UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-7702

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DERICK FALLIN, a/k/a Black,

Defendant - Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Richard D. Bennett, Senior District Judge. (1:11-cr-00353-RDB-1; 1:20-cv-01348-RDB)

Argued: May 4, 2022 Decided: July 14, 2022

Before GREGORY, Chief Judge, and MOTZ and WYNN, Circuit Judges.

Affirmed by unpublished opinion. Chief Judge Gregory wrote the opinion, in which Judge Motz and Judge Wynn joined.

ARGUED: Shawn Hogbin, WEST VIRGINIA UNIVERSITY COLLEGE OF LAW, Morgantown, West Virginia, for Appellant. Jonathan Scott Tsuei, OFFICE OF THE UNITED STATES ATTORNEY, Greenbelt, Maryland, for Appellee. **ON BRIEF:** Lawrence D. Rosenberg, Washington, D.C., Stephen C. Scott, JONES DAY, Pittsburgh, Pennsylvania, for Appellant. Erek L. Barron, United States Attorney, Baltimore, Maryland, David I. Salem, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Greenbelt, Maryland, for Appellee.

GREGORY, Chief Judge:

Derick Fallin challenges his designation as a career criminal offender on the theory that *United States v. Davis*, 139 S. Ct. 2319 (2019), invalidated the residual clause of the United States Sentencing Guidelines (U.S.S.G) ("Sentencing Guidelines"), § 4B1.2(a)(2). Because the Supreme Court, in *Beckles v. United States*, 137 S. Ct. 886 (2017), held that § 4B1.2(a)(2) is not subject to a same constitutional Due Process Clause challenge as the one raised in *Davis*, Fallin's argument is foreclosed. Moreover, because Fallin has not articulated an alternative basis for challenging the constitutionality of the § 4B1.2(a)(2)'s residual clause, his petition is denied. Accordingly, the district court's judgment is affirmed.

I.

From the mid-1990s until the late-2000s, Fallin, along with his co-conspirators, operated a large drug trafficking organization which distributed large quantities of heroin, cocaine, and marijuana. In 2008, Fallin learned that Wayne England and Calvin Sanders robbed approximately $250,000 from one of Fallin's stash houses. As a result, Fallin conspired to murder England and Sanders and placed bounties on them. Though members of Fallin's drug organization tried to kill England and Sanders, they failed. Later, police officers discovered that one of the victims was found to be shot fifteen times but survived.

On June 28, 2011, Fallin was named in an eleven-count indictment charging him with multiple drug, racketeering, and conspiracy offenses. On May 22, 2012, Fallin pled guilty to Conspiracy to Participate in Racketeering Enterprise, in violation of 18 U.S.C.

§ 1962(d) (Count One), and Conspiracy to Commit Murder, in violation of 18 U.S.C. § 1959 (a)(5) (Count Two). On August 20, 2012, the district court designated Fallin a career offender and calculated his final offense level as 36 and criminal history of VI. Fallin's advisory Sentencing Guideline range was 324 to 405 months. In all, the district court sentenced Fallin to a total term of 180 months' imprisonment, consisting of 180 months on Count One and 120 months on Count Two, to run concurrently. Fallin did not directly appeal his sentence.

Later, Fallin filed several Motions to Vacate under 28 U.S.C. § 2255, but they were all voluntarily withdrawn or dismissed.[1] Most recently, and at issue in this appeal, on June 1, 2020, Fallin filed a § 2255 motion alleging that (1) his designation as a career offender was improper because his conspiracy offenses no longer qualify as "crimes of violence" or "controlled substance offenses" in light of *Davis*, and (2) that the district court erred in calculating his points-based criminal history score and category in light of the "Recency 2 pt. provision being removed and the career offender status being invalidate[d]." J.A. 106–10. On October 26, 2020, the district court denied Fallin's motion on grounds that *Davis* does not impact Fallin's convictions because his career offender designation "is not subject to the Due Process vagueness challenge he advances." J.A. 130.

[1] Fallin filed his first § 2255 motion on August 9, 2013, which he voluntarily withdrew. *See* J.A. 72–79. Then, Fallin filed another § 2255 motion on June 15, 2016, which he also voluntarily dismissed. *See* J.A. 80–83. On October 17, 2017, this Court denied Fallin's motion for authorization to file a second or successive § 2255 motion because Fallin's prior motions to vacate under § 2255 were dismissed without prejudice. J.A. 7. So, on November 13, 2017, Fallin filed a third § 2255 motion, J.A. 84–97, which was voluntarily dismissed again.

Fallin timely appealed and we review the district court's denial of his § 2255 motion *de novo*. *United States v. Jones*, 914 F. 3d. 893, 899 (4th Cir. 2019).[2]

II.

We begin with a discussion of the residual clauses found in the Sentencing Guidelines and those in the in the criminal code, which the Supreme Court has invalidated.

Pursuant to U.S.S.G. § 4B1.1 (the "Career Offender Guideline"), a defendant is a career offender if:

> (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

U.S.S.G. § 4B1.1. At the time that Fallin was sentenced in 2012, "crime of violence" was defined as:

> any offense under federal or state law, punishable by imprisonment for a term exceeding one year that—
> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
> (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another.*

U.S.S.G. § 4B1.2(a) (2012) (emphasis added). The clause beginning with "or otherwise" is known as the residual clause.

[2] Fallin § 2255's motion is timely. Since he withdrew or voluntarily dismissed his previous § 2255 motions, the present § 2255 motion is his first. Because Fallin's § 2255 motion is premised on the *Davis* decision, decided on June 24, 2019, and because he filed his motion on June 19, 2020, his motion is timely. Also, the government waived any challenge to the timeliness of Fallin's § 2255 motion.

The Armed Career Criminal Act of 1984 ("ACCA") also contains a similarly worded residual clause and applies a fifteen-year mandatory minimum sentence for a defendant convicted of possession of a firearm after three prior convictions "for a violent felony or a serious drug offense or both." 18 U.S.C. § 924(e)(1). The ACCA defined a violent felony as:

> any crime punishable by imprisonment for a term exceeding one year [. . .] that—
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another [the "force clause"]; or
> (ii) is burglary, arson, or extortion, involves use of explosives, [the "enumerated clause"] *or otherwise involves conduct that presents a serious potential risk of physical injury to another* [the "residual clause"].

18 U.S.C. § 924(e)(2)(B) (emphasis added). On June 26, 2015, the Supreme Court held that "imposing an increased sentence under the residual clause of the [ACCA] violates the Constitution's guarantee of due process." *United States v. Johnson*, 576 U.S. 591, 606 (2015). The Supreme Court reasoned that § 924(e)(2)(B) required judges to imagine the kind of conduct that would qualify under the residual clause in a typical case. *Id.* at 597. This process, however, was untethered to actual elements or facts of the defendant's case and lead to unpredictable results. Accordingly, the residual clause violated the Due Process Clause which prohibits the government from "taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Id.*

Then, in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), the Supreme Court also invalidated the similarly worded residual clause found in 18 U.S.C. § 16 because it was unconstitutionally vague as it required judges to use a categorical approach that obligated

them to "'imagine' an 'idealized ordinary case of the crime'—or otherwise put, the court had to identify the 'kind of conduct the ordinary case of a crime involves.'" *Dimaya*, 138 S. Ct. at 1213–14 (quoting *Johnson*, 576 U.S. at 597 (reasoning that the residual clause was unconstitutionally vague because it "ties the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements.")).[3] As noted by the Supreme Court in *Johnson*, and adopted by *Dimaya*, these residual clauses required judges to use a categorical approach that "combin[ed] indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, [which, thus…] produce[s] more unpredictability and arbitrariness than the Due Process Clause tolerates." *Johnson*, 576 U.S. at 598. Such "unpredictability and arbitrariness," implicates the "twin constitutional pillars of due process and separation of powers." *Davis*, 139 S. Ct. at 2325.

After *Johnson* and *Dimaya*, we held that a similarly worded residual clause in § 924(c)(3)(B) was also unconstitutionally vague and violated the Due Process Clause. *United States v. Simms*, 914 F.3d 229, 236 (4th Cir. 2019). Then, in *United States v. Davis*, the Supreme Court, agreed with *Simms*, and held that the similarly worded residual clause of § 924(c)(3)(B) was unconstitutionally vague. 139 S. Ct. at 2336. Consistent with *Johnson* and *Dimaya*, *Davis* clarified that the residual clause in § 924(c)(3)(B) was also unconstitutionally vague because it required judges to use a categorical approach to

[3] *Dimaya* held that *Johnson* also rendered the residual clause contained in 18 U.S.C. § 16(b)'s definition of a "crime of violence" unconstitutionally vague. Following *Johnson* and *Davis*, we clarified that "the new rule in *Davis* applies retroactively to cases on collateral review." *In re Thomas*, 988 F.3d 783, 789 (4th Cir. 2021).

determine whether a petitioner's offense qualified as a violent felony or crime of violence. *See Davis*, 139 S. Ct. at 2329. To save § 924(c)(3)(B)'s residual clause from being stricken down as unconstitutionally vague, the Government offered a case-specific approach that asked judges to examine the defendant's actual conduct in the predicate offense. However, the Supreme Court rejected this approach because § 924(c)(3)(B)'s residual clause was "nearly identical" to the one found in § 924(e)(2)(B) and § 16(b), which *Johnson* and *Dimaya* found as unconstitutionally vague because it undoubtably required courts to use a categorical approach. *Davis*, 139 S. Ct. at 2327. Moreover, § 924(c)(3)(B) language and legislative history evidenced that Congress mandated judges to use the same categorical approach which was problematic in *Johnson* and *Dimaya*.

III.

A.

Fallin first argues that because *Davis* held that the residual clause in § 924(c)(3)(B) raised concerns of "constitutional dimension," 139 S. Ct. at 2327, the similarly worded residual clause in § 4B1.2(a)(2) (2012) is also unconstitutional and, thus, "was always invalid at the time of his sentence," *see* Opening Br. at 18–19. Accordingly, Fallin argues that he is entitled to § 2255 relief because the district court "extraordinar[ily] mis[applied]" the Career Offender Guideline in his case. Opening Br. at 23–24 (citing *United States v. Newbold*, 791 F.3d 455, 459 (4th Cir. 2015)).

In denying Fallin's § 2255 motion, the district court reasoned that *Davis* was not applicable "because [Fallin] was neither charged with, nor convicted of, a § 924(c) offense,

and because [the] career offender designations are not subject to vagueness challenges." J.A. 130. Furthermore, the district court reasoned that the Supreme Court, in *Beckles* clarified that a Due Process Clause vagueness challenge could not be brought against the residual clause in § 4B1.2(a)(2). J.A. 116–17. Following *Beckles*, we also held that the Supreme Court foreclosed any Due Process Clause vagueness challenge to a defendant's Career Offender Guideline designation based on the residual clause. *See United States v. Davis*, 684 F. App'x 317, 318–19 (4th Cir. 2017) (unpublished, *per curiam*); *see also United States v. Brown*, 868 F.3d 297, 304 (4th Cir. 2017) (holding that, pursuant to *Beckles*, *Johnson* did not create a right allowing petitioner to challenge the residual clause in the Sentencing Guidelines and, so, petitioner's habeas petition was untimely).

Here, Fallin critically misreads *Davis*. Namely, neither *Davis* nor *Johnson* extend as far as Fallin would like because he was not convicted under §§ 924(e), (c)(3)(B), or 16(b), and the Supreme Court has not invalidated the residual clause of the Sentencing Guidelines. On the contrary, in *Beckles*, the Supreme Court held that, unlike *Johnson*, "[t]he residual clause in § 4B1.2(a)(2) [] is not void for vagueness." *Beckles*, 137 S. Ct. at 892. In *Beckles*, the petitioner made a similar argument as Fallin does here. *Id.* at 891–92. In response, the Supreme Court explained that it "has invalidated two kinds of criminal laws as 'void for vagueness': laws that *define* criminal offenses and laws that *fix the permissible sentences* for criminal offenses." *Beckles*, 137 S. Ct. at 892 (emphasis in original). Thus, *Beckles* distinguished between the Sentencing Guidelines which "do not fix the permissible range of sentences," *id.* at 892, with § 924(c)(3)(B) which statutorily determines a sentencing minimum and range that would deprive the petitioner of their liberty in violation of the Due

Process Clause. That is, because the Sentencing Guidelines "merely guide the district courts' discretion[,] [they] . . . are not amenable to a vagueness challenge" as they "do not implicate the twin concerns underlying [the] vagueness doctrine—providing notice and preventing arbitrary enforcement." *Beckles*, 137 S. Ct. at 894. Following *Beckles*, we rejected a similar argument that Fallin makes today. *See United States v. Mack*, 855 F.3d 581, 584–85 (4th Cir. 2017) (rejecting petitioner's argument that because *Johnson* held that the residual clause in § 924(e)(2)(B)(ii) was unconstitutionally vague, the Sentencing Guidelines similarly worded residual clause in § 4B1.2(a)(2) is also vague).

Fallin tries to sidestep *Beckles* by recasting *Davis* as standing for the proposition that "an erroneous Guidelines classification *is* comparable to a violation of a statute or constitutional provision" and that "*Davis* created the blueprint for defendants to assert residual clause challenges based on violations of constitutional dimensions." Opening Br. at 26–28 (emphasis in original). Fallin's understanding of *Davis* misses the mark. As noted above, the Supreme Court held that the residual clause in § 924(e)(2)(B) was unconstitutionally vague because it required that judges conduct a categorical analysis which generated unpredictable and arbitrary outcomes that contravened the Due Process Clause. However, *Davis* does not stand for the proposition that all residual clauses, specifically those in the Sentencing Guidelines, are subject to the same constitutional

defect. Indeed, *Beckles* clarified that *Johnson*, and by extension *Davis*, cannot be used to invalidate § 4B1.2(a)(2)'s residual clause on the same grounds.[4]

At best, Fallin cites to one district court which held "that a straightforward application of *Johnson* dictates that a sentence enhanced under §§ 4B1.1 and 4B1.2(a)(2) of the career-offender guideline during the pre-*Booker* period when the Guidelines were mandatory, violates the Due Process clause." *United States v. Meadows*, 394 F. Supp. 3d 674, 679 (W.D. Tex. 2019). However, *Meadows* applied *Johnson*'s reasoning to a defendant who was sentenced before *Booker*, when the guidelines included a provision that made them mandatory and, thus, implicated the due process concerns articulated by the Supreme Court in *Johnson*. *See United States v. Booker*, 543 U.S. 220, 233 (2005) (recognizing that "[t]he Guidelines as written, however, are not advisory; they are mandatory and binding on all judges" and striking the provision making the Guidelines mandatory). In her concurrence, Justice Sotomayor noted that the majority in *Beckles* "at

[4] On August 1, 2016, the Sentencing Commission removed the residual clause at § 4B1.2(a)(2) and cited to the Supreme Court's decision in *United States v. Johnson*, 576 U.S. 591 (2015). *See* U.S.S.G. amendment 798 (eff. Aug. 1, 2016) (stating that "[t]he Commission determined that the residual clause at § 4B1.2 implicates many of the same concerns cited by the Supreme Court in *Johnson*, and, as a matter of policy, amends § 4B1.2(a)(2) to strike the clause."). As noted by the Sentencing Commission, following *Johnson* some sister circuits found that the residual clause in § 4B1.2(a)(2) was unconstitutional for vagueness. *See, e.g.*, *United States v. Townsend*, 638 F. App'x 172, 177–78 (3d Cir. 2015); *United States v. Harbin*, 610 F. App'x 562 (6th Cir. 2015); *United States v. Taylor*, 803 F.3d 931 (8th Cir. 2015); *United States v. Madrid*, 805 F.3d 1204, 1211 (10th Cir. 2015). On the other hand, other sister circuits found that *Johnson* was inapplicable to the § 4B1.2(a)(2). Then, *Beckles* settled this circuit split and agreed with our sister circuits that a vagueness challenge could not be brought against § 4B1.2(a)(2). *See United States v. Wilson*, 622 F. App'x 393, 405 (5th Cir. 2015); *United States v. Matchett*, 802 F.3d 1185 (11th Cir. 2015).

least leaves open the question whether defendants sentenced ... during the period in which the Guidelines *did* fix the permissible range of sentences ... may mount vagueness attacks on their sentences." *Beckles*, 137 S. Ct. at 903 n.4 (Sotomayor, J., concurring in the judgment); *see also Brown*, 868 F.3d at 309–11 (Gregory, C.J., dissenting and noting that because the pre-*Booker* mandatory Sentencing Guidelines' identically worded residual clause fixed the sentences for defendants, this residual clause would also violate the due process clause under *Johnson*); *Moore v. United States*, 871 F.3d 72, 83 (1st Cir. 2017) (recognizing that "[w]hat *Beckles* left open ... was a question of statutory interpretation concerning how mandatory the [Sentencing Reform Act] made the guidelines before *Booker*.").[5]

Still, Fallin asks us to bypass the Supreme Court by arguing that *Beckles* does not "render the advisory Guidelines immune from constitutional scrutiny altogether." Reply Br. at 5. While this is true, Fallin has not advanced any non-Due Process Clause constitutional

[5] Several sister circuits have concluded similarly as this court did in *Brown*, 868 F.3d 297. *See Nunez v. United States*, 954 F.3d 465 (2d Cir. 2020); *United States v. Green*, 898 F.3d 315 (3d Cir. 2018); *United States v. London*, 937 F.3d 502 (5th Cir. 2019); *Raybon v. United States*, 867 F.3d 625 (6th Cir. 2017); *Russo v. United States*, 902 F.3d 880 (8th Cir. 2018); *United States v. Blackstone*, 903 F.3d 1020 (9th Cir. 2018); *United States v. Greer*, 881 F.3d 1241, 1248 (10th Cir. 2018). However, other sister circuits have held that *Beckles* may not foreclose a challenge to the Sentencing Guidelines' residual clause for pre-*Booker* defendants. *See Shea v. United States*, 976 F.3d 63, 69 (1st Cir. 2020) (concluding that "*Johnson* establishes beyond reasonable debate that the pre-*Booker* Guidelines' residual clause was too vague to constitutionally enhance a defendant's sentence"); *Cross v. United States*, 892 F.3d 288, 304 (7th Cir. 2018) ("We take the Court at its word: the *Beckles* opinion applies only to the guidelines as they have been since 2005, not to the pre-*Booker* mandatory regime."); *United States v. Arrington*, 4 F.4th 162, 171 (D.C. Cir. 2021) (remanding for the district court to consider whether a pre-*Booker* Sentencing Guideline residual clause is invalidated by *Johnson*).

challenges. On the contrary, in his reply brief, Fallin maintains that the "heart of [his] argument[], is that his improper career-offender designation raises 'a fundamental defect of constitutional dimensions' under *Davis*." Reply Br. at 6. Again, Fallin has not clarified what constitutional grounds he hinges his argument on other than those articulated in *Davis*.[6] Though it is possible that the Supreme Court may invalidate the residual clause in the pre-2016 Sentencing Guidelines, we are not there today, and, thus, we are bound by *Beckles*.

Because the timeliness of Fallin's § 2255 petition was premised on the applicability of *Davis* to his case, his habeas petition no longer meets the gatekeeping requirements of 28 U.S.C. § 2255(f)(3), and is, thus, untimely. *In re Jones*, 226 F.3d 328, 333–34 (4th Cir. 2000). Still, for the sake of completeness, we will examine Fallin's remaining argument that he raised on appeal.[7]

B.

Second, Fallin argues that the district court failed to employ the categorical approach to determine whether his previous offenses qualified as crimes of violence for

[6] Indeed, he clarifies he "is challenging his career-offender designation that was *always* incorrect, *because the residual clause at issue violated [his] due process rights as clarified by Davis*, and his conspiracy offenses are not crimes of violence as made clear when analyzed under the traditional categorical approach." Reply Br. at 11 (emphasis added).

[7] For the first time on appeal, Fallin argues that his 1980 bank robbery conviction was "*never* a prior felony offense that could be at play for his career-offender designation [because] [h]e finished his sentence in 1994 [and] [t]hat 18-year time difference between the completion of his bank robbery incarceration and his [2012] guilty plea precludes consideration of his bank robbery offense as one of his two prior felonies." Opening Br. at 19–20. We need not consider this argument because it was waived as it was not raised on direct appeal, and he has not shown any changes in law or fact that prevented him from raising it on direct appeal. *See* 28 U.S.C. § 2255(f).

purposes of the career offender enhancement. J.A. 98–102. Accordingly, he argues that had the district court applied the categorical approach, it would have determined that his career offender designation "was *always* invalid at the time of his sentence" because his RICO and murder conspiracy convictions, under §§ 1962(d) and 1959(a)(5), "were never crimes of violence." Opening. Br. at 19 (emphasis in original). Thus, Fallin argues that his designation as a career offender is a miscarriage of justice. J.A. 109; *see also* Reply Br. at 2.

It is well-established that district courts must employ a categorical approach to determine whether a conviction qualifies as a predicate offense under the Sentencing Guidelines. *United States v. Seay*, 553 F.3d 732, 737 (4th Cir. 2009); *see also United States v. Mack*, 855 F.3d 581, 585–86 (4th Cir. 2017) (clarifying that courts must first establish the "generic" definition of the Guidelines-enumerated offense, from prior cases [. . . and,] [t]hen [] decide whether the state offense is a "categorical match" to the generic offense"); *United States v. Mathis*, 932 F.3d 242, 264–67 (4th Cir. 2019) (applying the categorical approach to determine whether two violent crimes in aid of racketeering [VICAR] offenses predicated on violations of Virginia law qualified as crimes of violence under § 924(c)'s force clause).

In *McCollum*, we applied the categorical approach and held that for purposes of the career offender enhancement in § 4B1.2(a)(2), "§ 1959(a)(5) is not categorically a crime of violence because conspiracy under that provision is, in fact, broader than generic conspiracy, and precedent directs that we consider the inchoate crime of conspiracy and its object independently." *United States v. McCollum*, 885 F.3d 300, 303 (4th Cir. 2018).

Specifically, we clarified that because § 1959(a)(5) does not require an overt act, and conspiracy under the Sentencing Guidelines does require an overt act, conspiracy under § 1959(a) was categorically broader than generic conspiracy. *Id.*

Similarly, in *Simmons*, we held that "a RICO conspiracy [under § 1962(d)], even when denominated as 'aggravated,' does not categorically qualify as a 'crime of violence'" under the force clause of § 924(c)(3). *United States v. Simmons*, 11 F.4th 239, 248 (4th Cir. 2021). *Simmons* determined that because an aggravated RICO conspiracy offense can be completed "without using, attempting to use, or threatening to use physical force, [] an aggravated RICO conspiracy is not categorically a crime of violence." *Id.* at 260.

Even if Fallin is correct that his conspiracy convictions no longer qualify as crimes of violence for purposes of the Career Offender Guideline, to correct this sentencing error, Fallin must establish that his sentencing error amounts to "a fundamental defect which inherently results in a complete miscarriage of justice." *Davis v. United States*, 417 U.S. 333, 343 (1974). As we held in *United States v. Foote*, 784 F.3d 931 (4th Cir. 2015), a career-offender enhancement that is later invalidated by case law is not a miscarriage of justice because it "would be remiss to place an erroneous Guidelines classification under an advisory scheme in the same category as violation of a statute or constitutional provision." *Id.* at 942; *see also United States v. Mikalajunas*, 186 F.3d 490, 495 (4th Cir. 1999) (holding that "misapplication of the sentencing guidelines does not amount to a miscarriage of justice."). In *Foote*, this court held that we would not correct the district court's misapplication of the career offender guideline because (1) the challenge involved no claim of actual innocence, (2) the Guidelines are advisory, (3) district courts are free to

deviate from Guideline enhancements, and (4) Foote's sentence did not exceed the statutory maximum. *Foote*, 784 F.3d at 940–41.

Fallin argues that *Foote* is inapplicable because the Supreme Court in *Johnson* and *Davis* invalidated the residual clause in § 924(c)(3) as unconstitutional, and thus, the district court's sentencing error amounts to a fundamental miscarriage of justice that this court must correct. As mentioned above, Fallin's constitutional argument is foreclosed by *Beckles*. Moreover, there is no alternative constitutional challenge that Fallin has articulated to invalidate the Sentencing Guidelines' residual clause.

On the contrary, Fallin's case falls squarely in *Foote*'s limitations. Here, the district court sentenced Fallin to a below-guideline range of 180 months—well outside his advisory guideline range of 324 to 405 months. So, even if the district court erred by not applying the categorical approach, there is no "miscarriage of justice" because the district court did not follow the guidelines. Even more, and as noted by the district court, if Fallin were not designated a career offender, he would now receive a criminal history of IV, instead of VI, and his advisory guideline range would now be 262 to 327 months, which is still more than the 180-month sentence that he received. *See* J.A. 131.

IV.

For the foregoing reasons, the district court's judgment is

AFFIRMED.