

## **APPENDIX**

## **TABLE OF CONTENTS**

Appendix A: Opinion by the U.S. Court of Appeals for the Fourth Circuit (April 14, 2023).....	1a
Appendix B: Judgment of Conviction in the U.S. District Court for the Northern District of West Virginia (February 1, 2022).....	17a
Appendix C: Fourth Circuit's Rehearing Denial (May 12, 2023).....	24a

**PUBLISHED**

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

---

**No. 22-4095**

---

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

PATRICK ANDREW GROVES,

Defendant - Appellant.

---

Appeal from the United States District Court for the Northern District of West Virginia, at Wheeling. John Preston Bailey, District Judge. (5:20-cr-00018-JPB-JPM-1)

---

Argued: September 14, 2022

---

Decided: April 14, 2023

---

Before KING, AGEE, and THACKER, Circuit Judges.

---

Affirmed by published opinion. Judge King wrote the opinion, in which Judge Agee and Judge Thacker joined.

---

**ARGUED:** Jenny R. Thoma, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Clarksburg, West Virginia, for Appellant. Sarah Wagner, OFFICE OF THE UNITED STATES ATTORNEY, Clarksburg, West Virginia, for Appellee. **ON BRIEF:** Brendan S. Leary, Assistant Federal Public Defender, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Wheeling, West Virginia, for Appellant. William Ihlenfeld, United States Attorney, David J. Perri, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Wheeling, West Virginia, for Appellee.

---

KING, Circuit Judge:

Defendant Patrick Andrew Groves appeals from the sentence he received in the Northern District of West Virginia in February 2022 after pleading guilty to unlawfully possessing a firearm and ammunition, in contravention of 18 U.S.C. § 922(g)(1). Groves contends that the district court erred by treating a federal drug offense on which he was convicted in 2014 — aiding and abetting in the distribution of a controlled substance, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 — as being a “controlled substance offense” that increased his Sentencing Guidelines offense level. Groves has proffered two principal arguments as to why his 2014 offense is not a “controlled substance offense” under the Guidelines. First, he asserts that aiding and abetting in a drug offense cannot be treated as a “controlled substance offense” in Guidelines calculations. Second, Groves maintains that, in any event, each and every § 841(a)(1) distribution offense is disqualified from such treatment. As explained herein, we reject Groves’s challenge to his sentence and affirm the criminal judgment entered by the district court.

I.

A grand jury in the Northern District of West Virginia returned a nine-count indictment in 2014 charging Groves and two codefendants with involvement earlier that year in a drug distribution ring in West Virginia and elsewhere. One of the four charges lodged against Groves in 2014 was that he had aided and abetted in a 21 U.S.C. § 841(a)(1) offense involving the distribution of cocaine base (the “2014 offense”). Section 841(a)(1) spells out the predominant federal drug distribution offense and provides, in pertinent part,

### 3a

that “it shall be unlawful for any person knowingly or intentionally . . . to . . . distribute . . . a controlled substance.” In addition to § 841(a)(1), the charge against Groves was alleged and pursued under 18 U.S.C. § 2, a criminal code provision which is entitled “Principals” and reads as follows:

- (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
- (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

*See* 18 U.S.C. § 2.<sup>1</sup> Pursuant to a plea agreement, Groves pleaded guilty to the 2014 offense and was sentenced in February 2015 to three years of probation.

Being a convicted felon because of the 2014 offense, Groves was thereafter prohibited under federal law from possessing a firearm. But while responding to a drug overdose incident in Wheeling in April 2020, law enforcement officers discovered a loaded firearm in Groves’s possession. Groves subsequently admitted to the authorities that the firearm was stolen. In August 2020, another grand jury in the Northern District of West Virginia indicted him for unlawfully possessing a firearm and ammunition, in contravention of 18 U.S.C. § 922(g)(1). Groves pleaded guilty to that offense in February 2021, but he reserved his right to appeal an adverse ruling on whether his 2014 offense qualifies as a “controlled substance offense” under the Sentencing Guidelines.

---

<sup>1</sup> The 2014 offense was also pursued under 21 U.S.C. § 841(b)(1)(C) (specifying penalties for Groves’s § 841(a)(1) offense) and 21 U.S.C. § 860 (enhancing penalties because § 841(a)(1) offense was committed near school).

In the presentence investigation report (the “PSR”) prepared in March 2021, the probation office treated Groves’s 2014 offense as a “controlled substance offense” and thus recommended an offense level of 20 under the guideline applicable to a § 922(g)(1) offense. *See USSG § 2K2.1(a)(4)(A)* (assigning an offense level of 20 if “the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense”). Otherwise, the offense level under that guideline would have been 14. *Id.* § 2K2.1(a)(6). Ultimately, Groves’s PSR calculated an adjusted offense level of 19 and a criminal history category of II, resulting in an advisory Guidelines range of 33 to 41 months of imprisonment.<sup>2</sup>

Groves timely filed written objections to the PSR in April 2021, in which he contested the treatment of the 2014 offense as a “controlled substance offense” and asserted that his offense level under Guidelines section 2K2.1 should thus be 14, not 20. Groves emphasized that position and provided further support for it in a January 28, 2022 supplemental objection to the PSR, advising the district court of our January 7, 2022 decision in *United States v. Campbell*. *See* 22 F.4th 438, 440-49 (4th Cir. 2022) (concluding that prior conviction under West Virginia drug distribution statute that criminalizes attempt was improper predicate for Guidelines enhancement because attempt offense cannot be treated as “controlled substance offense” in Guidelines calculations).

---

<sup>2</sup> The PSR’s adjusted offense level as to Groves included a two-level enhancement because the firearm was stolen. The PSR recommended a three-level reduction, however, for Groves’s acceptance of responsibility by pleading guilty.

During the sentencing hearing conducted on February 1, 2022, the district court overruled Groves’s objection with respect to the 2014 offense. The court then adopted the PSR’s calculations and agreed with the government’s recommendation that Groves receive a low-end Guidelines sentence, imposing a term of 33 months of imprisonment, followed by three years of supervised release. Groves has timely noted this appeal.

## II.

On appeal, Groves continues to maintain that his 2014 offense is not a “controlled substance offense” for purposes of the Sentencing Guidelines. He thereby presents a legal issue that we review *de novo*. *See United States v. Ward*, 972 F.3d 364, 368 (4th Cir. 2020). We address in turn Groves’s two primary arguments in support of his position — first, that aiding and abetting in a drug offense cannot be treated as a “controlled substance offense” in Guidelines calculations and, second, that each and every 21 U.S.C. § 841(a)(1) distribution offense is also disqualified from such treatment.

### A.

We start with Groves’s argument that aiding and abetting in a drug offense cannot constitute a “controlled substance offense” under the Guidelines. As explained above, in sentencing Groves on his 18 U.S.C. § 922(g)(1) offense, the district court imposed an offense level of 20 under Guidelines section 2K2.1 because Groves “committed any part of the instant offense subsequent to sustaining one felony conviction of . . . a controlled substance offense.” *See* USSG § 2K2.1(a)(4)(A). That guideline incorporates the definition of a “controlled substance offense” provided in Guidelines section 4B1.2(b), as

## 6a

well as the commentary thereto. *Id.* § 2K2.1 cmt. n.1. Pursuant to Guidelines section 4B1.2(b), a “controlled substance offense” is defined as

an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

*Id.* § 4B1.2(b). The relevant commentary, set forth in Application Note 1 of Guidelines section 4B1.2(b), states that the definition of a “controlled substance offense” in that guideline “include[s] the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.” *Id.* § 4B1.2 cmt. n.1.

In the decision highlighted by Groves, *United States v. Campbell*, our Court addressed whether Application Note 1 serves to expand Guidelines section 4B1.2(b)’s definition of a “controlled substance offense” to include an attempt to commit such an offense. *See* 22 F.4th 438, 441-49 (4th Cir. 2022). We concluded in *Campbell* that it cannot and thus does not. *Id.* In so ruling, we emphasized the “crucial” textual difference between Guidelines section 4B1.2(b) (which “does not mention attempt offenses”) and Application Note 1 (which expressly does). *Id.* at 442, 444. Invoking Supreme Court precedent, we explained that the variance in wording renders Application Note 1 inconsistent with Guidelines section 4B1.2(b), thereby requiring us to adhere to the text of the guideline alone. *Id.* at 443-47 (relying on, *inter alia*, *Stinson v. United States*, 508 U.S. 36, 38 (1993), for the proposition that the “commentary to the Sentencing Guidelines ‘is authoritative unless it . . . is inconsistent with, or a plainly erroneous reading of, that guideline’”).

Groves relies on the fact that, like attempt, aiding and abetting is not mentioned in Guidelines section 4B1.2(b), but is expressly included in the commentary set forth in Application Note 1. As Groves would have it, *Campbell* dictates that the distinction in wording renders Application Note 1 inconsistent with Guidelines section 4B1.2(b), thereby requiring us to adhere to the text of the guideline.

For its part, the government counters that *Campbell*'s rationale "in relation to attempt offenses does not logically extend to aiding and abetting." *See* Br. of Appellee 4. According to the government, the *Campbell* analysis is inapposite because "an aider and abettor to a crime generally is punishable under federal law as a principal." *See United States v. Allen*, 909 F.3d 671, 675 (4th Cir. 2018). That is, aiding and abetting — unlike attempt — is "not a separate offense," but is rather "a theory of liability for a substantive offense." *See* Br. of Appellee 16-17. The government consequently asserts that — rather than seeking to expand Guidelines section 4B1.2(b) — the inclusion of aiding and abetting in Application Note 1 "mak[es] explicit what is already inherent in [Guidelines section] 4B1.2(b)." *Id.* at 18.

We readily agree with the government on the aiding and abetting issue. As our Court has consistently explained, aiding and abetting is a theory of criminal liability for an underlying substantive offense. That is because "[a]iding and abetting is not a standalone criminal offense," but rather "simply describes the way in which a defendant's conduct resulted in a violation of a particular [federal] law." *See United States v. Ali*, 991 F.3d 561, 573 (4th Cir.), *cert. denied*, 142 S. Ct. 486 (2021) (internal quotation marks omitted); *accord United States v. Barefoot*, 754 F.3d 226, 239 (4th Cir. 2014) (recognizing that

“[a]iding and abetting is not itself a federal offense, but merely describes the way in which a defendant’s conduct resulted in the violation of a particular law”). Indeed, it has always been a “pervasive provision” of federal law — consistent with § 2 of Title 18 — “that aiders and abettors are principals.” *See United States v. Cammorto*, 859 F.3d 311, 315 (4th Cir. 2017) (citing *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 185 (2007)).

Moreover, when viewed as a whole, the Sentencing Guidelines confirm that aiding and abetting in an offense should be treated just like the underlying substantive offense — and different from an attempt offense. In fact, “aiding and abetting” has its own guideline, providing — again, consistent with § 2 of Title 18 — that “[t]he offense level [for aiding and abetting] is the same level as that for the underlying offense.” *See USSG § 2X2.1*. Meanwhile, an attempt offense is punished under the Guidelines as a lesser offense than the substantive offense to which it relates. *Id.* § 2X1.1(a).

Although it did not decide the issue, *Campbell* itself suggested that an offense prosecuted on an aiding and abetting theory can qualify as a “controlled substance offense.” That suggestion arises from *Campbell*’s reference to our precedent that distinguishes aiding and abetting criminal liability from attempt offenses. *See* 22 F.4th at 442 n.2 (comparing *Allen*, 909 F.3d at 675 (“[T]he long-standing rule [is] that an aider and abettor to a crime generally is punishable under federal law as a principal.”), with *United States v. Pratt*, 351 F.3d 131, 135 (4th Cir. 2003) (“An attempt to commit a crime . . . is recognized as a crime distinct from the crime intended by the attempt . . .”)).

Stated most succinctly, an offense prosecuted on an aiding and abetting theory can qualify as a “controlled substance offense” under Guidelines section 4B1.2(b), in that it is

the same as the underlying substantive offense. Unlike the inclusion of attempt offenses addressed in *Campbell*, the inclusion of aiding and abetting in Application Note 1 was not an effort to improperly expand Guidelines section 4B1.2(b)'s definition of a "controlled substance offense."

B.

Having disposed of Groves's aiding and abetting contention in favor of the government, we turn to his argument that no 21 U.S.C. § 841(a)(1) distribution offense can constitute a "controlled substance offense" under Guidelines section 4B1.2(b). According to Groves, that is so because § 841(a)(1) criminalizes an attempt offense, which our *Campbell* decision precludes from being treated as a "controlled substance offense" in Guidelines calculations.

1.

As we explained in *Campbell*, "[t]o determine whether a conviction under an asserted predicate offense statute . . . constitutes a 'controlled substance offense' as defined by the Sentencing Guidelines, we employ the categorical approach." *See* 22 F.4th at 441 (citing *Ward*, 972 F.3d at 368). The categorical approach requires us to "focus[] on the elements of the prior offense rather than the conduct underlying the conviction." *See* *United States v. Dozier*, 848 F.3d 180, 183 (4th Cir. 2017) (emphasis and internal quotation marks omitted). "If the 'least culpable' conduct criminalized by the predicate offense statute does not qualify as a 'controlled substance offense,' the prior conviction cannot support a [Guidelines] enhancement." *See Campbell*, 22 F.4th at 441 (quoting *United States v. King*, 673 F.3d 274, 278 (4th Cir. 2012)).

## 10a

In *Campbell*, we determined that the least culpable conduct criminalized by the predicate offense statute at issue — a West Virginia drug distribution statute — was “an attempt to deliver a controlled substance.” *See* 22 F.4th at 442. That is, we interpreted the West Virginia statute to criminalize the attempt offense of attempted delivery. Consequently, we concluded that a conviction under the West Virginia statute was an invalid basis for a Guidelines enhancement, in that an attempt offense cannot constitute a “controlled substance offense” under Guidelines section 4B1.2(b). *Id.* at 442, 449.<sup>3</sup>

2.

As Groves would have it, the federal drug distribution statute relevant herein, 21 U.S.C. § 841(a)(1), similarly criminalizes the attempt offense of attempted delivery and thus a § 841(a)(1) conviction cannot support a Guidelines enhancement. In pertinent part, § 841(a)(1) makes it “unlawful for any person knowingly or intentionally . . . to . . . distribute . . . a controlled substance.” *See* 21 U.S.C. § 841(a)(1). The term “distribute” means “to deliver (other than by administering or dispensing) a controlled substance.” *Id.* § 802(11). And the term “deliver” is defined as the “actual, constructive, or attempted transfer of a controlled substance.” *Id.* § 802(8) (emphasis added). In asserting that

---

<sup>3</sup> The Guidelines enhancement challenged in *Campbell* was a “career offender” designation pursuant to Guidelines section 4B1.1. *See* 22 F.4th at 440. That designation is imposed where, *inter alia*, a “defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.” *See* USSG § 4B1.1(a). Like the guideline at issue in this appeal, Guidelines section 4B1.1 utilizes the definition of a “controlled substance offense” provided in Guidelines section 4B1.2(b).

## 11a

§ 841(a)(1) criminalizes the attempt offense of attempted delivery, Groves equates an “attempted transfer” with an “attempted delivery.”

Our Court has not heretofore decided whether — by incorporating a definition of “delivery” that includes “attempted transfer” — § 841(a)(1) criminalizes the attempt offense of attempted delivery. Three of our sister courts of appeals (the Third, the Sixth, and the Eleventh Circuits) have recently concluded, however, that an “attempted transfer” is not an “attempted delivery” under § 841(a)(1) and analogous state drug distribution statutes. *See United States v. Booker*, 994 F.3d 591, 595-96 (6th Cir. 2021) (interpreting § 841(a)(1)); *see also United States v. Penn*, No. 21-12420, \_\_ F.4th \_\_, 2023 WL 2623586, at \*9 (11th Cir. Mar. 24, 2023) (§ 841(a)(1) and Florida statute); *United States v. Dawson*, 32 F.4th 254, 259 (3d Cir. 2021) (Pennsylvania statute); *United States v. Thomas*, 969 F.3d 583, 584-85 (6th Cir. 2020) (Michigan statute); *United States v. Garth*, 965 F.3d 493, 496-98 (6th Cir. 2020) (Tennessee statute). Those courts see an “attempted transfer” as “a *completed delivery* rather than an attempt crime.” *See Booker*, 994 F.3d at 596 (internal quotation marks omitted); *see also Penn*, 2023 WL 2623586, at \*9 (recognizing that “the attempted transfer of drugs constitutes a completed distribution offense”); *Dawson*, 32 F.4th at 259 (ruling that a “drug ‘delivery’ is a complete[d] offense, whether it is committed via actual or attempted transfer of drugs”).

That view has been predicated on the fact that attempt offenses are criminalized separately from completed offenses under the relevant federal and state schemes. For example, federal law criminalizes attempt offenses with respect to controlled substances in 21 U.S.C. § 846. Section 846 provides, in pertinent part, that “[a]ny person who attempts

## 12a

... to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt."

*See* 21 U.S.C. § 846. To avoid rendering § 846 superfluous, the Sixth Circuit has interpreted an "attempted transfer" under § 841(a)(1) to be a completed delivery and thus a completed distribution offense. *See Booker*, 994 F.3d at 596 (explaining that "[w]e must 'construe statutes, where possible, so as to avoid rendering superfluous any parts thereof'" (quoting *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991)).

Additionally, the Sixth Circuit has underscored how utterly "remarkable" it would be to conclude "that § 841(a)(1) did not describe a 'controlled substance offense' under [Guidelines section] 4B1.2(b)." *See Booker*, 994 F.3d at 596. As that court explained, when Congress directed the Sentencing Commission to enact the guidelines related to career offenders — including the definition of "controlled substance offense" in Guidelines section 4B1.2(b) — it "specifically instructed that 'offense[s] described in . . . 21 U.S.C. [§ ]841' be covered." *Id.* (alterations in original) (quoting 28 U.S.C. § 994(h)(1)(B), (2)(B)). Consequently, to except § 841(a)(1) offenses from the Guidelines' definition of a "controlled substance offense" would be to "hold that the Sentencing Commission failed to comply with this statutory command." *Id.* Moreover, it would be to proclaim "that the primary federal statute criminalizing offenses related to controlled substances does not count as a 'controlled substance offense' under the Guidelines." *Id.*

We agree with the Sixth Circuit that an "attempted transfer" is not an "attempted delivery" under § 841(a)(1), and that § 841(a)(1) therefore does not criminalize the attempt offense of attempted delivery. That is because construing § 841(a)(1) to criminalize an

## 13a

attempt offense would render § 846 superfluous. It is also because such an interpretation would absurdly exclude § 841(a)(1) distribution offenses — quintessential federal drug trafficking crimes — from treatment as a “controlled substance offense” in Guidelines calculations.

3.

Groves nevertheless maintains that we are constrained by our *Campbell* decision to rule that 21 U.S.C. § 841(a)(1) criminalizes the attempt offense of attempted delivery. Groves’s contention relies on the proposition that § 841(a)(1) is materially indistinguishable from the West Virginia drug distribution statute analyzed in *Campbell*. According to Groves, because we interpreted the West Virginia statute to criminalize attempted delivery, we must now construe § 841(a)(1) the exact same way.<sup>4</sup>

The West Virginia statute analyzed in *Campbell* “makes it ‘unlawful for any person to . . . deliver . . . a controlled substance.’” *See* 22 F.4th at 441-42 (emphasis omitted) (quoting W. Va. Code § 60A-4-401(a)). And that West Virginia statute defines the term “deliver” as “‘the actual, constructive or *attempted* transfer from one person to another of controlled substances.’” *Id.* at 442 (quoting W. Va. Code § 60A-1-101(h)). Based on that

---

<sup>4</sup> Groves has also invoked two of our unpublished decisions, which relied on *Campbell* and interpreted similar state drug distribution statutes to criminalize attempted delivery. *See United States v. Jackson*, No. 22-4179, 2023 WL 2852624 (4th Cir. Apr. 10, 2023) (South Carolina statute); *United States v. Locklear*, No. 19-4443, 2022 WL 2764421 (4th Cir. July 15, 2022) (North Carolina statute). Being unpublished, however, those decisions “do not constitute binding precedent in this Circuit.” *See Edmonson v. Eagle Nat'l Bank*, 922 F.3d 535, 545 n.4 (4th Cir. 2019).

## 14a

language, we deduced that “the least culpable conduct criminalized by the West Virginia statute is an attempt to deliver a controlled substance.” *Id.*

To be sure, the language of the West Virginia drug distribution statute is similar to that of § 841(a)(1). The problem for Groves is that the West Virginia scheme — at least as it was presented in *Campbell* — does not criminalize attempt offenses separately from completed drug distribution offenses. That renders the West Virginia scheme materially different from the federal scheme, wherein completed drug distribution offenses are defined in § 841(a)(1) and attempt offenses in 21 U.S.C. § 846. Again, to construe § 841(a)(1) to criminalize an attempt offense would render § 846 wholly “superfluous.” *See Booker*, 994 F.3d at 596 (internal quotation marks omitted). That was simply not a concern in *Campbell* with respect to the West Virginia drug distribution statute.

Notably, Groves asserts in this appeal that, under the West Virginia scheme, attempt offenses are actually criminalized separately (in West Virginia Code section 61-11-8) from completed drug distribution offenses. But that point cannot impact our interpretation of § 841(a)(1). Rather, that point may bear on the proper construction of the West Virginia drug distribution statute. Of course, even if *Campbell*’s reading of the West Virginia statute was somehow flawed, this panel has no power to overturn the *Campbell* panel’s work. *See McMellan v. United States*, 387 F.3d 329, 333 (4th Cir. 2004) (en banc) (explaining “the basic rule that one panel cannot overrule another”). Thus, we limit our focus today on § 841(a)(1). Put simply, we conclude that § 841(a)(1) does not criminalize the attempt offense of attempted delivery. As such, we rule that a § 841(a)(1) distribution

## 15a

offense is not categorically disqualified from being treated as a “controlled substance offense” under Guidelines section 4B1.2(b).<sup>5</sup>

\* \* \*

At bottom, we must reject each of Groves’s two principal arguments as to why his 2014 offense — aiding and abetting in a 21 U.S.C. § 841(a)(1) drug distribution offense — is not a “controlled substance offense” under the Sentencing Guidelines. First, the Guidelines’ definition of a “controlled substance offense” includes aiding and abetting in a drug offense. Second, although the Guidelines exclude attempt offenses, § 841(a)(1) does not criminalize attempt such that an § 841(a)(1) distribution offense would be categorically disqualified from being treated as a “controlled substance offense.”<sup>6</sup>

---

<sup>5</sup> In defense of the *Campbell* decision, the government did not dispute in the *Campbell* proceedings that the West Virginia drug distribution statute criminalizes the attempt offense of attempted delivery. Moreover, the Sixth Circuit accepted a similar concession with respect to the comparable Tennessee drug distribution statute, *see United States v. Havis*, 927 F.3d 382, 385 (6th Cir. 2019) (en banc), before later recognizing that concession was erroneous, *see Garth*, 965 F.3d at 497.

<sup>6</sup> Groves also contends that the 2014 offense is not a “controlled substance offense” under the Guidelines in light of our decision in *United States v. Hope*, which was issued in March 2022 shortly after Groves’s February 2022 sentencing. *See* 28 F.4th 487, 508 (4th Cir. 2022) (vacating defendant’s sentence for lack of categorical match as to drug type between predicate South Carolina offenses and definition of “serious drug offense” under Armed Career Criminal Act). Because Groves raised this issue for the first time on appeal, his contention is subject to stringent plain error review. *See United States v. Dawson*, 587 F.3d 640, 645 (4th Cir. 2009) (recognizing that “plain error requires the existence of (1) an error, (2) that is plain, (3) that affects the defendant’s substantial rights, and (4) that seriously affects the fairness, integrity, or public reputation of judicial proceedings”). Unfortunately for Groves, his *Hope* theory would require us to decide novel legal questions in his favor. Thus, we cannot say that any error was plain. *See United States v. Olano*, 507 U.S. 725, 734 (1993) (specifying that, to be plain, error must be “clear under current law”).

**16a**

III.

Pursuant to the foregoing, we affirm the criminal judgment entered by the district court.

*AFFIRMED*

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA	)	JUDGMENT IN A CRIMINAL CASE
v.	)	
PATRICK ANDREW GROVES	)	Case Number: 5:20CR18
	)	USM Number: 09945-087
	)	Brendan S. Leary
	)	Defendant's Attorney

**THE DEFENDANT:**

- pleaded guilty to count(s) One
- pleaded nolo contendere to count(s) \_\_\_\_\_ which was accepted by the court.
- was found guilty on count(s) \_\_\_\_\_ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title &amp; Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. §§ 922(g)(1) and 924(a)(2)	Unlawful Possession of a Firearm and Ammunition	04/08/2020	1

- See additional count(s) on page 2

The defendant is sentenced as provided in pages 2 through 7 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) \_\_\_\_\_ is/are dismissed on the motion of the United States.

It is ordered that the defendant must 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 must notify the court and United States attorney of material changes in economic circumstances.

February 1, 2022  
Date of Imposition of Judgment

Signature of Judge

Honorable John Preston Bailey, United States District Judge  
Name and Title of Judge

Date

2-2-2022

DEFENDANT: PATRICK ANDREW GROVES  
CASE NUMBER: 5:20CR18**IMPRISONMENT**

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: 33 months

- The court makes the following recommendations to the Bureau of Prisons:
- That the defendant be incarcerated at an FCI or a facility as close to Wheeling, West Virginia as possible;  
 and at a facility where the defendant can participate in substance abuse treatment, as determined by the Bureau of Prisons;  
 including the 500-Hour Residential Drug Abuse Treatment Program.
- That the defendant be incarcerated at \_\_\_\_\_ or a facility as close to his/her home in \_\_\_\_\_ as possible;  
 and at a facility where the defendant can participate in substance abuse treatment, as determined by the Bureau of Prisons;  
 including the 500-Hour Residential Drug Abuse Treatment Program.
- Jail Credit: From September 20, 2020, to the present.  
 That the defendant be allowed to participate in any mental health treatment while incarcerated, as determined by the Bureau of Prisons.
- That the defendant be allowed to participate in any educational or vocational opportunities while incarcerated, as determined by the Bureau of Prisons.
- Pursuant to 42 U.S.C. § 14135A, the defendant shall submit to DNA collection while incarcerated in the Bureau of Prisons, or at the direction of the Probation Officer.
- 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 \_\_\_\_\_  a.m.     p.m.    on \_\_\_\_\_ .  
 as notified by the United States Marshal.
- The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:  
 before 12:00 pm (noon) on \_\_\_\_\_ .  
 as notified by the United States Marshal.  
 as notified by the Probation or Pretrial Services Office.  
 on \_\_\_\_\_, as directed by the United States Marshals Service.
- 

**RETURN**

I have executed this judgment as follows:

Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_  
at \_\_\_\_\_, with a certified copy of this judgment.

UNITED STATES MARSHAL

By \_\_\_\_\_  
DEPUTY UNITED STATES MARSHAL

DEFENDANT: PATRICK ANDREW GROVES  
CASE NUMBER: 5:20CR18**SUPERVISED RELEASE**

Upon release from imprisonment, you will be on supervised release for a term of: 3 years

**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 probation officer.
  - 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 in its November 29, 2016, Standing Order, as well as with any other conditions on the attached page (if applicable).

DEFENDANT: PATRICK ANDREW GROVES  
CASE NUMBER: 5:20CR18Judgment—Page 4 of 7**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 shall not commit another federal, state or local crime.
4. You shall not unlawfully possess a controlled substance. You shall refrain from any unlawful use of a controlled substance. You shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the probation officer.
5. 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.
6. You must answer truthfully the questions asked by your probation officer.
7. 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.
8. 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.
9. 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.
10. 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.
11. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
12. 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).
13. 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.
14. 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.
15. You shall not purchase, possess or consume any organic or synthetic intoxicants, including bath salts, synthetic cannabinoids or other designer stimulants.
16. You shall not frequent places that sell or distribute synthetic cannabinoids or other designer stimulants.
17. Upon reasonable suspicion by the probation officer, you shall submit your person, property, house, residence, vehicle, papers, computers, or other electronic communications or data storage devices or media, or office, to a search conducted by a United States Probation Officer. Failure to submit to a search may be grounds for revocation of release. You shall warn any other occupants that the premises may be subject to searches pursuant to this condition.
18. You are prohibited from possessing a potentially vicious or dangerous animal or residing with anyone who possesses a potentially vicious or dangerous animal. The probation officer has sole authority to determine what animals are considered to be potentially vicious or dangerous.
19. 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](http://www.uscourts.gov).

Defendant's Signature \_\_\_\_\_

Date \_\_\_\_\_

DEFENDANT: PATRICK ANDREW GROVES  
CASE NUMBER: 5:20CR18

**SPECIAL CONDITIONS OF SUPERVISION**

- 1) You must participate in a substance abuse treatment program. The probation officer will supervise your participation in the program (provider, location, modality, duration, intensity, etc.).
- 2) You must not use or possess any controlled substances without a valid prescription. If you do have a valid prescription, you must disclose the prescription information to the probation officer and follow the instructions on the prescription.
- 3) You must submit to substance abuse testing to determine if you have used a prohibited substance. You must not attempt to obstruct or tamper with the testing methods.
- 4) You must participate in a mental health treatment program and follow the rules and regulations of that program. The probation officer, in consultation with the treatment provider, will supervise your participation in the program (provider, location, modality, duration, intensity, etc.).
- 5) You must take all mental health medications that are prescribed by your treating physician.
- 6) You must comply with the Northern District of West Virginia Offender Employment Program which may include participation in training, counseling, and/or daily job search as directed by the probation officer. Unless excused for legitimate reasons, if not in compliance with the condition of supervision requiring full-time employment at a lawful occupation, you may be required to perform up to 20 hours of community service per week until employed, as approved by the probation officer.

DEFENDANT: PATRICK ANDREW GROVES  
CASE NUMBER: 5:20CR18

## CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

<u>Assessment</u>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA Assessment*</u>	<u>JVTA Assessment**</u>
<b>TOTALS</b>	\$ 100.00	\$	\$	\$

- The determination of restitution is deferred until \_\_\_\_\_. An *Amended Judgment in a Criminal Case (AO 245C)* 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.

The victim's recovery is limited to the amount of their loss and the defendant's liability for restitution ceases if and when the victim receives full restitution.

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

- See Statement of Reasons for Victim Information
  - 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:

<sup>\*</sup>Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

<sup>\*\*</sup> 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.

DEFENDANT: PATRICK ANDREW GROVES  
CASE NUMBER: 5:20CR18**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 \$ 100 due immediately, balance due  
 not later than \_\_\_\_\_, or  
 in accordance with  C  D,  E,  F, or  G below; or
- B  Payment to begin immediately (may be combined with  C,  D,  F, or  G 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:  
 Financial obligations ordered are to be paid while the defendant is incarcerated, and if payment is not completed during incarceration, it is to be completed by the end of the term of supervised release; or
- G  Special instructions regarding the payment of criminal monetary penalties:  
 The defendant shall immediately begin making restitution and/or fine payments of \$ \_\_\_\_\_ per month, due on the first of each month. These payments shall be made during incarceration, and if necessary, during supervised release.

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 Clerk, U. S. District Court, Northern District of West Virginia, P.O. Box 1518, Elkins, WV 26241.

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) fine principal, (6) fine interest (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

FILED: May 12, 2023

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

---

No. 22-4095  
(5:20-cr-00018-JPB-JPM-1)

---

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

PATRICK ANDREW GROVES

Defendant - Appellant

---

O R D E R

---

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk