

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 2001

STATE OF DAVIS,

Petitioner,

v.

Brian SUMMO

Respondent.

No. 00-01749

August 16, 2001

ORDER

Case below, *Summo v. State of Davis*, 550 S.E.2d 963 (DV 2001).

The petition for writ of certiorari to the Supreme Court of the State of Davis is hereby granted limited to the following two questions:

- 1) Whether a statute that enhances the penalty for racially motivated unlawful conduct, when that conduct is directed toward a particular race, violates the Equal Protection Clause of the Fourteenth Amendment; and
- 2) Whether a defendant whose attorney is sleeping during trial must demonstrate prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984)?

Probable jurisdiction is noted, and a total of one half hour allotted for oral argument. The briefs of both parties are to be filed with the Clerk of the Court on or before 5:00 p.m. on Monday, September 24, 2001. The case is set for oral argument in the October 2001 term of this Court.

**SUPREME COURT OF THE STATE
OF DAVIS**

No. 00-2422-01

Brian SUMMO,

APPELLANT,

v.

STATE OF DAVIS,

APPELLEE.

*** **

ORDER AND OPINION

*** **

KALISTA, J., joined by LAYTON, J.,
HANNAH, J. and DIVINE, J.

Defendant, Brian Summo, appeals the State of Davis Circuit Court of Appeals decision to uphold his conviction and sentence under the State of Davis intimidation statute, Davis Code § 76.09. We reverse.

I. Background

In denying Defendant's request for a new trial, the Circuit Court reviewed the factual background of the case. As we are satisfied with the lower court's summation of the facts, we will not reiterate them here.

II. Procedural History

Defendant was charged with the crime of intimidation for committing the act of racially motivated aggravated assault against a Native American in the State of Davis. Defendant challenged his conviction stating that he received ineffective assistance of counsel during

his trial and that Davis Code § 76.09 violated the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. The Circuit Court of Appeals rejected both claims. Defendant appeals. We are asked to consider (1) whether the Davis statute that enhances the penalty for racially-motivated unlawful conduct directed toward a Native American violates the Equal Protection Clause and (2) whether a defendant whose attorney sleeps during his trial must demonstrate prejudice to succeed on a claim of ineffective assistance of counsel. We address the latter first because that issue is dispositive of this appeal.

III. Ineffective Assistance of Counsel.

The United States Constitution guarantees certain fundamental rights of procedural due process to all citizens, including the right of the accused to the assistance of counsel in a criminal trial. U.S. Const. amend. VI. The Supreme Court has held that "the right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771, n.14 (1970). This means that criminal defendants have a right to more than just the presence of an attorney. Criminal defendants have the right to be represented by an advocate who will avidly pursue their best interests. *Lema v. United States*, 987 F.2d 48, 51 (1st Cir. 1993) (quoting *United States v. Natanel*, 938 F.2d 302, 309-310 (1st Cir. 1991)).

The Supreme Court of the United States has instituted a two-part test for determining whether or not an attorney's conduct is deficient. *Strickland v. Washington*, 466 U.S. 668 (1984). The

first prong requires a showing of attorney error and the second prong requires a showing of prejudice. *Id.* at 687. According to the trial judge, Summo's counsel fell asleep during portions of his trial. We hold that this conduct is in and of itself attorney error. There is simply no reasonable situation where a slumbering attorney is completing every affirmative duty she holds during a trial. Thus, Summo has satisfied the first prong of *Strickland*.

Although Summo has not demonstrated prejudice under the second prong, this requirement is not absolute. The Supreme Court has provided for a number of circumstances when prejudice is presumed. First, there may be cases where "prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost." *Strickland v. Washington*, 466 U.S. at 692. See also *Cuyler v. Sullivan*, 446 U.S. 335, 345-350 (1980). Second, a presumption may be made where cases "involve impairments of the Sixth Amendment right that are easy to identify." *Id.* Finally, cases where the government is directly responsible and may have easily prevented the problem allow for a presumption of prejudice. *Id.* See also *United States v. Cronin*, 466 U.S. 648 (1984).

Today, we hold that a sleeping attorney is per se prejudicial. In doing so, we follow the Ninth Circuit's holding in *Javor v. United States*, 724 F.2d 831 (9th Cir. 1984). In *Javor*, the Ninth Circuit held that "when an attorney for a criminal defendant sleeps through a substantial portion of the trial such conduct is inherently prejudicial and thus no separate showing of prejudice is necessary." *Id.* at 833.

Javor involved a two-week jury trial with three co-defendants. In that case, the attorney in question fell asleep during "substantial" and crucial portions of the trial. *Id.* The Circuit Court created a presumption of prejudice for a sleeping attorney case in stating "today we conclude that when an attorney for a criminal defendant sleeps through a substantial portion of the trial, such conduct is inherently prejudicial and thus no separate showing of prejudice is necessary." *Id.*

We further take notice that the Second Circuit has also adopted a per se test for the sleeping attorney in *Tippins v. Walker*, 77 F.3d 682 (2nd Cir. 1996). There, the court applied the presumption in a case where an attorney fell asleep for substantial portions of the trial and was admonished on the record. The court held that repeated suspension of trial due to attorney slumber when the defendant's interests are at stake is per se prejudicial. *Id.* at 687.

Most recently, the Fifth Circuit has addressed the necessary showing in the case of the sleeping attorney in *Burdine v. Johnson*, 2001 U.S. App. LEXIS 18277 (5th Cir. 2001). There, the court held that the repeated dozing of an attorney during the guilt innocence phase of a capital murder trial constituted prejudice per se.

The State of Davis now joins the other jurisdictions that have with all just wisdom held that a sleeping attorney is per se prejudicial. Thus, Summo has satisfied the second *Strickland* prong.

IV. Conclusion

Summo has satisfied both prongs of the *Strickland* test and has thus demonstrated the ineffective assistance of his counsel at trial. This finding requires reversal of the conviction. Because we reverse the conviction on this ground, we do not reach the question of the constitutionality of the Davis statute.

The judgment of the Circuit Court of Appeals is hereby, REVERSED, and this case is REMANDED for proceedings not inconsistent with this opinion.

MORRISON, C.J., joined by PETTY, J. and GUERTLER, J. Concurring in the judgment and Dissenting in part,

I agree that the conviction must be reversed, but not because of the ineffective assistance of counsel. I find it ultimately unbelievable that the majority has taken the rash step to allow a per se showing of prejudice in the case of a sleeping attorney and thus I must dissent from the opinion. I nonetheless concur in the judgment reversing the conviction, because I believe that Davis Code § 76.09 violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

I.

Strickland v. Washington, 466 U.S. 668 (1984), held that "the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so

undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686. The Court then set forth a two-part test for determining whether a defendant has shown that the result of a trial is called into question. "First the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Id.* at 687. This is the only test under which to analyze the case at hand.

I believe that there is a serious question as to whether or not Summo has satisfied even the first prong of the *Strickland* test. My skepticism over the specificity required, however, is unnecessary to make the only proper determination of the question. The *Strickland* test represents the law as dictated by the highest court in the land. Although limited per se exceptions have been allowed none of those exceptions are applicable here.

Recently, some circuit courts have tried to include cases of the sleeping attorney in this category. Specifically, the majority cites *Javor v. United States*, 724 F.2d 831 (9th Cir. 1984). The holding in *Javor* requires an examination

of the record to ascertain if the attorney slept through a "substantial" portion of the trial. Thus, an appellate court will either have to discover what percentage of the trial the attorney slept through or the importance of the parts of the trial that the attorney missed. In either case, a review of the record is absolutely necessary. *Strickland* sought to avoid a case-by-case analysis to conserve judicial resources. Reviewing the record to determine if an attorney slept through a "substantial" portion of the trial undermines this principle of conservation and misapplies the *Strickland* holding.

Furthermore, the majority cites *Burdine v. Johnson*, 2001 U.S. App. LEXIS 18277 (5th Cir. 2001). Even in that case, however, the Fifth Circuit stated "We decline to adopt a per se rule that any dozing by defense counsel during trial merits a presumption of prejudice. Our holding, that the repeated unconsciousness of Burdine's counsel through not insubstantial portions of the critical guilt-innocence phase of Burdine's capital murder trial warrants a presumption of prejudice, is limited to the egregious facts found by the state habeas court in this case." *Id.* at *35-36.

It is of crucial importance to note that in this case, Summo's attorney was only asleep during cumulative evidence. According to the trial record, Ms. Shreve was awake for and questioned the victim. The eyewitness that was called by the State virtually repeated the victim's testimony word for word. Mrs. Summo's co-worker testified in a manner that was not inconsistent with Summo's own testimony. In short, Summo's attorney did not miss anything that could have changed the outcome of

trial. For these same reasons, the Second Circuit's holding in *Tippins v. Walker*, 77 F.3d 682 (2nd Cir. 1996), is inapplicable to the case at hand because here, there was no "prolonged inattention during stretches of a long trial." *Id.* at 686.

Finally, there are several negative practical implications in utilizing the majority's per se rule. First, controversy over whether an attorney was actually asleep will invade appellate courts and lead to an increased inquiry into the trial court's record. Secondly, sleeping may be a tactic used by attorneys to downplay the importance of events. See *Prada-Cordero v. United States*, 95 F. Supp. 2d 76, 81-82 (D.P.R. 2000). Finally, unscrupulous lawyers may start using sleep to void cases that they are obviously losing in order to get a new trial. A per se rule is uncalled for and without valid precedent.

II.

Because I believe that Summo has not satisfied the *Strickland* burden, I now examine his equal protection claim. In doing so, I find that Davis Code § 76.09 violates the Equal Protection Clause.

Defendant alleges that Davis Code § 76.09 violates the Fourteenth Amendment of the U.S. Constitution because § 76.09 provides greater protection to hate crime victims than victims of other crimes. Defendant differentiates § 76.09 from the hate crime statutes of other states found constitutional by those states by highlighting § 76.09(3). This section invokes an enhanced sentence for the crime of intimidation committed against a Native American. I will address this

distinction made by the defendant along with his Equal Protection argument.

The State of Davis Circuit Court of Appeals made the broad assumption that the reasoning applied by other state courts regarding the constitutionality of their respective hate crime statutes applies analogously to Davis Code § 76.09. See *Summo v. State of Davis*, 4:64 CR-1316, n. 4. The Circuit Court of Appeals, however, fails to see one large difference between § 76.09 and other hate crime statutes. All hate crime statutes cited by the Appellate Court are racially neutral in the sense that anyone can potentially fall into the victim category of the statutes. Though § 76.09(1) is racially neutral, § 76.09(3) is not; only Native Americans can be victims. We are the first state court to decide whether or not a race-specific hate crime statute violates Equal Protection. There are two state courts, however, that clarify in dicta that a race-specific hate crime statute would violate Equal Protection. *State v. Talley*, 858 P.2d 217, 229-230 (Wash. 1993); *State v. McKnight*, 511 N.W.2d 389, 456 (Iowa 1994). "The legislature could decide that blacks are more valuable than whites, and enhance the punishment when a black is the victim of a criminal act. Such a statute would ...not survive analysis under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution." *McKnight*, 511 N.W.2d at 456. We agree with the Defendant that we must distinguish § 76.09 from the racially neutral hate crime statutes of other states.

Defendant argues that § 76.09 provides greater protection to hate crime victims than other victims. I believe that § 76.09

provides greater protection to Native American victims of hate crimes than victims of other crimes. For these reasons, I agree with the dicta of *McKnight* and *Talley* and believe that § 76.09 does not survive an Equal Protection analysis.

The Circuit Court of Appeals found that § 76.09 was constitutional because the statute rationally related to a State of Davis' legitimate purpose. I disagree with the Circuit Court's Equal Protection analysis.

Defendant argues that strict scrutiny should apply for various reasons elaborated by the Circuit Court of Appeals' opinion. I agree with Defendant's third contention that strict scrutiny applies because § 76.09 gives special treatment to a group of victims based on the suspect characteristics of race and national origin, i.e. being Native American. In *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 202 (1995), the United States Supreme Court found that the government's use of suspect race and ethnic based classifications to favor minority contractors bidding on federal projects be analyzed under a strict scrutiny standard. Section 76.09 makes the same type of race and ethnic classification to favor Native American hate crime victims. Therefore, the statute should be subjected to the same strict scrutiny analysis.

In order to survive a strict scrutiny analysis, a statute must be narrowly tailored to serve a compelling state interest. *Bush v. Vera*, 517 U.S. 952, 982-985 (1996). The interest to remedy discrimination only becomes compelling when the discrimination is specific and

identified by the state. *Shaw v. Hunt* (*Shaw II*), 517 U.S. 899, 910 (1996). Even though Texas' redistricting plan addressed in *Bush* was designed by state legislators to remedy discrimination against minorities, the plan failed a strict scrutiny analysis because appellants did not cite a specific need to remedy discrimination. *Bush* at 982-985. Though the State of Davis went farther than the State of Texas to identify instances of discrimination against Native Americans by citing Native American comparative hate crime statistics, these instances are not specifically enumerated before this court. See *Summo v. State of Davis*, 4:64 CR-1316, n.7. The State did not even identify a single specific incidence of a hate crime against a Native American that occurred the year that Senator Grossman proposed § 76.09. This court is not convinced that the State of Davis' interest to remedy discrimination against Native Americans was compelling.

A state's plan to remedy discrimination also must be narrowly tailored to remedy the effects of prior discrimination. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507-508 (1989). The Supreme Court found that the plan introduced in *Croson* to set aside 30% of city construction contracts for racial and ethnic minority contractors was not narrowly tailored to remedy effects of prior discrimination. *Id.* Not all minority contractors protected by the plan had experienced discrimination and Richmond did not pursue any alternative racially neutral means to remedy discrimination. *Id.* Along this same line, not all Native Americans are subjected to hate crimes that are more severe than those hate crimes committed against individuals of any other § 76.09

classified group. Therefore, § 76.09 is not narrowly tailored to remedy past discrimination. Without a narrowly tailored plan to serve a compelling state interest, § 76.09 fails a strict scrutiny analysis.

Section 76.09 would also fail a rational basis analysis for there is no rational basis behind the heightened sentence under § 76.09(3). When determining whether a sentence violates Equal Protection, the Supreme Court also considers the appropriateness of the sentence given the Defendant's crime. *Holman v. Page*, 95 F.3d 481, 486 (7th Cir. 1996). See also *Chapman v. U.S.*, 500 U.S. 453, 465 (1991) and *Jones v. U.S.*, 463 U.S. 354, 362 n.10 (1983). The Constitution requires that there be a rational connection between the sentence and the offense. I cannot understand why it would be more appropriate to issue a heightened sentence for an offender who harms a Native American than for an offender who harms a Mexican, Japanese, Australian or any other individual with the same motivation of hatred. I do not believe that the State has shown a rational connection by stating that hate crimes against Native Americans are more severe. Therefore, the statute also fails a rational basis analysis.

For these reasons, I would hold that Summo has not satisfied the required showing under *Strickland* to warrant a new trial based on the ineffective assistance of counsel. I would further hold that Davis Code § 76.09 violates the Equal Protection Clause of the U.S. Constitution and reverse Defendant's conviction for the crime of intimidation against a Native American.

**CIRCUIT COURT OF APPEALS
FOR THE WESTERN CIRCUIT OF
DAVIS
CRIMINAL ACTION No. 4:64 CR-
1316**

**Brian SUMMO,

APPELLANT,**

v.

**STATE OF DAVIS,

APPELLEE.**

*** **
ORDER AND OPINION
*** **

MASTER, C.J., joined by HUNT, J. and
CROSS, J.

The State of Davis charged Defendant with the crimes of (1) aggravated assault in violation of Davis Code § 13.5-108 and (2) intimidation in violation of Davis Code § 76.09(1). Both charges were based on an incident in which Defendant attacked a Native American with a screwdriver while shouting racial slurs. Defendant pleaded guilty to the aggravated assault charge; his conviction and sentence on that charge are not at issue in this court. Defendant pleaded not guilty to the intimidation charge; he was convicted on that charge after a jury trial and sentenced on that conviction according to Davis Code § 76.09(3). Defendant made a motion to set aside the verdict based on ineffective assistance of counsel. The trial court summarily denied Defendant's motion, holding that Summo did not demonstrate prejudice. Defendant Brian Summo appears before this court to appeal the

trial court's enforcement of Davis Code § 76.09 on Equal Protection grounds and the Trial Court's denial of his ineffective assistance of counsel claim.¹

I

Defendant does not challenge the sufficiency of the evidence against him, which, construed favorably to the verdict, showed as follows. On January 25, 2000, Defendant Brian Summo, carrying a toolbox to be pawned, entered a City of Competition pawnshop owned by Mr. Gary Middlerider. Defendant removed a screwdriver from the toolbox and approached the Native American, Mr. Middlerider, who stood behind the store's register. Defendant shouted, "You killed my wife, you Indian scum!" and then grabbed Mr. Middlerider by the back of his head and proceeded to jab him with the screwdriver.² Mr.

¹ Davis Code § 8.42 allows for claims of ineffective assistance of counsel to be brought on direct appeal in conjunction with any other ground that must be brought on direct appeal.

² Prior to the death of his wife, Defendant Brian Summo lived with his wife and son in the city of Competition, Davis. The family home stood at 33206 Falcon Drive, approximately two blocks from the Abalone Native American Reservation that bordered the City of Competition on two sides. The Native American reservation supported its population by hosting the largest Big Money Casino in the United States. The Summo home was within walking distance from the Big Money Casino.

Mr. Summo's wife had a problem with gambling. Employed as a Big Money bartender, Mrs. Summo would often come home early on Saturday mornings after losing her entire paycheck the night before at the blackjack table.

On or about January 8, 2000, Mrs. Summo joined a high stakes game of blackjack where the minimum bet was \$500. After losing the remainder of the Summo's joint savings account, Mrs. Summo bet the title of the 33206 Falcon Drive home on the next hand and lost. Mrs. Summo burst into tears, left the table quickly,

Middlerider received multiple lacerations to his face and arms due directly to Defendant's actions. Middlerider lost consciousness due to blood loss and lay in a shock-induced coma for one week after the incident.

The State of Davis charged Brian Summo with aggravated assault under Davis Penal Code § 13.5-108. The State of Davis also charged Summo with intimidation under Davis Code § 76.09.³

climbed to the roof of Big Money and jumped into the pool forty stories below. She died on impact.

As a result of his wife's actions, Defendant had to remove himself and his son from the family home and temporarily relocate to the City of Competition Rescue Mission. Mr. Summo blamed the Big Money Casino for the death of his wife and the loss of his home. He specifically aimed his anger toward the Abalone Native American Tribe who operated the local Big Money Casino. Defendant often expressed his distaste for the local Native Americans by making derogatory remarks about their habits of corrupting and stealing money from City of Competition residents.

³ Davis Code § 76.09

- (1) A person commits the crime of intimidation if, by reason of the actual or perceived race, color, religion, national origin, or sexual orientation of another individual or group of individuals, he or she violates Davis Code § 13.5 which prohibits harassment, trespass, and crimes of violence.*
- (2) Except as provided in (3), a person found guilty of intimidation shall be sentenced to a term of imprisonment of not less than two years and not more than 4 years.
- (3) The crime of intimidation committed against a Native American carries a jail sentence of six years.
- (4) Any sentence imposed under this section shall run consecutive to any sentence imposed for the underlying violation of Davis Code § 13.

*Davis Code § 13.5-108 states, "Aggravated assault is an unlawful use of violence upon the person of another. Aggravated assault is

Mr. Summo, under the guidance of his attorney, Ms. April Shreve, pleaded guilty to aggravated assault and not guilty to intimidation. Summo also moved to dismiss the intimidation charge, claiming that the Davis statute violated the Equal Protection Clause. The trial court denied Summo's motion.

The jury found Brian Summo guilty of aggravated assault and intimidation. The trial court judge deferred sentencing in order to allow for a pre-sentence report to be presented.

Unsatisfied with the performance of his attorney during trial, Mr. Summo immediately moved for new counsel. Summo's appellate counsel, Mr. Bryan Hamil, moved to set aside the trial court's guilty verdict based on the ineffective assistance of counsel. The trial court held a hearing on Mr. Summo's motion to set aside the verdict on May 5, 2000. The trial court judge refused to set aside the verdict, refused to order a new trial, and sentenced Summo to six years' imprisonment under Davis Code § 76.09(3) for the crime of intimidation against a Native American. This sentence is to be served consecutively with a sentence of three years for aggravated assault under Davis Code § 13.5-108.

Defendant appeals his conviction and sentence under Davis Code § 76.09 on two grounds. Defendant argues that Davis Code § 76.09 violates the Equal Protection Clause of the Fourteenth Amendment of the United States

punishable by imprisonment in the county jail not exceeding two years."

Davis Code § 13.5-108(1)(f) states, "For the purposes of the Davis Code, aggravated assault is considered a crime of violence."

Constitution. Defendant also argues that Ms. Shreve's sleeping during the trial resulted in ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution.

II

Defendant alleges that Davis Code § 76.09 violates the Fourteenth Amendment of the U.S. Constitution's Equal Protection Clause. He argues that § 76.09 provides greater protection to hate crime victims than victims of other crimes. Defendant's argument also centers upon the marked difference between § 76.09 and the hate crime statutes found constitutional in other states. Specifically, Defendant points to Davis Code § 76.09(3). This section prescribes an enhanced sentence if the crime of intimidation has been committed against a Native American.

The first step in equal protection analysis is to decide the level of scrutiny to be used in examining the classification made: strict scrutiny, intermediate scrutiny, or rational basis. *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). Strict scrutiny analysis takes place only when a governmental classification hinders the exercise of a fundamental right or categorizes individuals based on suspect characteristics such as race. *Id.* Intermediate scrutiny is reserved for classifications based on gender. *See, e.g., Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982). In the remaining situation, courts will use a rational basis test, under which, to be upheld, a classification must only rationally further a legitimate state interest. *Nordlinger*, 505 U.S. at 10

(1992). Defendant argues that strict scrutiny applies for three reasons.

First, Mr. Summo asks the court to strictly scrutinize § 76.09 because the statute impinges on the fundamental right to have and express racist beliefs protected by the First Amendment. We disagree. The Supreme Court recognizes that not every state-implemented burden on a fundamental right should be subject to strict scrutiny. *Zablocki v. Redhail*, 434 U.S. 374, 387 (1978)(regulations affecting the right to marry); *Califano v. Jobst*, 434 U.S. 47, 53 (1977)(same). If there is only an incidental effect on protected rights, the Supreme Court does not apply strict scrutiny. *Id.* In this case, the existing penal code has already eliminated the violent conduct addressed by § 76.09 from the category of permissible conduct. *See* Davis Code § 13.5-108. Section 76.09 punishes violent conduct that has already been addressed in the penal code; it does not result in the sudden loss of expressive conduct protected by the First Amendment. Section 76.09 only represents an increased punishment of violent conduct that is not protected by the First Amendment. *Fair Political Practices Com. v. Superior Court*, 157 Cal. Rptr. 855, 862-863, 599 P.2d 46, 53-54 (Cal. 1979).⁴ Because § 76.09 has, at most, only an incidental impact on conduct protected by the First Amendment, strict scrutiny is not appropriate. *Id.*

⁴ There is no State of Davis precedent to help this court with the Equal Protection analysis of § 76.09 in deciding this case. Therefore, this court has decided that the hate crime statutes analyzed by other states cited within this opinion are similar enough to § 76.09 to provide this court with direction in its own analysis of the State of Davis hate crime statute.

Second, Defendant argues that strict scrutiny applies because the right to equal treatment under criminal law is a fundamental right impinged by § 76.09. We also disagree with this contention. The Kansas Appellate Court correctly stated that Defendant's position would result in the right to equal protection being considered a fundamental right in all situations where the right is implicated; this result is unacceptable. *City of Wichita v. Edwards*, 939 P.2d 942, 948 (Kan. Ct. App. 1997).

Third, Defendant claims that strict scrutiny applies because § 76.09(3) gives special treatment to a group of victims based on the suspect characteristics of race and national origin, i.e., being Native American. We disagree. Section 76.09(3) protects society as a whole from the violence of hate crimes by further deterring the most common type of hate crimes committed in the State of Davis, those committed against Native Americans. The presence of hate within a society affects everyone. Therefore, the special protection provided by § 76.09 is for all State of Davis residents, not just members of the Native American community. See *State v. Ladue*, 631 A.2d 236, 237 (Vt. 1993). Section 76.09 does not give the type of special treatment that would require strict scrutiny analysis.

For these reasons, we reject Defendant's request for strict scrutiny and analyze § 76.09 under a rational basis test.⁵ Any

⁵ Though the court rejects a strict scrutiny analysis of § 76.09, § 76.09 would likely pass a strict scrutiny analysis, if subjected to one, because the statute is narrowly tailored to serve the compelling interest of the State of Davis to protect Native Americans and preserve a good relationship between the State and the Abolone Native American Reservation located within the

classification made by § 76.09 must be rational, and it must further a legitimate state interest. *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

Legislatures have a long-standing and recognized ability to conquer race discrimination by classifying protected groups through anti-discrimination legislation. *Wisconsin v. Mitchell*, 508 U.S. 476, 487-488 (1993). Courts not only recognize this legitimate function of the legislature but also rely on this legislative power as a reason to avoid excessive involvement with eradicating racial discrimination themselves. *Id.* Courts have recognized that the need for hate crime laws stems from the fact that bias-motivated crimes are more likely to provoke retaliatory crimes, inflict emotional harm on their victims, and incite community unrest. *Id.* at 484. Therefore, the State of Davis' goal to eradicate discrimination, outlined by the legislative history of § 76.09⁶, fulfills the

State. The State of Davis also has a compelling interest in remedying the effects of all prior discrimination in the State of Davis. How can the Equal Protection Clause of the U.S. Constitution not protect discrimination in the selection of victims of discriminatory hiring, firing or promotions and at the same time protect discrimination in the selection of a crime victim? *In re Joshua H*, 17 Cal. Rptr. 2d 291, 300-301 (Cal. Ct. App. 1993). Section 76.09 contains a "narrow proscriptive focus on violent conduct that is already unlawful" just like the statute held constitutional against an equal protection claim in *People v. MacKenzie*, 40 Cal. Rptr. 2d 793, 800 (Cal. Ct. App. 1995). Though not addressed by Mr. Summo, the statute would certainly satisfy the requirements of intermediate scrutiny as well. This, however, need not be addressed in this opinion.

⁶The following material is compiled from a State of Davis Senate floor debate. 181 Dv. Cong. Rec. 5498 (daily ed. April 4, 1991) (Statement of S. Grossman). Senator Bob Grossman proposed the bill that became §76.09 in response and as a solution to the alarming escalation in the

legitimate purpose of protecting the health, safety, and welfare of its citizens. *State v. Mortimer*, 641 A.2d 257 (N.J. 1994).

Defendant argues that the classification created by § 76.09(3) is not rational,

incidence of hate crimes in the State of Davis and the inadequacy of existing laws to punish and deter them. He stated during the debate that this law was inspired by the hate crime statutes being adopted by numerous states in the U.S. Grossman cited David Stine, *Campus Ethnoviolence*, 30 Nat'l Inst. Against Prejudice and Violence 5 (1992), to show the State Senate that victims of hate crimes require more protection than victims of random crimes because they fear recurrence and experience increased vulnerability-feelings of isolation and injustice. Grossman stated that according to the State of Davis Committee for Social Justice, the number of hate crimes committed in the State of Davis has increased by an average of 22% every year since 1985. These hate crimes were, on the whole, more serious than conventional crimes. Bob McTaco, *Hate Crimes and the State of Davis*, 1985-1996, 34-36 (1997). Thirty percent of hate crimes involved violent physical assault compared to only 10% of crimes not motivated by bias. *Id.* Injuries inflicted during hate crimes were also more severe. *Id.* Seventy four percent of hate crimes committed in Davis result in physical injury and 30% in hospitalization compared to physical injuries inflicted on only 29% of victims of other types of crime and hospitalization of only 7% of these victims. *Id.* Senator Grossman introduced § 76.09(3) as an added deterrence against the even more quickly rising violent crimes against Native Americans in the State of Davis. According to the State of Davis Multicultural Awareness Board, Native Americans living both on and off the Native American reservation comprise well over 36% of the State of Davis population. Native Americans are victims of 3 out of every 4 hate crimes committed in the State of Davis. State of Davis Multicultural Awareness Bd., Leaflet No. 3, *Native American Culture in Trouble* (1997). Also, Native American hate crime victims are 65% more likely to be severely injured from a hate crime than any other hate crime victim in the State of Davis. *Id.*

because it focuses on eradicating only hate crimes committed against Native Americans with no rational explanation for affording Native Americans added protection. However, the Supreme Court has stated that it is "reasonable that among crimes of different natures those should be most severely punished, which are the most destructive of public safety and happiness." *Wisconsin v. Mitchell*, 508 U.S. 476, 488 (1993) quoting 4 William Blackstone, *Commentaries* *16. See also *People v. Grupe*, 532 N.Y.S.2d 815, 820-821 (1988). Therefore, it was rational for the State of Davis to punish the most destructive hate crimes, those committed against Native Americans, the most severely. See n. 7 *supra*. The State of Davis' effort to further a legitimate purpose of public safety by implementing § 76.09 was rational. Therefore, § 76.09 passes the rational basis test.

The burden of proof for constitutional challenges lies with the challenger. The Defendant must prove that the statute is unconstitutional in light of a strong presumption in favor of the statute's constitutionality. *Concordia Fire Ins. Co. v. Illinois*, 292 U.S. 535 (1934). We do not believe that the Defendant has met this burden. For this reason, we join most major state decisions in determining that this hate-crime statute does not violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.⁷

⁷ This decision also follows a Supreme Court trend of upholding statutes challenged on Equal Protection grounds that affirmatively protect groups subjected to historical discrimination. *University of California Regents v. Bakke*, 438 U.S. 912 (1978); *Johnson v. Transportation Agency*, 480 U.S. 616 (1987); *U.S. v. Paradise*, 480 U.S. 149, 196-198 (1987). All these cases

III

Finally, Summo has filed a motion for new trial alleging he received ineffective assistance of counsel. Specifically, he complains that his appointed counsel, April Shreve, slept through substantial portions of his two-day trial.

Defendant and his attorney appeared in the trial court on April 8, 2000. Ms. Shreve produced two witnesses to testify on Defendant's behalf. One witness was an employee of the Rescue Mission who testified Mr. Summo exercised good will toward the one Native American employee of the Rescue Mission. The second, contradicting the first, testified that he had seen Mr. Summo threaten that same Native American employee with a butter knife during dinner one evening.⁸ As the trial judge noted in his denial of Summo's motion for a new trial, "Ms. Shreve did not question two of the three State witnesses and did not object at any point during the State's case. At one point, she was visibly

napping and I was forced to admonish her."⁹

While Ms. Shreve's conduct at trial was despicable, we must deny Summo's motion because he has failed to demonstrate prejudice under the second prong of *Strickland v. Washington*, 466 U.S. 668 (1984). A defendant retains the burden of establishing prejudice from an attorney's lack of attention to the proceedings. See *United States v. Peterson*, 777 F.2d 482, 484 (9th Cir. 1985). Summo has failed to specifically identify how Ms. Shreve's sleeping harmed him. His motion for new trial is denied.

Accordingly, the holdings of the trial court are AFFIRMED.

deal specifically with state laws designed to eliminate the imbalance between groups. *Paradise* deals specifically with the eradication of discriminatory behavior against blacks. *Paradise* at 196-198. This is quite similar to the contested § 76.09(3). Despite the protection afforded to blacks specifically, the Supreme Court determined that the statute in the *Paradise* case did not violate the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. *Id.* In fact, the Supreme Court states that a fifty percent promotion requirement fulfilled the compelling state interest of eradicating discrimination against blacks. *Id.*

⁸ This witness clearly did not testify as Ms. Shreve had expected. Shreve objected to the statement concerning the attack as irrelevant. She was overruled. The Native American employee of the Rescue Mission did not press charges and did not appear at trial.

⁹ The State put on the victim, an eyewitness, and a co-worker of Defendant's wife. Shreve only questioned the victim. Summo's petition for a new trial stated that Shreve had recently been involved in an automobile accident in which she received injuries to her left leg. She was taking pain medication for these injuries during the trial. This medication causes drowsiness. These allegations are not contradicted by the state.