

No. 00-01749

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

STATE OF DAVIS,

Petitioner

v.

Brian SUMMO,

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DAVIS

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

Prior to the death of his wife, Brian Summo lived with his wife and son in the City of Competition, Davis. The family home was located approximately two blocks from the Abalone Native American Reservation. The reservation supported its inhabitants by hosting the largest Big Money Casino in the United States. An employee of the casino, Mrs. Summo had a problem with gambling. She 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 she proceeded to lose all of the Summo's joint savings account and the title to the family home. Mrs. Summo became upset, left the blackjack table, climbed to the roof of the casino and plunged forty stories to her death. As a result of his wife's actions, Mr. Summo had to leave the family home and relocate to the City of Competition Rescue Mission.

On January 25, 2000, Mr. Summo, carrying a toolbox to be pawned, entered a City of Competition pawnshop owned by Gary Middlerider, a Native American. Mr. Summo approached Mr. Middlerider and shouted, "You killed my wife, you Indian scum!" Mr. Middlerider was then assaulted by Mr. Summo.

The State of Davis charged Mr. Summo with aggravated assault under Davis Penal Code § 13.5-108. The State of Davis also charged Mr. Summo with intimidation under Davis Code § 76.09.

Relying on the advice of his trial attorney, Mr. Summo pleaded guilty to aggravated assault and not guilty to intimidation. Mr. Summo also moved to dismiss the intimidation charge, claiming that the Davis statute violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The trial court denied Mr. Summo's motion. The jury found Mr. Summo guilty of intimidation.

Due to patently deficient assistance of his attorney at trial, Mr. Summo immediately moved for new counsel. Mr. Summo's new attorney moved to set aside the trial court's guilty verdict based on ineffective assistance of counsel. After a hearing on the motion, the trial court refused to set aside the verdict, refused to order a new trial, and sentenced Mr. Summo to six years imprisonment under Davis Code § 76.09(3) for the crime of intimidation against a Native American. Mr. Summo was sentenced to three years for aggravated assault, to be served consecutively with the six-year sentence.

Mr. Summo appealed his conviction and sentence under Davis Code § 76.09 on two grounds. Mr. Summo alleged that Davis Code § 76.09 violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution by providing greater protection to hate crime victims than to victims of other crimes. Specifically, Mr. Summo pointed to Davis Code § 76.09(3), which provides for an enhanced sentence if the crime of intimidation

has been committed against a Native American. Mr. Summo also alleged that his trial attorney's sleeping during the trial resulted in ineffective assistance of counsel in violation of the Sixth Amendment of the United States Constitution.

The Circuit Court of Appeals for the Western Circuit of Davis upheld Mr. Summo's conviction and sentence. First, the court rejected strict scrutiny as the proper level of scrutiny to be used in analyzing the equal protection claim. Using a rational basis test, the court concluded that the State of Davis' goal of eradicating discrimination served the legitimate purpose of protecting the health, safety, and welfare of its citizens. Thus, the court held that the hate-crime statute did not violate the Equal Protection Clause. With regard to Mr. Summo's ineffective assistance of counsel claim, the court concluded that Mr. Summo had failed to demonstrate prejudice under the second prong of *Strickland v. Washington*, 466 U.S. 668 (1984). Specifically, the court stated that Mr. Summo had failed to show how his attorney's sleeping during trial had harmed him.

The Supreme Court of the State of Davis reversed. Without reaching the question of the constitutionality of the Davis statute, the court analyzed the ineffective assistance of counsel claim using the two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984). Noting that Mr. Summo had shown attorney error under the first prong, the court noted that

requirement of demonstrating prejudice under the second prong was not absolute. In accordance with precedent providing for circumstances when prejudice has been presumed, the court held that a sleeping attorney is per se prejudicial.

The State of Davis filed a petition for a writ of certiorari, which this Court granted on August 16, 2001.

SUMMARY OF ARGUMENT

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. Under the Equal Protection Clause, strict scrutiny is appropriate when reviewing a statute that gives special treatment to a group based on the suspect characteristics of race and national origin, i.e., being a Native American. Davis Code § 76.09(3) fails under a strict scrutiny analysis because the statute is not a narrowly tailored means of serving a compelling state interest. Davis Code § 76.09(3) would also fail under a rational basis analysis because it does not rationally further a legitimate state interest.

A defendant whose attorney is sleeping during trial does not need to demonstrate prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). Demonstration of prejudice is not an absolute requirement in establishing ineffective assistance of counsel, and prejudice can be presumed in this case. Additionally, this Court should adopt the rule that a sleeping attorney is per se prejudice.

DISCUSSION

I. 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.

A. UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT, STRICT SCRUTINY IS APPROPRIATE WHEN REVIEWING A STATUTE THAT GIVES SPECIAL TREATMENT TO A GROUP BASED ON THE SUSPECT CHARACTERISTICS OF RACE AND NATIONAL ORIGIN.

The Fourteenth Amendment guarantees that "[n]o State shall make or enforce any law which shall deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV. The first step in equal protection analysis is to decide the level of scrutiny to be used in examining the classification made. *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). Strict scrutiny analysis is appropriate 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 applicable to classifications based on gender. *See Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982). A rational basis test is used for all other classifications. *Nordlinger*, 505 U.S. at 10.

Davis Code § 76.09(3) gives special treatment to a group of victims based on the suspect characteristics of race and national origin, i.e., being a Native American. In *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), this Court found that the

government's use of suspect race and ethnic based classifications to favor minority contractors bidding on federal projects was to be analyzed under a strict scrutiny standard. *Id.* at 224. With respect to governmental racial classifications, the Court noted three general principles: skepticism, consistency, and congruence. Skepticism requires that any classification based on race or ethnicity must be subjected to a searching examination, i.e., strict scrutiny. *Id.* at 223. Consistency requires that the standard of review under the Equal Protection Clause not be dependent on the race of those burdened or benefitted by a particular classification. *Id.* at 224. Congruence requires that Equal Protection analysis be the same under both the Fifth and Fourteenth Amendments. *Id.* "Taken together, these three propositions lead to the conclusion that any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny." *Id.* Accordingly, the Court held that all racial classifications must be reviewed under the strict scrutiny standard, which requires such classifications to be narrowly tailored measures that further compelling governmental interests. *Id.* at 227.

Davis Code § 76.09(3) makes the same *Adarand*-type of race and ethnic classification to favor Native American hate crime

victims. There is no avoiding the conclusion that § 76.09(3) employs a classification based on race, i.e., Native American. After *Adarand*, it is clear that all classifications based on race are suspect. Therefore, the statute should be subjected to a strict scrutiny analysis.

B. DAVIS CODE § 76.09(3) FAILS UNDER A STRICT SCRUTINY ANALYSIS BECAUSE THE STATUTE IS NOT A NARROWLY TAILORED MEANS OF SERVING A COMPELLING STATE INTEREST.

In order to survive strict scrutiny analysis, a statute must be narrowly tailored to serve a compelling state interest. *Shaw v. Hunt*, 517 U.S. 899, 908 (1996). The interest to remedy discrimination only becomes compelling when the discrimination is specific and identified by the state. *Id.* at 910. For example, a generalized assertion of past discrimination in a particular region is not adequate because it "'provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy.'" *Id.* at 909 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498 (1989)). "Accordingly, an effort to alleviate the effects of societal discrimination is not a compelling interest." *Id.* at 909-10. Also, a state's mere assertion of a compelling interest does not satisfy the standard. The institution that makes the classification based on race must have had strong evidentiary support to decide that remedial action was necessary. *Id.* at 910.

In *Bush v. Vera*, 517 U.S. 952 (1996), this Court concluded

that a redistricting plan established by the Texas legislature failed the strict scrutiny standard. *Id.* at 976-989. 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 the state did not cite a specific need to remedy discrimination. *Id.* at 982-85.

Though the State of Davis went farther than the State of Texas to identify instances of discrimination against Native Americans by citing comparative hate crime statistics, these instances were not specifically enumerated. In fact, the State of Davis has failed to identify a single specific incidence of a hate crime against a Native American that occurred during the proposal period of § 76.09. Thus, the State of Davis has not established that it had a compelling interest in remedying discrimination against Native Americans.

In addition to serving a compelling interest, a state's plan to remedy discrimination must also 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). This 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.* Thus, the method employed by Richmond to remedy past discrimination was not narrowly tailored and did not pass muster under a strict scrutiny analysis. *Id.*

Applying this reasoning to the present case, 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. While the statistics relied upon in enacting § 76.09 may have indicated an increase in the number of hate crimes in general, there is no evidence in the record that the State of Davis ever even considered any racially neutral means of remedying the perceived discrimination against Native Americans. What the State of Davis has done instead is to stigmatize all Native Americans by singling them out for added protection, whether they want it or not. This classification may have been intended to benefit Native Americans; nevertheless, it is not a permissible categorization of a suspect class under existing law. Therefore, § 76.09(3) is not a narrowly tailored means of remedying past discrimination. Without a narrowly tailored plan to serve a compelling state interest, § 76.09(3) fails a strict scrutiny analysis.

C. DAVIS CODE § 76.09(3) FAILS UNDER A RATIONAL BASIS ANALYSIS BECAUSE IT DOES NOT RATIONALLY FURTHER A LEGITIMATE STATE INTEREST.

While Mr. Summo steadfastly contends that strict scrutiny analysis is proper, assuming arguendo that a rational basis test is used, Davis Code § 76.09(3) fails under such an analysis because the legitimate state interests that have been recognized in the past have not been shown by the State of Davis. Hate crime laws have been justified in large part because bias-motivated crimes are more likely to provoke retaliatory crimes, inflict emotional harm on their victims, and incite community unrest. *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993). To support its enactment of § 76.09(3), the State of Davis merely cites to reports showing an overall increase in hate crimes. These reports do not disclose any adverse effects that may provide some basis for a legitimate state interest. Without this information, the State of Davis' effort to protect Native Americans is more properly viewed as a paternalistic measure than a rational means of furthering a legitimate state interest.

Davis Code § 76.09(3) also fails under such a rational basis analysis because there is no rational basis behind the heightened sentence. When determining whether a sentence violates the Equal Protection Clause, this Court considers the appropriateness of the sentence given the defendant's crime. *Chapman v. United States*, 500 U.S. 453, 465 (1991). The Constitution requires that there be a rational connection between the sentence and the offense. *Id.* It is not more appropriate to issue a heightened

sentence for an offender who harms a Native American than for an offender who harms a Mexican, Muslim, or any other individual with the same motivation of hatred. The State of Davis has not shown a rational connection by merely asserting that hate crimes against Native Americans are more severe. Therefore, § 76.09(3) also fails a rational basis analysis.

II. A DEFENDANT WHOSE ATTORNEY IS SLEEPING DURING TRIAL DOES NOT NEED TO DEMONSTRATE PREJUDICE UNDER *STRICKLAND V. WASHINGTON*, 466 U.S. 668 (1984).

A. DEMONSTRATION OF PREJUDICE IS NOT AN ABSOLUTE REQUIREMENT IN ESTABLISHING 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. This Court has noted 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). "If no actual '[a]ssistance' 'for' the accused's 'defence' is provided, then the constitutional guarantee has been violated." *Unites States v. Cronic*, 466 U.S. 648, 654 (1984) (quoting U.S. CONST. amend. VI). Thus, criminal defendants have a right to more than just the presence of an attorney.

This Court has established a two-part test for determining whether or not an attorney's misconduct at trial constitutes ineffective assistance of counsel. *Strickland v. Washington*, 466

U.S. 668, 687 (1984). First, the defendant must show that his attorney's performance was deficient in that the attorney made an error so egregious that the attorney was not fulfilling the constitutional guarantee of counsel. *Id.* Second, the defendant must show that his attorney's deficient performance prejudiced the defense. *Id.* "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." *Id.*

While the second prong normally demands a showing of prejudice, this requirement is not absolute.¹ This Court has recognized circumstances in which prejudice is presumed. *See id.* at 692 ("In certain Sixth Amendment contexts, prejudice is presumed."). First, "[a]ctual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice." *Id.* Second, various forms of state interference with counsel's assistance are also legally presumed to be prejudicial. *Id.* Prejudice can reasonably be presumed in these circumstances because it is so likely to be present that a case-by-case determination is not worth the cost and because such circumstances involve constitutional deprivations that are easy

¹ The Supreme Court of the State of Davis held that Mr. Summo had satisfied the first prong of *Strickland*, and this Court's grant of certiorari is limited to whether a defendant must show prejudice when his attorney sleeps during trial. Thus, Mr. Summo's analysis is limited to the second prong of *Strickland*.

to identify. *Id.* Finally, "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *United States v. Cronin*, 466 U.S. 648, 659 (1984). See *Davis v. Alaska*, 415 U.S. 308, 318 (1974) (stating that no specific showing of prejudice was required because petitioner had been "denied the right of effective cross-examination" which "would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it").

Although Mr. Summo has not affirmatively established that his attorney's sleeping at trial prejudiced his defense, it is clear from the above-cited precedent that such a showing is not always required. In fact, Mr. Summo does not need to make such a showing because prejudice to him can be presumed under the standards previously provided by this Court. His attorney's sleeping through portions of the trial resulted in a constructive denial of Mr. Summo's right to assistance of counsel. An attorney who is not awake for relevant portions of the trial cannot be deemed to be assisting her client in any ordinary sense. Indeed, an unconscious attorney cannot help her client any more than an attorney who is not present at the trial at all. Such patently obvious attorney misconduct is so easy to identify that a case-by-case determination of prejudice simply is not

warranted. Furthermore, Mr. Summo's attorney failed to question two of the three state witnesses and did not object at any point during the state's case. Although the record is unclear as to why this occurred, if the attorney's failure to effectively cross-examine witnesses or test the state's case resulted from her napping, then prejudice to Mr. Summo must be presumed.

B. THIS COURT SHOULD ADOPT THE RULE THAT A SLEEPING ATTORNEY IS PER SE PREJUDICIAL.

Although this Court has not specifically addressed the issue of a sleeping attorney for purposes of an ineffective assistance of counsel claim, prejudice to Mr. Summo can be presumed under existing standards as noted in the above discussion. Several circuit courts, however, have specifically held that a sleeping attorney is per se prejudicial. In *Javor v. United States*, 724 F.2d 831 (9th Cir. 1984), 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 in which the attorney in question fell asleep during important portions of the trial. *Id.* at 832. The court noted that when a defendant is not tried with the full participation of counsel, he is prejudiced as a matter of law. *Id.* at 834. "Prejudice is inherent in this case because unconscious or sleeping counsel is equivalent to no counsel at

all." *Id.*

Similarly, in *Tippins v. Walker*, 77 F.3d 682 (2d Cir. 1996), the Second Circuit adopted a per se test for a sleeping attorney. *Id.* at 687. 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 concluded that the defendant suffered prejudice "if his counsel was repeatedly unconscious at trial for periods of time in which defendant's interests were at stake." *Id.*

Recently, in *Burdine v. Johnson*, 2001 U.S. App. LEXIS 18277 (5th Cir. 2001), the Fifth Circuit addressed the necessary showing in the case of a sleeping attorney. There, the court held that the repeated dozing of an attorney during the guilt-innocence phase of a capital murder trial entitled the defendant to a presumption of prejudice. *Burdine v. Johnson*, 2001 U.S. App. LEXIS 18277, *10 (5th Cir. 2001). Despite the State's argument to the contrary, *Burdine* was not required to demonstrate precisely when his attorney slept during the trial in order to prove that his attorney slept during critical stages of the criminal proceeding. *Id.* at *29. In determining that the guilt-innocence phase was critical, the court looked to whether "the substantial rights of a defendant may be affected during that type of proceeding." *Id.* at *30-31.

This Court should adopt the per se rule because, as

discussed in Part II.A. *supra*, a sleeping attorney is prejudicial under existing standards, and the situation is befitting of a precise rule. This approach obviates the need for a case-by-case analysis, which this Court has indicated is a consideration in presumed prejudice situations. Also, as at least one of the circuit courts has noted, a sleeping attorney is equivalent to no attorney at all, *Javor*, 724 F.2d at 834, a proposition clearly at odds with the Sixth Amendment. The *Strickland* prejudice inquiry entails consideration of the various tactics and strategies available to a lawyer; thus, counsel is unlikely to be deemed ineffective for a risky or ill-advised course of action. However, it is assumed under the *Strickland* test that counsel is conscious and able to exercise her judgment. This is an assumption that does not hold true in the present case. When a criminal defendant is denied the effective assistance of counsel during portions of the trial because his attorney is sleeping, no showing of prejudice is needed, and this Court should adopt a specific rule that a sleeping attorney is per se prejudicial.

CONCLUSION

For the reasons set forth above, the Respondent respectfully requests that this Honorable Court affirm the decision of the Supreme Court of the State of Davis.

Respectfully submitted,

Number 471

Counsel for Respondent