

No. _____

**IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2026**

ROBERT VINCENT HARRIS, *Petitioner*,

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

CORRECTED PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does an unlawful distribution of a controlled substance under 21 U.S.C. § 841(a) include the sharing of a controlled substance between addicts, who are not in the chain of distribution, when there is no actual delivery of the controlled substance and when the Defendant merely allows a third party to ingest some of a personal use quantity of a controlled substance.

PARTIES TO THE PROCEEDING

Robert Vincent Harris – Petitioner/Appellant below

United States of America – Respondent/Appellee below

RELATED PROCEEDINGS

Pursuant to Supreme Court Rule 14.1(b)(iii), Petitioner lists all lower court proceedings that are directly related to this case:

- **United States District Court for the District of Nebraska**
 - *United States v. Robert Harris* No. 23 Cr 3057. Judgment entered November 25, 2024.
- **United States Court of Appeals for the Eighth Circuit**
 - *United States v. Robert Harris* No. 24-3497. Judgment entered April 29, 2026.
 - Petition for rehearing denied June 11, 2026

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PETITION FOR WRIT OF CERTIORARI

Petitioner Robert Vincent Harris respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 2026 WL 1161430 and is reprinted in the Appendix at pages 16-17. The order of the Court of Appeals denying rehearing dated June 4, 2026, is reprinted in the Appendix at page 38. The opinion and order of the United States District Court for the Nebraska is reported at 2024 US Dist. LEXIS 142407 and is reprinted in the Appendix at pages 26-37.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on April 29, 2026. The Court of Appeals denied Petitioner's petition for rehearing on June 11, 2026.

This Court has jurisdiction under 28 U.S.C. § 1254(1), which provides that cases in the courts of appeals may be reviewed by this Court by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. This petition is timely filed within 90 days after entry of the order denying rehearing.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are as follows:

Constitutional Provisions:

- a. U.S. CONST. Amend. XIV, § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

- b. U.S. CONST. Amend. V which provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Federal Statute:

21 U.S.C § 841(a). Prohibited acts A

(a) Unlawful acts. Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

...

(C) In the case of a controlled substance in schedule I or II, . . . and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life. . .

STATEMENT OF THE CASE

1. Factual Background:

This case was tried to the Court on stipulated evidence. The relevant facts were found by the Court as follows:

On February 14, 2023, Harris was looking to buy heroin, but his usual source didn't have any. Instead, he got "10 blues" from his source, which looked like 30mg Oxycodone but he was certain were actually fentanyl. He crushed them into powder to cut and snort throughout the day. At some point, he went to hang out at a friend's apartment. All of this happened in Lincoln, Nebraska.

Ariel L. (Ariel) was at the same gathering with several other people, and was dispatched to a convenience store at 17th and L Streets to buy alcohol. Harris went with her. He had offered Ariel heroin about a week earlier, and she asked if the offer still stood. He said it did, and suggested they stop by his apartment on the way to the convenience store. At his apartment, Harris produced a small mirror, which held powder and a short straw. He cut a line of the powder and snorted about two-thirds of the line himself. He gave Ariel the straw and she used it to snort the remainder.

They continued to the convenience store and Ariel bought alcohol while Harris waited outside. As they were walking away Ariel began feeling the drug's effect, and she fell down. She may have gotten up and fallen again, but after that doesn't remember anything until waking up in an ambulance.

Harris said that when Ariel passed out, he saw what he thought was Narcan in her purse, so he grabbed it. The clerk at the convenience store said that a man—indisputably Harris—came into the store with a "white T shaped object," which would describe Narcan nasal spray. He was, according to the clerk, fumbling with the object and may have been trying to fix it. He left the store but came back a short time later, and when the clerk offered to call 911 Harris told him he should.

Ariel came to in an ambulance, where the paramedic told her that she had been given Narcan and that they were giving her more. She was in the hospital for some time. The emergency room doctor who treated her, and an independent

expert, each opined that Ariel suffered a fentanyl overdose, and a urine sample indicated the presence of a few drugs, including fentanyl.

When he returned home, Harris used the rest of the fentanyl. The next day he messaged another woman, Lorinda J. (Lorinda), about what happened the day before. Lorinda asked Harris if he could get more of the drugs and he said he could, but didn't have money. She wired him some money and said she would give him "a couple points," presumably for setting up the purchase. She indicated she would come to his apartment and pick the drugs up a little after noon. A couple of hours later, he messaged her again and asked, "how is that."

That evening, police executed a no-knock warrant at Harris' residence. A small amount of heroin was found on a small mirror in a dresser drawer, along with two short straws containing residue. Harris admitted acquiring that heroin earlier that day. One of the straws tested positive for fentanyl; the other tested positive for fentanyl, methamphetamine, cocaine, and heroin.
(Memorandum Opinion, pages 2,3; Doc. 73)

2. The Nature of the Charges Against Petitioner

Relevant to this case, the Petitioner Robert Vincent Harris (Harris) was charged with distribution of a controlled substance resulting in serious bodily injury to Ariel Linville (A.L.) in violation of 21 U.S.C. § 841(a)(1) enhanced under §841 (b)(1)(c) carrying a mandatory minimum prison term of 20 years.

3. Key Facts Regarding the Alleged Criminal Conduct

The Defendant and A.L. were habitual drug users. It was alleged that Harris distributed a controlled substance to A.L. by allowing her to ingest some of his personal use quantity of a controlled substance. A.L. did so by taking physical possession of a straw that was present, ingesting the drugs by use of the straw.

4. Circumstances of the investigation, arrest, and charging decisions

Sometime after leaving Harris' apartment A L. became unconscious. Harris revived her by administering Narcan, which she had in her possession in case of an overdose. Harris had a nearby store clerk call 911 and medical attention was administered to A.L by paramedics.

Sometime later during the investigation, she advised that she has shared drugs with Harris. Harris was contacted and admitted to the using the drugs and allowing A.L. to share the drugs.

5. Facts Material to the Legal Questions Presented

There was no evidence that Harris acquired the controlled substance that he used in his apartment with the intent to distribute it. There was no evidence that A.L. attempted to acquire any controlled substance from Harris, for further distribution. It was clear beyond a reasonable doubt that the two drug addicts shared some of Harris' personal use quantity of drugs. Harris never transferred possession of the drugs to A.L. by any affirmative act. Taken in a light most favorable to the government, Harris simply allowed A.L. to take possession of a straw and then by her own act, she used the straw to ingest the drugs from a small mirror which Harris used to cut and ingest the drugs.

Harris was charged with a violation of 21 U.S.C. § 841(a), thereby conferring jurisdiction in the District Court in the first instance. 18 U.S.C. § 3231.

6. District Court's Legal Reasoning on Key Issues Relevant to the Question Presented:

Based upon Eighth Circuit precedent the trial court determined by Harris allowing A.L. to use a straw to ingest some of his personal use quantity of the drug or by not prohibiting her from doing so, was sufficient evidence of a distribution under §841(a). Under Eighth Circuit precedent, the trial court concluded that the sharing of drugs from a common source where the Defendant does not physically deliver any controlled substance to the other party, and that is not part of the chain of distribution of a controlled substance, nevertheless violated §841(a).

7. Court of Appeals Legal Reasoning on Key Issues Relevant to the Question Presented:

Petitioner appealed to the United States Court of Appeals for the Eighth Circuit, raising the same issue regarding whether Harris’ conduct was within the scope of §841(a). In a per curiam opinion, a three-judge panel of the Court of Appeals affirmed the conviction and sentence. The Court concluded that consistent with its own precedent in similar cases, Harris conduct in allowing A.L. to ingest some of his drugs was sufficient to support a conviction under §841(a). In doing so, the Court of Appeals rejected the views of two other circuits that held that there are limits to an overly technical application of §841(a) to such “sharing” of drugs by joint users of a controlled substance.

REASONS FOR GRANTING THE WRIT

1. The Circuits Are Divided on the Scope of §841(a) and the Split in Question is Well Established and Widely Acknowledged.

The issue in this case was first confronted by the Second Circuit in *United States v. Swiderski*, 548 F. 2d 445 (2nd Circuit 1977). The *Swiderski* Court faced a case in which multiple parties who shared resources to enable one of them to buy drugs from a dealer and then return and share those drugs with the others, was charged with a distribution offense under section §841(a). Although a technical distribution took place, the *Swiderski* Court concluded that as a matter of statutory construction and Congressional intent, such a transaction was beyond the scope of section §841(a).

More recently, the Third Circuit in *United States v. Semler*, 548 F. 2d 533 (3rd Cir. 2021), was again confronted by the similar issue of what constituted a “delivery or transfer” of drugs for purposes of section §841(a). The *Semler* Court rejected the government’s “broadest possible definition” that “any physical handoff” of drugs from one person to another “no matter the circumstances” is a felony distribution offense. The Court concluded that the joint acquisition

of a controlled substance that is distributed among the group, is not a transfer of a controlled substance within the scope of §841(a) - avoiding a “hyperliteral” construction.

The Court in *Semler* addressed the “definition” issue and provided the following analysis:

The Controlled Substances Act (CSA), 21 U.S.C. § 841, makes it unlawful for any individual knowingly or intentionally to "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." The meaning of the terms involved here is critical. We first look at "distribute." The CSA defines it as "to deliver," and defines "deliver" as "the actual, constructive, or attempted *transfer* of a controlled substance . . . whether or not there exists an agency relationship."

That brings us to the proper interpretation of the term "transfer," which is not defined in the CSA. When words are not defined within a statute, we construe them "in accordance with [their] ordinary or natural meaning." However, we "do not . . . do so blindly." Rather, "statutory language must be read with reference to its statutory context," and "may or may not extend to the outer limits of its definitional possibilities. "For example, we will not interpret a "word of general meaning" to include a particular act where "consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include [it]."

The government proposes the broadest possible definition of "transfer": that is, that *any* physical handoff of drugs from one person to another, no matter the circumstances, is a felony distribution offense. *Semler*, on the other hand, offers an interpretation of "transfer" that centers on possession and control. She argues that, when there has been a joint acquisition or purchase of a controlled substance by a group of users to share among themselves, there is no "transfer" between the members of the group. For the reasons stated below, we conclude that this is the appropriate definition of "transfer" under the facts of this case.

Interpreting "transfer" as *Semler* suggests is consistent both with the term's plain meaning and with our precedent. This definition mirrors the definition of "distribute" in the Third Circuit's Model Jury Instructions, which states that "[d]istribute . . . as used in the offenses charged, means . . . to deliver or to transfer . . . *possession or control of a controlled substance from one person to another.*" We have cited it favorably in at least two opinions. Indeed, we approved a comparable definition in *United States v. Figueroa*.

Turning to a plain reading of the statute, we are not persuaded by the government's sweeping interpretation. While we agree that Congress intended "distribute" to be construed broadly in the context of the CSA, neither Section 841(a)(1) nor any other provision in the statute indicates that every instance of shared drug use must constitute a felony distribution. (Emphasis added). Such a construction is "hyperliteral, contrary to the ordinary usage of the terms "transfer"

and "distribute," and leads to consequences that Congress cannot have intended (emphasis added).

In *United States v. Frommelt*, 971 F. 3d 823 (8th Cir. 2020) the Eighth Circuit considered and rejected the statutory construction principle in *Swiderski*. In this case, although the issue was squarely presented, the Eighth Circuit did not directly address the issue. Rather, it held that under its precedent, Harris violated §841(a) by allowing A.L. to take control of the drugs and ingesting them or by not stopping her from doing so citing *United States v. Parker*, 993 F. 3d. 595 (8th Cir. 2021). In this case, the ultimate conclusion of the Court that compels review was that “ we conclude there was sufficient evidence Harris distributed fentanyl even if there was no hand-to-hand transfer”. App. 16.

The Circuit split is based upon a fundamental disagreement as to the proper scope of §841(a). Two Circuit Courts will not apply an overly technical application of §841(a). Those Circuits have concluded that the application must be consistent with congressional intent, ordinary rules of statutory construction, and consistent with Due Process and Fair Notice requirements. The Eighth Circuit analysis applies a broader, more technical application of §841(a). So far, the Eighth Circuit and those cases cited by the trial court its Order, have not discussed the issue in terms of Congressional intent, Due Process, Fair Notice and the Rule of Lenity as applied to the interpretation of criminal statutes.

Some effort was undertaken by the Trial Court and the Eighth Circuit to distinguish between the “joint acquisition” theory in *Swiderski*, and the general notice of social sharing of drugs. But making that distinction misses the point of *Swiderski*. The underlying question is whether the issue raised in this case, and the issues presented in *Swiderksi* turn on a statutory interpretation that meets constitutional standards or is it a matter of interpreting words or grammar. It seems

clear that *Swiderski* involved a perceived *exception* for the joint acquisition and subsequent sharing of drugs. But that exception is not found in the plain language of §841(a). It was found in the Court's analysis of Congressional intent and the scope of §841(a). Although clearly raised by Harris on this appeal, that analysis was lacking in the both the Trial Court's holding and the Eighth Circuit's judgement on appeal.

This case presents an ideal vehicle for resolving the question because it was tried to the Court on stipulated facts, with the sole purpose of challenging the application of §841(a) to the facts. The decision in this case creates disparate treatment of criminal defendants based on geographic location. In this case, Harris was subject to a mandatory minimum prison term of 20 years, which should be applied to the worst of the worst trafficking offenders, not drug addicts sharing personal use quantity drugs.

2. The Question Presented Is Important and Recurring

The question presented affects many future applications of section 841(a). The day-to-day incidents of drug addicts sharing drugs is doubtless too numerous to estimate. In this case, the application invoked a mandatory minimum penalty of 20 years in prison, Given the consequences, it should be clear beyond a reasonable doubt that Congress intended such a strict or technical application of the law.

That defendants in the Second and Third Circuit avoid prosecution for sharing controlled substances when the Court's looked closely at the facts and the application of the law. In this case Harris was sentenced to the minimum term of 20 years in prison under similar circumstances. That is untenable. A criminal defendant's sentencing exposure should not depend on the happenstance of which circuit's law applies. *Davis v. United States*, 564 U.S. 229, 131 S.

Ct. 2419 (2011) Only this Court's intervention can restore uniformity to federal criminal law on this critical issue.

3. The Decision Below Is Clearly Wrong as a Matter of Statutory Construction

The Eighth's Circuit's approach is not only in conflict with other circuits it is also legally incorrect. The Court's analysis did not follow directly from a well-reasoned and considered application of the ordinary rules of statutory construction in criminal cases.

We note that proper statutory construction consistent with Congressional intent, is consistent with Fair Notice, Due Process, and the Rule of Lenity. More recently this Court restated the constitutional limitations of broad remedial interpretation of criminal statutes by the lower courts and government prosecutors in two cases. First, in *Fischer v. United States*, 603 U.S. 480 (2024) this Court overturned the conviction concluding that the government and the lower courts had too broadly construed the scope of Sarbanes-Oxley Act of 2002; specifically 18 U.S.C. § 1512(c)(2), which imposes criminal liability on anyone who corruptly obstructs, influences, or impedes any official proceeding, or attempts to do so.

Second, in *Snyder v. United States*, 603 U.S. 1 (2024) this Court overturned the conviction of a public official for bribery. This Court concluded that the provisions of 18 U.S.C. § 666(a)(1)(B) - a bribery statute – has been construed too broadly by the lower federal courts and prosecutors. This Court based its decision upon the proper applications of the ordinary rules of statutory construction, the principle of Fair Notice and the Rule of Lenity.

The concurrence by Justice Gorsuch in *Snyder* concluded the opinion by opining:

Call it what you will. The Court today speaks of inferences from the word “corruptly,” the statute’s history and structure, and associated punishments. See ante, at 10. It discusses concerns of fair notice and federalism. Ibid. But the bottom line is that, for all those reasons, any fair reader of this statute would be left with a reasonable doubt about whether it covers the defendant’s charged conduct. And when that happens, judges are bound by the ancient rule of lenity to decide the case as the Court does today, not for the

prosecutor but for the presumptively free individual. See *United States v. Davis*, 588 U. S. 445, 464-465, 139 S. Ct. 2319, 204 L. Ed. 2d 757 (2019). 603 U.S. 1; 144 S. Ct. 1947, 219 L. Ed. 2d 572. Lenity may sometimes, as it does today, go unnamed. It may be deployed under other guises, too. “Fair notice” or “fair warning” are especially familiar masks. See, e.g., ante, at 10, 15, 17; *Marinello v. United States*, 584 U. S. 1, 6-7, 9-10, 138 S. Ct. 1101, 200 L. Ed. 2d 356 (2018); *McDonnell v. United States*, 579 U. S. 550, 576, 136 S. Ct. 2355, 195 L. Ed. 2d 639 (2016). Cf. *Wooden v. United States*, 595 U. S. 360, 389, 142 S. Ct. 1063, 212 L. Ed. 2d 187 (2022) (Gorsuch, J., concurring in judgment) (“Lenity works to enforce the fair notice requirement”); *Yates v. United States*, 574 U. S. 528, 548, 135 S. Ct. 1074, 191 L. Ed. 2d 64 (2015) (plurality opinion) (same). Other times, we clothe lenity in its corollary that courts cannot “rely upon prosecutorial discretion to narrow the” scope of an “otherwise wide-ranging” criminal law. *Marinello*, 584 U. S., at 11, 138 S. Ct. 1101, 200 L. Ed. 2d 356; see, e.g., ante, at 17; *Dubin v. United States*, 599 U. S. 110, 131, 143 S. Ct. 1557, 216 L. Ed. 2d 136 (2023). And in still other instances, we do much the same when we speak of the “restraint” necessary “in assessing the reach of a federal criminal statute.” *Id.*, at 129, 143 S. Ct. 1557, 216 L. Ed. 2d 136 (internal quotation marks omitted); accord, *Marinello*, 584 U. S., at 6-7, 11, 138 S. Ct. 1101, 200 L. Ed. 2d 356; *Arthur Andersen LLP v. United States*, 544 U. S. 696, 703, 125 S. Ct. 2129, 161 L. Ed. 2d 1008 (2005). But make no mistake: Whatever the label, lenity is what’s at work behind today’s decision, just as it is in so many others. Rightly so. I am pleased to join.

Mr. Harris is a drug addict, caught up in a complex legal dispute over the proper application of a statute that carries a mandatory minimum prison term of 20 years. The Eighth Circuit case law has arrived at a place where “allowing someone to use drugs,” or “not stopping them from doing so” when no drugs were physically transferred; where no purchase or sale was involved; when the transaction was not “in the chain of distribution” and did not contribute to it; is a distribution offense under §841(a) and subject to the harshest of penalties.

Under the standards of statutory construction discussed in *Snyder*, the Eighth Circuit should have provided a more careful review of the government’s theory of the case and the application of the statute. The Court certainly did not conclude that §841(a) is applicable to Harris’ conduct beyond a reasonable doubt.

4. Alternatively, This Court Should Grant Review to Decide an Important Federal Question

Even if this Court concludes that the circuit conflict is not sufficiently square to warrant review under Supreme Court Rule 10(a), the petition should be granted under Rule 10(c) because the decision below decides an important question of federal law that has not been, but should be, settled by this Court.

- The question implicates a fundamental constitutional right to Due Process of Law and Fair Notice.
- The question affects the proper scope of federal criminal liability in a recurring context.
- The question has significant practical consequences for the administration of federal criminal justice in guiding the discretion of prosecutors.
- The question involves the interpretation of a major federal criminal statute.

The record facts are not in dispute. The issue was squarely presented to the Trial Court by a stipulated trial, preserved for appeal, and decided by the Court of Appeals on the merits. There are no threshold procedural obstacles, alternative grounds for affirmance, or factual disputes that would complicate this Court's review. Moreover, the record is fully developed on the relevant issue. The Court has before it everything it needs to resolve the question presented definitively.

In practical effect, prosecuting a drug addict who allows another drug addict to ingest some of his personal use quantity of a controlled substance unjustifiably expands prosecutorial discretion beyond reasonable statutory limits of §841(a), narrows constitutional protections, and creates arbitrary enforcement. This case thus presents an opportunity for the Court to reaffirm the core principles articulated in *Snyder* and *Fischer*, not in the context of white-collar corruption, but in the context of addicts at the bottom rung of the social ladder. Under the facts of this case, Harris should not be facing a mandatory minimum 20-year prison term unless it is clear beyond a

reasonable doubt that Congress intended it, that Due Process permits it and the ordinary rules of statutory construction compel it.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

s/Robert B. Creager
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Dated: September 18, 2026

CERTIFICATE OF COMPLIANCE

The Petition for Writ of Certiorari filed in this matter complies with the page limits found at S. Ct. R. 33.2(b) because, excluding the parts of the document exempted by Rule; this document contains 4,684 words using Word 365.

s/Robert B. Creager
Robert B. Creager # 15370

No. ____

**IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2026**

ROBERT HARRIS, *Petitioner,*

v.

UNITED STATES OF AMERICA

PROOF OF SERVICE

I, Robert B. Creager, do swear or declare on this 18th day of September, 2026 as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and CORRECTED PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

Lesly Woods, Acting US Attorney
Sara Fullerton AUSA - Sara.Fullerton@usdoj.gov
1620 Dodge St. Suite 1400
Omaha, NE 68102

Solicitor General of the United States Room 5616
Department of Justice
950 Pennsylvania Ave N.W.
Washington DC 20530-0001
Room

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 18, 2026.

s/Robert B. Creager

Robert B. Creager #15370

APPENDIX

Appendix A — Opinion of the United States Court of Appeals for the Eighth Circuit, filed April 29, 2026

Appendix B — Judgment of the District Court entered Aug. 25, 2024

Appendix C — Decision of the United States District Court, filed August 12, 2024

Appendix D — Order Denying Petition for Rehearing, entered June 4, 2026

Appendix E — Constitutional and Statutory Provisions

U.S. Const. Amends. V and XIV

21 U.S.C. §841(a)

App A

United States Court of Appeals

For the Eighth Circuit

No. 24-3497

United States of America

Plaintiff - Appellee

v.

Robert Vincent Harris

Defendant - Appellant

Appeal from United States District Court for the District
of Nebraska - Lincoln

Submitted: April 24, 2026
Filed: April 29, 2026
[Unpublished]

Before SHEPHERD, ERICKSON, and KOBES, Circuit Judges.

PER CURIAM. Robert Harris appeals after the district court¹ found him guilty of two drug offenses following a bench trial, and sentenced him to 240 months in prison. On appeal, Harris challenges the sufficiency of the evidence to support his conviction for distribution of fentanyl resulting in serious bodily injury, in violation of 21 U.S.C. § 841(a)(1), (b)(1). Specifically, he argues the evidence that he allowed the victim to use some of his personal quantity of fentanyl was insufficient to show distribution.

Upon careful review, we conclude there was sufficient evidence Harris distributed fentanyl, even if there was no hand-to-hand transfer. See *United States v. Monteer*, 83 F.4th 1119, 1122 (8th Cir. 2023) (applying same review standard to bench trial and jury verdicts for sufficiency-of-evidence challenges;

¹ The Honorable John M. Gerrard, United States District Judge for the District of Nebraska.

upholding verdict if reasonable factfinder could find offense proven beyond reasonable doubt); *United States v. Gentry*, 555 F.3d 659, 664 (8th Cir. 2009) (reviewing sufficiency-of evidence challenges, including challenges hinging on interpretation of statute, de novo, considering evidence in light most favorable to government). Our cases make clear that a defendant distributes a controlled substance within the statutory meaning of that term “anytime he gives it to a third party.” See *United States v. Parker*, 993 F.3d 595, 605 (8th Cir. 2021); see also *United States v. Deng*, 104 F.4th 1052, 1055 (8th Cir.) (because statute at issue, as interpreted by our case law, made clear that conduct in question was proscribed, there was no need to resort to rule of lenity), cert. denied, 145 S. Ct. 348 (2024). Here, the record established Harris obtained a substance he was certain was fentanyl, invited the victim to his apartment when she sought heroin from him, brought out a mirror with fentanyl on it, cut a line, snorted some of the line, and allowed the victim to consume the remainder through a straw he gave her. See *United States v. Frommelt*, 971 F.3d 823, 830 (8th Cir. 2020) (sufficient evidence defendant distributed drugs when he set them out on table in his home while hosting guests and left line for guest staying in his bedroom).

Accordingly, we affirm.

UNITED STATES DISTRICT COURTfor the
District of Nebraska

UNITED STATES OF AMERICA

v.

ROBERT VINCENT HARRIS

JUDGMENT IN A CRIMINAL CASE

Case Number: 4:23CR3057-001

USM Number: 59792-510

Robert B. Creager

Defendant's Attorney

THE DEFENDANT:

- ☐ pleaded guilty to count(s)
- ☐ pleaded nolo contendere to count(s)_ which was accepted by the court.
- ☒ was found guilty on counts I and II of the Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section& Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
21:841(a)(1), 841(b)(1) DISTRIBUTE FENTANYL RESULTING IN SERIOUS BODILY INJURY	February 14, 2023	I
21:841(a)(1), 841(b)(1) POSSESSION WITH INTENT TO DISTRIBUTE FENTANYL, METHAMPHETAMINE, COCAINE AND HEROIN	February 15, 2023	II

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s)
- ☐ Count(s) dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

November 25, 2024

Date of Imposition of Sentence:

s/ John M. Gerrard

Senior United States District Judge

November 25, 2024

Date

DEFENDANT: ROBERT VINCENT HARRIS
CASE NUMBER: 4:23CR3057-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **two hundred forty (240) months on Count I and two hundred forty (240) months on Count II, with Count II to be served concurrently with Count I.**

☒ The Court makes the following recommendations to the Bureau of Prisons:

1. That the defendant be allowed to participate in the Residential Drug Treatment Program or any similar drug treatment program available.
2. That the defendant be incarcerated in a federal facility which includes a Residential Drug Treatment Program as close as possible to **Lincoln, Nebraska.**
3. Defendant should be given credit for time served. Defendant was detained 2/15/23 to 2/21/23 and 5/17/23 to 9/20/23.
4. That the defendant be allowed to participate in vocational and educational training while incarcerated appropriate with his past skills and education.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at

☐ as notified by the United States Marshal.

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☒ at 1 p.m. on February 5, 2025.

☒ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant was delivered on _____ to

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

BY: _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of five (5) years on Count I and three (3) years on Count II, each of said terms to be served concurrently with the other.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court. ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (check if applicable)
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. (check if applicable)
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. (check if applicable)
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. (check if applicable)
7. ☐ You must participate in an approved program for domestic violence. (check if applicable)

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10

days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.

9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.

10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).

11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.

13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see Overview of Probation and Supervised Release Conditions, available at: www.uscourts.gov.

Defendant's Signature

Date

DEFENDANT: ROBERT VINCENT HARRIS

CASE NUMBER: 4:23CR3057-001

SPECIAL CONDITIONS OF SUPERVISION

- a. You must not purchase or possess, use, distribute, or administer any alcohol, just the same as any other narcotic or controlled substance.
- b. You must submit your person, residence, office, or vehicle to a search conducted by a United States Probation Officer at any time; failure to submit to a search may be grounds for revocation; you must warn any other residents that the premises may be subject to searches pursuant to this condition.
- c. You must attend, pay for and successfully complete any diagnostic evaluations, treatment or counseling programs, or approved support groups (e.g., AA/NA) for alcohol and/or controlled substance abuse, as directed by the probation officer.
- n. You must provide the probation officer with access to any requested financial information.
- zz. You must report to the Supervision Unit of the U.S. Probation Office for the District of Nebraska between the hours of 8:00 a.m. and 4:30 p.m., 100 Centennial Mall North, 530 U.S. Courthouse, Lincoln, Nebraska, (402)4371920, within seventy-two (72) hours of being placed on probation or release from confinement and, thereafter, as directed by the probation officer.

AO245B(Rev 09/19) Judgment in a Criminal Case
 DEFENDANT: ROBERT VINCENT HARRIS
 CASE NUMBER: 4:23CR3057-001

Judgment Page 6 of 8

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties in accordance with the schedule of payments set forth in this judgment.

<u>Assessment</u>	<u>Restitution</u>	<u>Fine AVAA Assessment*</u>	<u>JVTA</u>
<u>Assessment**</u>			

Totals \$200

☐ The determination of restitution is deferred until . An Amended Judgment in a Criminal Case (AO245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Totals Total Loss***</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
----------------------	-----------------------------	----------------------------	-------------------------------

☐ Restitution amount ordered pursuant to plea agreement \$

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows: *Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299 **Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22. *** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO245B(Rev 09/19) Judgment in a Criminal Case
 DEFENDANT: ROBERT VINCENT HARRIS
 CASE NUMBER: 4:23CR3057-001

Judgment Page 7 of 8

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A** ☒ Lump sum payment of \$200.00 due immediately, balance due
☐ not later than _____, or
☒ in accordance with ☐ C, ☐ D, ☐ E, or ☒ F below; or
- B** ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C** ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D** ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E** ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F** ☒ Special instructions regarding the payment of criminal monetary penalties:
 The criminal monetary penalty is due in full on the date of the judgment. The defendant is obligated to pay said sum immediately if he or she has the capacity to do so. The United States may institute civil collection proceedings at any time to satisfy all or any portion of the criminal monetary penalty.

Without limiting the foregoing, and following release from prison, the defendant shall make payments to satisfy the criminal monetary penalty in the following manner: (a) monthly installments of \$100 or 5% of the defendant's gross income, whichever is greater; (b) the first payment shall commence 30 days following the defendant's discharge from incarceration, and continue until the criminal monetary penalty is paid in full; and (c) the defendant shall be responsible for providing proof of payment to the probation officer as directed.

All financial penalty payments are to be made to the Clerk of the U. S. District Court, 111 S. 18th Plaza, Suite 1152, Omaha, NE 68102-1322.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Number Defendant and Co-Defendant Names (including defendant number)	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s): _____

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) principal, (6) fine interest, (7) community restitution, (8) JVT A assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

AO245B(Rev 09/19) Judgment in a Criminal Case
DEFENDANT: ROBERT VINCENT HARRIS
CASE NUMBER: 4:23CR3057-001

Judgment Page 8 of 8

CLERK'S OFFICE USE ONLY:

ECF DOCUMENT

I hereby attest and certify this is a printed copy of a document which was electronically filed with the
United States District Court for the District of Nebraska.

Date Filed: _____

DENISE M. LUCKS, CLERK

By _____ Deputy Clerk

App C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
NEBRASKA

UNITED STATES OF AMERICA ,

Plaintiff,

vs.

ROBERT VINCENT HARRIS ,

Defendant.

4:23 -CR -3057

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This matter, having been tried without a jury, is before the Court for findings of fact pursuant to Fed. R. Crim. P. 23(c). *See United States v. B.A.D.*, 647 F.3d 772, 776 (8th Cir. 2011). The parties have agreed to waive a jury trial, and the Court accepts that waiver, finding that the defendant's express waiver was knowing and intelligent. *See* Rule 23(a); *United States v. Mahler*, 141 F.3d 811, 814 (8th Cir. 1998); *United States v. Stalder*, 696 F.2d 59, 62 (8th Cir. 1982). The case has been presented on a largely uncontested record, *see* filing 65, and the parties have submitted the case after a hearing in open court and closing arguments presented by written briefs, *see* filing 67; filing 69; filing 71.

The defendant, Robert Harris, is charged by indictment with two counts of violating 21 U.S.C. § 841: (I) distribution of fentanyl resulting in serious bodily injury; and (II) possession of fentanyl, methamphetamine, cocaine, and heroin with intent to deliver. Filing 1. The events leading to those charges are largely undisputed, and the Court finds them to have been proven beyond a reasonable doubt, particularly relying on the statements of Harris (exh. 1 & 16D), and the alleged victim of Count I, Ariel. (exh. 2 & 16C).

FINDINGS OF FACT

On February 14, 2023, Harris was looking to buy heroin, but his usual source didn't have any. Instead, he got "10 blues" from his source, which looked like 30mg Oxycodone but he was certain were actually fentanyl.² He crushed them into powder to cut and snort throughout the day. At some point, he went to hang out at a friend's apartment. All of this happened in Lincoln, Nebraska.

Ariel L. (Ariel) was at the same gathering with several other people, and was dispatched to a convenience store at 17th and L Streets to buy alcohol. Harris went with her. He had offered Ariel heroin about a week earlier, and she asked if the offer still stood. He said it did, and suggested they stop by his apartment on the way to the convenience store. At his apartment, Harris produced a small mirror, which held powder and a short straw. He cut a line of the powder and snorted about two-thirds of the line himself. He gave Ariel the straw and she used it to snort the remainder.

They continued to the convenience store and Ariel bought alcohol while Harris waited outside. As they were walking away Ariel began feeling the drug's effect, and she fell down. She may have gotten up and fallen again, but after that doesn't remember anything until waking up in an ambulance.

Harris said that when Ariel passed out, he saw what he thought was Narcan in her purse, so he grabbed it. The clerk at the convenience store said that a man—indisputably Harris—came into the store with a "white T shaped object," which would describe Narcan nasal spray. He was, according to the clerk, fumbling with the object and may have been trying to fix it. He left the

² Counterfeit oxycodone made from fentanyl is not uncommon. *E.g. United States v. White*, No. 0:22-CR-207, 2023 WL 5753678, at *16 (D. Minn. June 5, 2023).

store but came back a short time later, and when the clerk offered to call 911 Harris told him he should.

Ariel came to in an ambulance, where the paramedic told her that she had been given Narcan and that they were giving her more. She was in the hospital for some time. The emergency room doctor who treated her, and an independent expert, each opined that Ariel suffered a fentanyl overdose, and a urine sample indicated the presence of a few drugs, including fentanyl.

When he returned home, Harris used the rest of the fentanyl. The next day he messaged another woman, Lorinda J. (Lorinda), about what happened the day before. Lorinda asked Harris if he could get more of the drugs and he said he could, but didn't have money. She wired him some money and said she would give him "a couple points," presumably for setting up the purchase. She indicated she would come to his apartment and pick the drugs up a little after noon. A couple of hours later, he messaged her again and asked, "how is that." That evening, police executed a no-knock warrant at Harris' residence. A small amount of heroin was found on a small mirror in a dresser drawer, along with two short straws containing residue. Harris admitted acquiring that heroin earlier that day. One of the straws tested positive for fentanyl; the other tested positive for fentanyl, methamphetamine, cocaine, and heroin.

CONCLUSIONS OF LAW

As will be explained below, the Court finds those facts prove the elements of each offense beyond a reasonable doubt, and will adjudge Harris guilty on both counts of the indictment.

(I) Distribution of Fentanyl Resulting in Serious Bodily Injury To sustain a conviction under 21 U.S.C. § 841(a)(1) with a serious bodily injury enhancement under § 841(b)(1)(C), the government must prove beyond

a reasonable doubt that (1) the defendant knowingly sold or otherwise transferred a controlled substance and (2) serious bodily injury resulted from use of that controlled substance. *See United States v. Cooper*, 990 F.3d 576, 581-82 (8th Cir. 2021); *see also United States v. Blair*, 93 F.4th 1080, 1085 (8th Cir. 2024). The defendant doesn't need to know the exact nature of the substance, only that it was a controlled substance of some kind. *Cooper*, 990 F.3d at 582.

1. DISTRIBUTION

The government proved beyond a reasonable doubt that Harris distributed a controlled substance. Specifically, Ariel said that she asked Harris if he could get heroin from him, and he said yes. At his apartment, he cut a line of powder on a mirror, gave Ariel a straw, and allowed her to consume some of it. She took possession of the drugs by ingesting them. And Harris admitted those events to law enforcement.

That's enough to show distribution. In *United States v. Frommelt*, 971 F.3d 823 (8th Cir. 2020), the defendant argued on similar facts that the evidence of distribution of methamphetamine was insufficient because of testimony that the drugs were simply out on a table when his guests arrived at his house. But the Eighth Circuit pointed to one of the guest's testimony that the defendant "left her a line of methamphetamine when she was staying the night in her bedroom." And even without that, because it was the defendant's house, it was reasonable to infer that drugs left out on a table in that house were left there by the defendant—again, supporting a finding of distribution.

The same is true here. Harris provided drugs for Ariel to use. Whether or not he handed the drugs directly to her—as opposed to leaving them on the

mirror for her to use—doesn't change that. It was his home, they were his drugs, and he provided them for her use.

Similarly, in *United States v. Parker*, 993 F.3d 595 (8th Cir. 2021), the defendant argued that the evidence was insufficient to show distribution because, he said, his girlfriend took the drugs on her own. But the Eighth Circuit rejected that argument, based on the defendant's testimony that he possessed the drugs first and she didn't steal them—instead, she took them from him and he didn't stop her. The Court of Appeals found sufficient evidence that the defendant had distributed heroin to his girlfriend because "[the defendant] knew the substance was heroin, brought it to the. . . apartment, discussed it with [his girlfriend], told his parole officer that he gave it to [her], and ultimately snorted it alongside [her]."

The Court does not find—particularly in light of *Frommelt*—that any admission that the defendant "gave" a pill to his girlfriend is essential to *Parker*'s holding. Rather, both cases take the common-sense view that hand-to-hand contact is not the only way to distribute drugs, and that in social settings a defendant may distribute drugs in his possession by knowingly permitting another person to take and use them.

Harris' argument to the contrary is factually off base. His argument, in a nutshell, is that when one drug user has drugs for personal use, and shares them with another drug user, that's not distribution. As support, he turns—as many defendants have—to the Second Circuit's decision in *United States v. Swiderski*, 548 F.2d 445 (2d Cir. 1977), in which the court held that a drug isn't distributed between users when it was jointly acquired and held by them for their own use. Filing 69 at 3.

But Harris—as many defendants have—misapplies *Swiderski* here. That case merely held that *joint* acquisition and possession by two closely

related persons is not enough to support an inference of intent to distribute. Outside the context of drugs that were *jointly* acquired and possessed, the law is quite clear, in the Eighth Circuit, in the Second Circuit, and in many other courts: Sharing drugs with another is "distribution" under § 841(a)(1). *See United States v. Ragland*, 555 F.3d 706 (8th Cir. 2009); *United States v. Ironi*, 525 F.3d 683 (8th Cir. 2008); *United States v. Hester*, 140 F.3d 753 (8th Cir. 1998); *United States v. Fregoso*, 60 F.3d 1314 (8th Cir. 1995).

The Second Circuit explained its own law best in *United States v. Wallace*, 532 F.3d 126 (2d Cir. 2008):

The rule announced in *Swiderski* is expressly limited "to the passing of a drug between joint possessors who simultaneously acquired possession at the outset for their own use. We advised that the rule would not apply where the evidence showed that the defendant handed over a small amount of marijuana for smoking purposes to another individual without proof that the other individual had jointly and simultaneously acquired possession of the drug at the outset. Rather, since sole possession in such a case would rest with the defendant, his transfer of the drug to a third person, friend or not, would violate the prohibition on drug distribution.

Id. at 130-31 (citations and quotations omitted).

That's why the Second Circuit and other courts have repeatedly rejected invitations to extend *Swiderski* to circumstances in which the defendant individually possessed drugs and then shared them with someone else. *See, e.g., United States v. Bobadilla-Pagán*, 747 F.3d 26 (1st Cir. 2014); *United States v. Wright*, 593 F.2d 105 (9th Cir. 1979); *United States v. Washington*, 41

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F.3d 917 (4th Cir. 1994). Instead, the consensus rule is that when a defendant provides others with drugs for personal use, even in a social setting, it's evidence of distribution. *See, e.g., Bobadilla-Pagán*, 747 F.3d at 34 (defendant admitted to distribution when he said he sometimes shared marijuana with friends); *United States v. Boidi*, 568 F.3d 24 (1st Cir. 2009) (sharing with a girlfriend is as much distribution as selling on a street corner); *Wallace*, 532 F.3d at 130 (defendant's testimony that he purchased drugs for personal use but also shared them with friends—*i.e.* "if a lady friend come by we use it together"—was direct evidence of distribution); *United States v. Travis*, 201 F.3d 442 (6th Cir. 1999) (intent to share marijuana with friends is intent to distribute); *Fregoso*, 60 F.3d at 1325 (defendant distributed cocaine when he freely gave it to associates on numerous occasions); *Washington*, 41 F.3d at 920 (defendant distributed when he and his friends pooled their money to buy cocaine but defendant purchased it alone); *United States v. Ramirez*, 608 F.2d 1261 (9th Cir. 1979) (sharing cocaine with friends on vacation is distribution for purposes of § 841(a)(1)); *Wright*, 593 F.2d at 108 (defendant distributed drugs to woman who gave him \$20 to buy heroin they would use together). Here, Harris had sole possession of drugs, and shared with Ariel in a social setting. *Swiderski* is distinguishable, and the Court is not persuaded by the defendant's argument.

The defendant also points to the Third Circuit case of *United States v. Semler*, 858 F. App'x 533 (3d Cir. 2021), filing 69 at 3, in which the Third Circuit agreed with *Swiderski* that when there has been a joint acquisition or purchase of a controlled substance by a group of users to share among themselves, there is no "transfer" between the members of the group. But that case is distinguishable for the same reason *Swiderski* itself is. In *Semler*, the defendant and alleged distributee "planned *together* to purchase drugs;

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traveled *together* to buy the drugs; and shared the drugs *together* for their own personal use." *Id.* at 540-41.

That, the Third Circuit said, was enough to at least warrant an instruction on joint possession and simultaneous acquisition. But, it's important to note the Third Circuit held that a properly instructed jury could still find distribution on those facts. *Id.* at 541. It's even more important to note that factually, *Semler* isn't applicable here—because again, there's *no* evidence here of joint acquisition or even possession. As the *Semler* court itself explained,

we do not conclude that instances of "social sharing" can never constitute a distribution under § 841(a)(1). Certainly, there may be situations where a transfer of possession has occurred between users in a social setting. Consider a situation in which one user goes alone to purchase a quantity of a controlled substance for himself, then transfers some or all of that substance to another user in a social setting for that person to use alone or share with others. Such a situation is more likely to constitute a distribution than the one presented here, where individuals purchase drugs together to share only among themselves.

Id. at 539. The *Semler* court's holding was expressly limited to whether "physical divvying up of a small quantity of *jointly purchased and shared drugs* must constitute a distribution." *Id.* (emphasis supplied). And that holding has no bearing on the present case.

Harris also asserts that the government's theory of this case "would affirm a conviction under § 841(a) as applied to college roommates sharing a 'joint' by passing it back and forth while the other inhaled. That simply cannot

be the law, and no case law supports that proposition." Filing 69 at 2. But it turns out there's a good reason for that—the statute specifically addresses that situation, and treats it differently: "Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in [21 U.S.C. § 844] and [18 U.S.C. § 3607]." § 841(b)(4). In other words, sharing a joint is treated as simple possession. *See id.* (citing § 844). That statutory difference readily explains any lack of caselaw.

But the statutory language is also revealing: A person who violates § 841(a) "by *distributing* a small amount of marijuana for no remuneration" is treated as having committed the offense of simple possession. § 841(b)(4) (emphasis supplied). The statute clearly contemplates that passing a joint *is* "distributing" a controlled substance, which is why Congress created an exception for small amounts of marijuana. *See id.* But in this case, unfortunately for everyone involved, the defendant didn't share marijuana. So, he falls within the general ambit of the statute, not the exception.

2. KNOWLEDGE AND INTENT

The evidence also proved beyond a reasonable doubt that Harris acted knowingly. Ariel said that, about a week before her overdose, Harris offered her heroin. On the night of the overdose, she specifically asked for heroin, and he said he had some. He clearly knew he was offering a controlled substance. He admitted that he had crushed fentanyl pills into powder to use it. And the evidence shows that he provided the powder to Ariel intentionally, most pertinently by handing her the straw she would need to use it.

3. SERIOUS BODILY INJURY

Finally, the evidence is sufficient to prove beyond a reasonable doubt that Ariel suffered serious bodily injury. "[S]erious bodily injury" is "bodily injury" involving "a substantial risk of death"; "protracted and obvious disfigurement"; or "protracted loss or impairment of the function of a bodily member, organ, or mental faculty." 21 U.S.C. § 802(25)(A)-(C). The drug must be either the "but-for" cause or an "independently sufficient" cause of the injury. *United States v. Cathey*, 997 F.3d 827, 832 (8th Cir. 2021). The evidence is sufficient to show a "substantial risk of death" where the victim survived an overdose from the use of a controlled substance. *Cooper*, 990 F.3d at 582.

Here, the medical evidence establishes beyond a reasonable doubt that Ariel suffered an overdose involving an opiate and faced a substantial risk of death. And the evidence shows that Ariel obtained suspected fentanyl from Harris, consumed it, and became unresponsive shortly thereafter. Narcan, administered to Ariel, only reverses the effect of opiates, which is strong evidence of an opiate overdose. See *United States v. Cathey*, 997 F.3d 827, 833 (8th Cir. 2021).

In sum, the Court finds the expert testimony regarding Ariel's overdose persuasive, and that it proves beyond a reasonable doubt that Ariel's use of Harris' drugs caused serious bodily injury.

(II) Possession of a Controlled Substance with Intent to Deliver To convict a defendant of possession with intent to distribute a controlled substance, the government must prove beyond a reasonable doubt that the defendant both knowingly possessed and intended to distribute the drugs. *United States v. Brown*, 88 F.4th 750, 761 (8th Cir. 2023).

This count is, the Court understands from the government's brief, based on the residue of drugs found in Harris' apartment after Ariel's overdose. Filing

59 at 9. Which makes sense, because Harris can't be convicted of violating § 841(a)(1) twice for briefly possessing and then distributing the same drugs. *See United States v. Mendoza*, 902 F.2d 693 (8th Cir. 1990). So this charge must be proved by his possession of drugs he did *not* provide to Ariel.

- a. The evidence is obviously sufficient to prove, beyond any reasonable doubt, that Harris possessed the drugs found in his apartment. The evidence is also sufficient to prove beyond a reasonable doubt that he intended to—and indeed, probably did—distribute the larger portion of the same drugs to Lorinda. He admitted acquiring the drugs earlier that day, and the messages found on his phone—supported particularly by the Cash App transfer—set forth the transaction step-by-step. Harris might not have been a regular drug dealer, but in this case he agreed to act as the middleman in a drug transaction, which means he possessed drugs intending to distribute them.
- b. Harris argues that the evidence is insufficient because there's only circumstantial evidence that the transaction *planned* in the messages actually panned out:
- c. Rather than purchase drugs for [Lorinda] perhaps Harris was only able to obtain from his source, enough for his personal use. Maybe he did get enough to deliver some to [Lorinda] The problem is, there is no evidence to support that conclusion. It is pure speculation. We might be able to connect the dots if we heard from [Lorinda] about what if anything actually happened. But on this record, there is simply no proof that Harris obtained any heroin on February 15, 2023, with the intent to deliver it to [Lorinda].

Filing 69 at 5. But the Court is unpersuaded. The messages found on Harris' phone indicate that he was on his way to pick up the cash he was sent and the

drugs. The Court finds it unlikely that the deal would fall apart at that point. And Harris' argument doesn't explain a small but important piece of evidence: Harris' message a couple of hours after the planned delivery, "So how is that[?]" In the context of their conversation, the obvious interpretation of that question is that Harris was asking Lorinda what she thought of the drug—which obviously suggests delivery.

While the Court respects Harris' attempt to create reasonable doubt, the Court has none, and will adjudge the defendant guilty on both counts.

IT IS ORDERED:

1. The defendant is found guilty beyond a reasonable doubt on Count I and Count II.
2. The defendant's Rule 29 motion is denied.
3. This case shall proceed to sentencing.

Dated this 12th day of August, 2024.

BY THE COURT:



John M. Gerrard
Senior United States District
Judge

App D

**UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT**

No. 24-3497

United States of America

Appellee

v.

Robert Vincent Harris

Appellant

Appeal from U.S. District Court for the District of Nebraska - Lincoln
(4:23-cr-03057-JMG-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

June 04, 2026

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Susan E. Bindler

App. E

21 U.S.C. § 841. Prohibited acts A

(a) Unlawful acts. Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

...

(C) In the case of a controlled substance in schedule I or II, . . . and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life. . .

U.S. CONST. Amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.