heard over the transmitter.[12]

Smith testified to hearing four different voices: Birkenhauer's, another male's, a female's, and a fourth voice that "sounded as if it was of a male black."[13] Smith stated it was the Black male's voice he heard engaged in the drug transaction.[14] Clifford is a Black male, while Vanover is white.[15] Smith's cross-examination went as follows:

> Q: Okay. Well, how does a [B]lack man sound?
>
> A: Uh, some male [B]lacks have a, a different sound of, of their voice. Just as if I have a different sound of my voice as Detective Birkenhauer does. I sound different than you.
>
> Q: Okay, can you demonstrate that for the jury?
>
> A: I don't think that would be a fair and accurate description of the, you know, of the way the man sounds.
>
> Q: So not all male [B]lacks sound alike?
>
> A: That's correct, yes.
>
> Q: Okay. In fact, some of them sound like whites, don't they?
>
> A: Yes.
>
> Q: Do all whites sound alike?
>
> A: No sir.
>
> Q: Okay. Do some white people sound like [B]lacks when they're talking?
>
> A: Possibly, yes.[16]

A jury convicted Clifford of one count of trafficking in a controlled substance in the Campbell Circuit Court of Kentucky.[17] On appeal, Clifford challenged the admissibility of Smith's "opinion" that the fourth voice he heard sounded like a Black male.[18] The Supreme Court of Kentucky affirmed the conviction, holding that Smith's

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12. *Id.*
13. *Id.*
14. *Id.* at 373–74.
15. *Id.* at 373.
16. *Id.* at 374.
17. *Id.* at 373.
18. *Id.* at 374–76.

opinion was permissible as lay testimony.[19] The court relied on *People v. Sanchez*[20] in holding that the "collective facts rule"[21] permitted a person to express an opinion that a voice they heard was of a particular race.[22] The district court denied rehearing, and Clifford appealed to the Sixth Circuit Court of Appeals.[23] The Sixth Circuit then affirmed the denial.[24]

B. The Sixth Circuit Analysis

Clifford claimed on appeal that Smith's racial voice identification violated his Fourteenth Amendment Due Process rights because the identification was inherently unreliable and prejudicial.[25] To support his first claim that the voice identification was inherently unreliable, Clifford cited *Neil v. Biggers*[26] and *Manson v. Brathwaite*,[27] prohibiting unreliable identification procedures as unconstitutional.[28] The court disagreed, on the grounds that *Neil* and *Manson* were not broad enough to apply to the present case.[29] *Neil* and *Manson* proscribed pretrial identification procedures used by law enforcement that were so "impermissibly suggestive as to give rise to the likelihood of misidentification."[30] In applying the rules to this case, the court held that no suggestive procedures were used to identify Clifford, noting that Smith never even identified Clifford at all.[31]

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19. *Id.* at 374 (citing KY. R. EVID. 701 ("If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are: (a) Rationally based on the perception of the witness; and (b) Helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.")).

20. 492 N.Y.S.2d 683 (Sup. Ct. 1985).

21. The "collective facts rule" allows the court to permit a lay witness to resort to a conclusion or opinion to describe an observation, where there is no alternative way to communicate that observation to the jury. *Clifford*, 7 S.W.3d at 374.

22. *Id.* at 375.

23. Clifford v. Chandler, 333 F.3d 724, 726 (6th Cir. 2003).

24. *Id.* at 732.

25. *Id.* at 730.

26. 409 U.S. 188, 198 (1972).

27. 432 U.S. 98, 112 (1977).

28. *Clifford*, 333 F.3d at 730–31.

29. *Id.* at 731.

30. *Id.* (quoting Ledbetter v. Edwards, 35 F.3d 1062, 1070 (6th Cir. 1994)).

31. *Id.*

The court stated that even without the limitations of the two Supreme Court cases, it would likely have found the voice identification reliable anyway.[32] The court cited a study in which 421 students at Stanford University were asked to identify the racial identity of twenty different speakers, and students correctly identified the African-American males 88% of the time.[33] It further supported its holding that racial voice identification was reliable by citing cases from other jurisdictions that held similar testimony admissible.[34]

The court then rejected Clifford's claim that Smith's identification was unconstitutionally prejudicial. Despite recognizing that the Constitution prohibits racially based arguments, the court "rejecte[d] the notion [that] the mere identification of an individual's race by his voice will always result in unconstitutional prejudice."[35]

To illustrate, the court cited *State v. Kinard*,[36] where a rape victim could not see her attacker's face but could hear his voice. That court allowed the victim to testify that the voice of her attacker sounded Black.[37] The *Clifford* court argued that "such probative evidence should not be excluded simply because of an ambiguous concern over the possibility of racial prejudice."[38]

Before concluding, the court noted that a defendant was not precluded from showing that racial voice identification was improper.[39] However, the defendant would have to demonstrate

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32. *Id.*

33. *Id.* (citing Thomas Purnell et al., *Perceptual and Phonetic Experiments on American English Dialect Identification*, 18 J. LANGUAGE & SOC. PSYCHOL. 10, 19–20 (1999) [hereinafter Purnell]).

34. *Id.* at 731–32 (citing United States v. Card, 86 F. Supp. 2d 1115, 1116 (D. Utah 2000) ("perpetrator of robberies 'talked like' or 'acted like' an African-American"); State v. Smith, 415 S.E.2d 409, 415 (S.C. Ct. App. 1993) (describing a caller as a white male); State v. Kinard, 696 P.2d 603, 604 (Wash. Ct. App. 1985) (the robber "'sounded [B]lack to me'"); State v. McDaniel, 392 S.W.2d 310, 315 (Mo. 1965) (testimony that the voices heard during the robbery had a Black accent); Rhea v. State, 147 S.W. 463, 468 (Ark. 1912) (the witness testified that the voice he heard in a crowd of African-Americans was a white man's)).

35. *Id.* at 731.

36. 696 P.2d 603 (Wash. Ct. App. 1985).

37. *Id.* at 605.

38. *Clifford*, 333 F.3d at 732.

39. *Id.*

"how the identification was inappropriately prejudicial in his particular case."[40] Finally, concluding that the voice identification was not used in a prejudicial manner in this particular case, the court affirmed the district court's decision denying Clifford's motion for a writ of habeas corpus.[41]

III. THE COURT SHOULD HAVE EXCLUDED BIRKENHAUER'S TESTIMONY BECAUSE OF THE DANGER OF UNDUE PREJUDICE

The Federal Rules of Evidence allow for the exclusion of relevant evidence if "its probative value is substantially outweighed by the danger of unfair prejudice."[42] Rule 403 requires the court to balance the relative probative value of the evidence against the prejudicial risk of misuse.[43]

A. Probative Value

1. Smith's Voice Identification Had Little Probative Value Because of Birkenhauer's Eyewitness Testimony

While dismissing Clifford's claim of undue prejudice, the court expressed concerns about excluding the "best evidence" available because of a remote danger of prejudice:[44]

> [U]nder the theory propounded by [Clifford] the trial court would be required to exclude a rape victim's testimony about the race of her attacker when she did not see his face but only heard his voice. Such probative evidence should not be excluded simply because of an ambiguous concern over the possibility of racial prejudice.[45]

The inherent flaw in the Sixth Circuit's analysis is apparent through its use of a factually distinguishable case to illustrate its reasoning in *Clifford*. The critical difference in *Clifford* is that Birkenhauer's eyewitness testimony substantially diminishes the probative value of Smith's voice identification.

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40. *Id.*
41. *Id.*
42. FED. R. EVID. 403.
43. Old Chief v. United States, 519 U.S. 172, 172–73 (1997).
44. *Clifford*, 333 F.3d at 731.
45. *Id.* at 732 (citing State v. Kinard, 696 P.2d 603, 605 (Wash. Ct. App. 1985)) (citation omitted).

In its reasoning, the court cites *State v. Kinard*,[46] where a robbery victim was permitted to testify that her attacker "sounded [B]lack."[47] In *Kinard*, one of the robbers held a pillow over the victim's head and she only heard their voices.[48] Since there were no other witnesses, the victim's voice testimony was crucial to identifying the attacker, and this court asserted that it would not exclude such probative evidence due to ambiguous concerns of racial prejudice.[49]

The *Clifford* court cites several other cases holding equivalent testimony admissible.[50] In one case, *State v. McDaniel*,[51] testimony that the voice of the robber (who was wearing a mask) had a Negro accent was admitted because of its significance in "identify[ing] the probable race of the robbers."[52] In every case the court cites, the racial identification came from a single "earwitness"[53] and was admissible because it was vital to the identification of the defendant. The defendant's accent was the best available evidence linking the defendant to the crime because there were no eyewitnesses.

In contrast, Smith's testimony in *Clifford* had very little probative value because there was an eyewitness directly linking Clifford to the crime. The "best evidence" available was Birkenhauer's testimony that he negotiated the drug transaction directly with Clifford. The court compared the testimony to that in *McDaniel*, stating that Smith merely purported to identify the race of the voice he heard engaged in the crime.[54] But unlike *McDaniel*, it

46. 696 P.2d 603.
47. *Id.* at 604.
48. *Id.*
49. *Clifford*, 333 F.3d at 732.
50. *See supra* note 33.
51. 392 S.W.2d 310 (Mo. 1965).
52. *Id.* at 315.
53. *Clifford*, 333 F.3d at 731 (citing United States v. Card, 86 F. Supp. 2d 1115 (D. Utah 2000) (where the robbers wore masks or disguises); State v. Smith, 415 S.E.2d 409 (S.C. Ct. App. 1993) (the witness spoke to the killer over the telephone); State v. Kinard, 696 P.2d 603 (Wash. Ct. App. 1985) (the robber jammed a pillow over the victim's head); State v. McDaniel, 392 S.W.2d 310 (Mo. 1965) (where the robbers wore masks); Rhea v. State, 147 S.W. 463 (Ark. 1912) (the witness was too far from a crowd of people to identify any of their races, but was able to hear their voices)).
54. *Id.* at 732.

was of no consequence to identify the drug dealer's probable race, since Birkenhauer had already identified Clifford.

By comparing Smith's testimony to similar racial identifications admitted in other cases, the court accorded it too much probative weight. Rather than being the best available evidence as in the cited cases, or the only evidence linking the defendant to the crime, Smith's testimony was merely cumulative because of Birkenhauer's eyewitness testimony.

2. Smith's Testimony Had Little Value Without Evidence of Clifford's Actual Voice

The material fact at issue in this case was whether it was Clifford or Vanover who sold the drugs. Although Birkenhauer identified Clifford as the drug dealer, Vanover gave conflicting testimony that it was actually he, and not Clifford, who sold the drugs.[55] Therefore, the only way that Smith's testimony could have had significant probative value is if it tended to show it was Clifford, instead of Vanover, who negotiated the drug deal.

Presumably, that effect could have been achieved if Smith had specifically identified the voice he heard as *Clifford's* voice, or at the very least, with a showing that Clifford's manner of speech indeed sounded like that of a male Black. Absent such evidence, Smith's testimony alone had no value. The dissent in *Clifford v. Commonwealth*[56] aptly pointed out that Smith's testimony "in no way tended to increase the probability that [Clifford] was the speaker, because there was no showing that [Clifford], himself, spoke in the manner described."[57]

The court attempted to support the reliability of the racial voice identification by noting a study in which participants were asked to identify the races of twenty different speakers.[58] The study's participants correctly identified African-American males by the sounds of their voices approximately 88% of the time.[59] While the study supports a finding that someone's voice is a reliable indicator

55. Clifford v. Commonwealth, 7 S.W.3d 371, 373 (Ky. 2000).
56. *Id.* at 371.
57. *Id.* at 379.
58. *Clifford*, 333 F.3d at 731 (citing Purnell, *supra* note 33).
59. *Id.*

of their race,[60] it does not provide any findings as to the probability that Clifford actually speaks with an African-American accent. In fact, the same study states that the speech patterns of African Americans are learned characteristics and cannot be predicted by race.[61] Without evidence of what Clifford's voice or speech sounds like, Smith's testimony had little probative value in proving that Clifford, and not Vanover, was the man who negotiated the drug deal.

B. Danger of Undue Prejudice

1. Smith's Testimony Produced a Danger of Racial Prejudice

Absent a showing that Clifford actually speaks with an African-American accent, the jury was forced to make the "impermissible inference" that it was Clifford's voice that Smith heard, simply because he is Black.[62] Smith's testimony was unfairly prejudicial, within the meaning provided by the rule's advisory committee, because it created an "undue tendency to suggest decision on an improper basis."[63]

Smith's testimony that the drug dealer sounded Black, and the fact that Clifford was the "lone [B]lack man sitting at the defense table,"[64] was highly prejudicial. The jury was left to presume that Clifford spoke with what some linguists call "Black English,"[65] and

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60. Compare with Justice Johnstone's dissent, arguing that it is contrary to common sense that a person can ascertain a person's race solely by hearing his voice. That would be "tantamount to saying [that] one can 'hear a color' or 'smell a sound' or 'taste a noise.' One can no more determine that a person's skin is pale, cinnamon, or ebony simply by hearing his voice, than one can perceive that an individual will have a British accent . . . simply by gazing at his countenance and the color of his skin." *Clifford*, 7 S.W.3d at 378.

61. Purnell, *supra* note 33, at 14 (this fact is demonstrated by the African-American author's ability to mimic the speech patterns of Blacks, Chicanos, and Standard American English speakers, having grown up in inner-city communities).

62. *Clifford*, 7 S.W.3d at 378.

63. FED. R. EVID. 403 advisory committee's note.

64. *Clifford*, 7 S.W.3d 371 at 378.

65. *See* Jill Gaulding, *Against Common Sense: Why Title VII Should Protect Speakers of Black English*, 31 U. MICH. J.L. REFORM 637, 638–39 (1998) (discussing the different labels used to identify the particular speech pattern of many Blacks in the United States).

to conclude that he was the man Smith heard selling drugs. That conclusion, then, is clearly suggested on an improper basis.

In addition, even though the jury could already see that Clifford was African-American, the implicit characterization that he also *sounded* Black could have intensified any existing stereotypical images of Black males[66] or unconscious prejudices of the jurors. Black English is often associated with negative connotations[67] that do not necessarily attach to African-Americans who speak Standard American English. "[I]f someone is black, but they speak with the same accent as a Midwestern white person, it completely changes the perception of them."[68] Ironically, the study that the *Clifford* court cited was conducted to show discrimination against Blacks based solely on their voices.[69] Thus, the assumption that Clifford sounded Black created a likelihood of producing damaging racial imagery in the jurors' minds.[70]

2. Smith's Testimony Tended to Implicate Clifford Solely Because of His Race

The court also cited *United States v. Card*,[71] which admitted similar racial identification evidence over a Rule 403 objection because its probative value substantially outweighed the danger of prejudice.[72] The court held the evidence was not prejudicial because

66. *See* Lis Wiehl, *"Sounding Black" in the Courtroom: Court-Sanctioned Racial Stereotyping*, 18 HARV. BLACKLETTER L.J. 185, 186 n.12, 201 n.116 (2002) (noting the public's preconceptions in associating Black males with drug crimes, especially involving crack cocaine).

67. Gaulding, *supra* note 65, at 641, 646 n.49 (some connotations include uneducated, disreputable, lazy, and inferior).

68. *Id.* at 644 (quoting Joleen Kirschenman & Kathryn M. Neckerman, *"We'd Love to Hire Them, But . . .": The Meaning of Race for Employers*, *in* THE URBAN UNDERCLASS 203, 224 (Christopher Jencks & Paul E. Peterson eds., 1991)).

69. Purnell, *supra* note 33, at 10 ("This article, detailing four experiments, shows that housing discrimination based solely on telephone conversations occurs.").

70. *See* Sheir Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739 (1993) (discussing the dangers of both blatant and subtle racial imagery in criminal cases).

71. 86 F. Supp. 2d 1115 (D. Utah 2000) (admitting testimony that one of the perpetrators spoke like an African-American, where the bank robbers wore disguises so that witnesses could not see their skin or hair).

72. *Id.* at 1118–19.

it was not "used to suggest that because of [defendant's] ethnic status, he was more likely to commit the offense . . . . [R]ather, [it was] directly related to the legitimate factor of identification in the case."[73]

Though similar, Smith's testimony was not truly used for mere identification purposes. An eyewitness identified both Clifford and Vanover as being present at the scene of the drug deal. Due to conflicting accounts of who actually sold the drugs, Smith's testimony was used to bolster Birkenhauer's contention that it was Clifford. The prosecution was suggesting that it was more likely that Clifford sold the drugs than Vanover because the voice that negotiated the drug deal sounded Black. It is doubtful that the prosecution *intended* to suggest Clifford was more likely to have committed the crime because of his ethnic status, but Smith's testimony essentially had the same effect. Both led the jury to deduce that because Clifford is Black, he was more likely the person who sold drugs to the undercover police officer. Therefore, while the jury was free to believe either Birkenhauer's or Vanover's conflicting testimony, Smith's testimony was used to bolster Birkenhauer's testimony based on Clifford's race.

This Comment does not argue that the prosecution *intended* to appeal to the racial prejudice of the jurors, or that the danger of prejudice was necessarily strong, but that any risk of undue prejudice should have excluded the evidence because its probative value was so insignificant. "Where the evidence is of very slight (if any) probative value, it's an abuse of discretion to admit it if there's even a *modest likelihood* of unfair prejudice . . . ."[74] Unlike the cases cited by the court, the racial voice testimony did not have any value as identification evidence because Clifford had already been identified by an eyewitness.

The disputed facts for the jury to consider were the conflicting testimonies of Birkenhauer and Vanover. As identification was not the real issue, Smith's testimony was used to reinforce Birkenhauer's version of events. However, because the sound of Clifford's voice was unknown, Smith's testimony had very little probative value. The court should not have admitted the testimony because it

73. *Id.* at 1119.

74. United States v. Hitt, 981 F.2d 422, 424 (9th Cir. 1992) (emphasis added).

produced the danger that the jury would impermissibly rely on racial stereotypes to link Clifford to the voice that Smith heard over the transmitter.

IV. IMPLICATION

The court's holding moves the judicial consideration of racial voice testimony in the direction of an inflexible rule of admissibility, rather than toward the case-by-case balancing inquiry that Rule 403 requires. The court erred by relying on cases that permitted similar testimony, but used in a different context. By comparing Smith's testimony to similar racial identifications held admissible in other cases, the court overvalued its probativeness, and almost mechanically held it admissible. If other jurisdictions follow form and presume admissibility of racial voice testimony simply because it is identical to the testimony admitted in *Clifford*, the admission of impermissibly prejudicial evidence will continue, contrary to the purposes of Rule 403.

The Supreme Court has recognized the possibility that racism may influence jury decisions, and has held that racially biased arguments are unconstitutional.[75] What's more, even in cases that involve "special circumstances" that *merely create* a risk of racial prejudice, the defendant is entitled to question prospective jurors with respect to racial prejudice.[76] Notwithstanding these protections against biased arguments and "special circumstances," racial prejudice is less obvious when in the form of unconscious racism, subtle references which invoke a "set of beliefs whereby we irrationally attach significance to . . . race."[77]

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75. McCleskey v. Kemp, 481 U.S. 279, 311 (1987).

76. Turner v. Murray, 476 U.S. 28, 35–38 (1986) (recognizing the likelihood that the unconscious racial attitudes of the jurors might have influenced the capital sentence of a Black defendant for the murder of a white victim, the court held that the trial judge failed to adequately protect the defendant's constitutional right to an impartial jury).

77. Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 330 (1987). In this article, the author discusses the ineffectiveness of the current equal protection doctrine in eradicating racial discrimination. Since the doctrine requires a showing of discriminatory purpose before invalidating legislation as unconstitutional, it ignores the fact that racial discrimination is often a product of unconscious racial motivation. The same argument can be made in eradicating racism in the courtroom. Even though the courts prohibit racially

The *Clifford* court established that in order to show racial voice testimony is improper, the defendant has the burden of showing how the identification was inappropriately prejudicial *in his particular case*.[78] This is an unreasonable burden if racial prejudice is mostly a product of the subconscious, since each juror's response to particular racial imagery is impossible to determine.[79]

The court noted that there was no evidence that the voice identification was used to inflame the jury, or that the lower court judge made inappropriate references to the identification.[80] However, "[b]y insisting that a blameworthy perpetrator be found before the existence of racial discrimination can be acknowledged, the Court creates an imaginary world where discrimination does not exist unless it was consciously intended."[81] Thus, the court's requirement of a showing of improper intent presents a hurdle that is almost impossible to overcome, and in effect not only creates an inflexible rule of admissibility, but hinders the goal of eradicating racism in the courtroom.

V. CONCLUSION

Courts should recognize the possibility of unconscious racism among jurors and be wary of race-based testimony. Due to the unreasonableness of identifying racial prejudice, whenever racial testimony is used, courts should presume a possibility of prejudice and only admit evidence that has strong probative value. Rule 403 is not a difficult hurdle, and in the cases cited by the court, the value of the racial identifications easily outweighed the danger of undue prejudice. This court erred by presuming probative value and dismissing Rule 403 considerations with hardly a second glance. By failing to take into consideration a major distinguishing factor from

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biased arguments, even subtle references to race may trigger unconscious racism.

78. Clifford v. Chandler, 333 F.3d 724, 732 (6th Cir. 2003).

79. Johnson, *supra* note 70, at 1743.

80. *Clifford*, 333 F.3d at 732.

81. Lawrence, *supra* note 77, at 324–25.

other racial voice identification cases, the court admitted unduly prejudicial testimony that resulted in a conviction.

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