

No. 18-_____

In the
Supreme Court of the United States,

TIFFANY A. PRINCE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a non-fatal drug overdose is a “significant physical injury” under U.S.S.G. § 5K2.2.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Tiffany A. Prince respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is *United States v. Prince*, 2018 U.S. App. LEXIS 25939 (6th Cir. Sept. 13, 2018), Case No. 17-6004.

The Opinion of the United States District Court for the Eastern District of Kentucky at Covington, *United States v. Prince*, was issued May 11, 2017. The Opinion is unpublished but is reported at 2017 U.S. Dist. LEXIS 72556 (E.D. Ky., May 11, 2017). Petitioner's Sentencing Memorandum was filed on August 18, 2017. Judgment was entered on August 25, 2017.

BASIS FOR JURISDICTION

The district court's Judgment was entered on August 25, 2017. The Sixth Circuit entered its Opinion affirming the Judgment on September 13, 2018. This Court now has jurisdiction to consider this appeal under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

21 U.S.C.S. § 841(a)(1) provides: “[I]t shall be unlawful for any person knowingly or intentionally to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.”

U.S.S.G. § 5K2.2 provides: “If significant physical injury resulted, the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the extent of the injury, the degree to which it may prove permanent, and the extent to which the injury was intended or knowingly risked. When the victim suffers a major, permanent disability and when such injury was intentionally inflicted, a substantial departure may be appropriate. If the injury is less serious or if the defendant (though criminally negligent) did not knowingly create the risk of harm, a less substantial departure would be indicated. In general, the same considerations apply as in § 5K2.1.”

STATEMENT OF THE CASE

The Government charged four individuals, including Ms. Prince, with various crimes pertaining to the unlawful distribution of a mixture of heroin and fentanyl. (Indictment, R. 3, Page ID# 3-5). Ms. Prince had previously traveled to the home of her co-defendants on numerous occasions to purchase heroin for personal use. (Presentence Investigation Report, Sealed Entry R. 105, page 4). However, on September 6, 2016, Ms. Prince traveled to her co-defendants' residence at the request of her friend, B.R., who is the purported victim in this case. *Id.*

When they arrived at the residence, B.R. gave Ms. Prince \$40 to go inside and purchase heroin for him while he remained in his truck. *Id.* When Ms. Prince returned to the vehicle, she gave B.R. the drugs, which he snorted in the driveway of the residence. (U.S. Sentencing Memo., R. 97, Page ID# 254).

From there, they proceeded to a nearby grocery store. *Id.* B.R. went inside the store while Ms. Prince waited in the truck. Unbeknownst to them, the heroin B.R. snorted had also contained fentanyl. (PSR, Sealed Entry R. 105, page 4). Due to the potency of this drug cocktail, B.R. overdosed while inside the store. *Id.*

Maysville/Mason County EMS personnel responded to the scene. (Sentencing Transcript, R. 114, Page ID# 402).¹ According to the EMS Patient Care Record, B.R. was found on a bench inside the store. *Id.* He was unconscious and had slow, labored breathing upon their arrival. *Id.* The EMTs administered Narcan to him. *Id.* In response, B.R. sat up and began to talk, and was alert and oriented. *Id.* He

¹ The Sentencing Transcript has incorporated Government Exhibit 8, B.R.'s medical records, by reference. These documents are sealed.

refused any medical attention and signed the EMS refusal form. *Id.* Similarly, he refused to be transported to the hospital. (Sentencing Transcript, R. 114, Page ID# 367). He did not leave the scene in an ambulance, and was never seen by a physician. *Id.* at PageID# 368. In short: he was fine.

After being indicted, Ms. Prince pleaded guilty to the aiding and abetting charge, which was the sole charge against her. (Sentencing Transcript, R. 114, Page ID# 358). Her Presentence Investigation Report (“PSR”) reflected a Criminal History Category of V and a total offense level of 10, making the appropriate sentencing range under the Guidelines 21 to 27 months. (Def. Sentencing Memo., R. 98, Page ID# 260).

The PSR suggested that Mr. Prince’s conduct had caused a “significant physical injury” to B.R., and that an upward departure under U.S.S.G. § 5K2.2 might therefore apply. (PSR, Sealed Entry R. 105, page 16). Defense counsel timely objected to the suggestion that B.R. had suffered a significant physical injury, and further objected to any departure under § 5K2.2. (Def. Sentencing Memo., R. 98, Page ID# 261-263).

At the sentencing hearing, the district court overruled Ms. Prince’s objections and departed upward three levels in reliance upon § 5K2.2. (Sentencing Transcript, R. 114, Page ID# 381). The district court determined that B.R.’s heroin overdose constituted a “significant physical injury” for the purposes of the guideline. *Id.* at PageID# 381. Based on this determination, the court held that Ms. Prince’s effective guideline range was 30 to 37 months. *Id.* at Page ID# 384. The court

ultimately sentenced her to 36 months' imprisonment. (Judgment, R. 102, Page ID# 301). The Judgment was entered on August 25, 2017. Petitioner's Notice of Appeal to the Sixth Circuit was filed four days later. The Sixth Circuit entered its Opinion affirming the Judgment on September 13, 2018.

The district court had original jurisdiction under 18 U.S.C. § 3231. The United States Court of Appeals for the Sixth Circuit had appellate jurisdiction because the district court's opinion was a final decision within the meaning of 28 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT PETITION

1. The Sixth Circuit has decided an important question of federal law that has not been, but should be, settled by this Court.

The Sixth Circuit has incorrectly interpreted the meaning of the term "significant physical injury" under the Guidelines. The meaning of that term is an important question of federal law, as it affects whether non-fatal drug overdoses can be a sufficient basis for an upward departure under U.S.S.G. § 5K2.2.

The sole count upon which Ms. Prince was convicted was for aiding and abetting the distribution of heroin and fentanyl in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. Because B.R.'s respiration rate had briefly slowed down during his non-fatal overdose, the district court imposed an upward departure under U.S.S.G. § 5K2.2, and tacked nine months onto the high end of her otherwise-applicable guidelines range.

The key question presented to this Court is whether a non-fatal drug overdose constitutes a "significant physical injury" under U.S.S.G. § 5K2.2. Ms.

Prince respectfully submits that it does not, as it is neither an “injury” nor “significant.”

The plain meaning of the words used in the Guideline demonstrate that suppressed respiration as a result of heroin ingestion (i.e., an overdose) is not an “injury”; and even if it were, it is not “significant.” Because breathing slowly is not a significant physical injury under § 5K2.2, it was improper for the district court to depart upward in reliance upon that guideline.

The United States Sentencing Guidelines permit a district court to increase an individual’s sentence above the authorized guideline range “[i]f significant physical injury resulted.” U.S.S.G. § 5K2.2. However, the Guidelines “do not define what constitutes ‘significant physical injury.’” *United States v. Singleton*, 917 F.2d 411, 413 (9th Cir. 1990). Thus, other legal sources must be consulted to ascertain the meaning of these terms.

Black’s Law Dictionary defines “physical injury” as “physical damage to a person’s body.” Black’s Law Dictionary (abridged 8th ed. 2005). Here, there was no evidence presented of any “damage” to B.R.’s body. (See Sentencing Transcript, R. 114, Page ID# 373) (“[W]e don’t have medical evidence in this record”).² Rather, the testimony presented from DEA Agent Anderson Muse was that B.R.’s breathing rate had slowed down, which led EMTs to administer Narcan. *Id.* at Page ID# 365, 367. That is the extent of what the Government relied upon to show “injury”:

² At the sentencing hearing, after the presiding judge made this comment, the EMS Patient Run Report was introduced by the Government as Government Exhibit 8. But this document likewise fails to note any “damage” to B.R.’s body.

slowed breathing. However, Agent Muse conceded on cross-examination that individuals with the common cold also have respiration problems, and he would not consider that to be an injury. *Id.* at Page ID# 368.

After B.R. received Narcan, his respiration returned to a normal rate. See *id.* at Page ID# 366. He was alert, and declined treatment from the EMTs. (Sentencing Transcript, R. 114, Page ID# 402).³ He refused to go to the hospital. (Sentencing Transcript, R.114 at PageID# 368). He was never seen by a physician. *Id.* In short, he was fine. And the reason he was fine is that he *wasn't injured*. His body had not been damaged; he was healthy. It was therefore wholly inappropriate for the district court to conclude that he suffered a significant physical injury, and depart upward as a result.

And even if B.R.'s overdose were to be considered a "physical injury," it nevertheless cannot be considered "significant." To be "significant," there must be "something more than 'physical injury' standing alone." *Singleton*, 917 F.2d at 413. Not just any damage of a physical kind can satisfy the Guidelines, as such a standard would be overly-inclusive of all types of physical injuries. *Id.* "[T]he injury should be of some importance before it is considered significant." *Id.*

The overdose of B.R. cannot be viewed as a "significant" physical injury in this context. His breathing slowed down. He was never hurt, his body never damaged. Because his breathing had slowed, EMTs administered Narcan to him,

³ The Sentencing Transcript has incorporated Government Exhibit 8, B.R.'s medical records, by reference. These documents are sealed.

and he was fine thereafter. In light of these facts, it is plain that he did not suffer a “significant” physical injury.

This Court should grant certiorari to review this issue and define the term “significant physical injury” under § 5K2.2, to clarify that it does not include non-fatal drug overdoses.

CONCLUSION

For the reasons stated herein, Ms. Prince respectfully requests that the Court issue a writ of certiorari.

Respectfully submitted,

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