No. 20-_____

SUPREME COURT OF THE UNITED STATES

Kevin Dean Green,

Petitioner,

vs.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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I. Question Presented

Does *Beckles v. United States*, — U.S. —, 137 S. Ct. 886 (2017) foreclose a vagueness challenge to a sentencing guideline when the operative term in that guideline is defined by a criminal statute, which *is* subject to a vagueness challenge?

II. Parties to the Proceedings

All parties appear in the caption on the cover page.

III. Table of Contents

IV. Table of Authorities

Cases

Statutes and Rules

U.S.S.G. Provisions

Other Authorities

V. Petition for Writ of Certiorari

Kevin Dean Green, an inmate currently incarcerated at FCI Pekin in Pekin, IL, by and through Nate Nieman, appointed CJA counsel, respectfully petitions this Court for a writ of certiorari to review the judgment of the Eighth Circuit Court of Appeals.

VI. Opinion Below

A final sentencing judgment was entered in the Southern District of Iowa in 3:17-cr-00104 (*United States v. Green*) on February 7, 2019. That judgment was affirmed on appeal. The opinion of the United States Court of Appeals for the Eighth Circuit affirming the District Court's judgment is reported at *United States v. Green*, 954 F.3d 1119 (8th Cir. 2020), and is reproduced in the appendix to this petition at Pet. App. ("App.") at 1-9. Green did not file a petition for rehearing.

VII. Jurisdiction

The United States District Court had jurisdiction over Green's federal criminal prosecution pursuant to 18 U.S.C. § 3231 ("The district courts of the United States shall have original jurisdiction . . . of all offenses against the laws of the United States." Green filed a timely notice of appeal on February 24, 2019 from the judgment formally entered on February 7, 2019. *See* Fed. R. App. P. 4(b)(1)(A)(i). The Eighth Circuit Court of Appeals had jurisdiction of Green's appeal pursuant to 28 U.S.C. § 1291 (The courts of appeals ". . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ").

The District Court's judgment was affirmed on direct appeal on April 2, 2020. Mr. Green invokes this Court's jurisdiction under 28 U.S.C. §1254(1). Furthermore, this petition is timely filed. Under U.S. Supreme Court Rule 13, "Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States court of appeals (including the United States Court of Appeals for the Armed Forces) is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment," making the original due date for the petition July 1, 2020.

However, due to coronavirus disruptions, the Court entered an order on March 19, 2020 extending the time for filing a petition for certiorari to "150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing." *See* App. at 10-11. Accordingly, Green's petition for certiorari is due in this Court on August 30, 2020. Where this petition has been filed before that date, it is timely.

VIII. United States Sentencing Guideline Provisions Involved

U.S.S.G. § 2G2.2(b)(6):

> If the offense involved the use of a computer or an interactive computer service for the possession, transmission, receipt, or distribution of the material, or for accessing with intent to view the material, increase by 2 levels.

IX. Statement of the Case

Green argued on direct appeal that the district court erred by applying the "use of computer" enhancement under U.S.S.G. § 2G2.2(b)(6) where the term "computer" is void for vagueness. The Eighth Circuit Court of Appeals disagreed, and Green

respectfully requests this Court to grant this petition and overturn the Eighth Circuit's decision.

1. District Court proceedings.

Green was charged by criminal complaint with receiving and possessing child pornography on October 31, 2017. (DCD 1, p. 1)[1]. The complaint was replaced by an indictment charging Green with receipt of child pornography in violation of 18 U.S.C. §§ 2252(a)(2) and 2252(b)(1) (count 1) and possession of child pornography, in violation of 18 U.S.C. §§ 2252(a)(4)(B) and 2252(b)(2) (count 2) on November 14, 2017. (DCD 17, pp. 1-2). Green filed a "motion to dismiss count two," (DCD 35), and a "motion to suppress evidence and statement and request for evidentiary hearing," (DCD 37), on May 29, 2018. The Government filed responses to both motions on June 7, 2018. (DCD 45; DCD 46).

The district court, without a hearing, denied Green's motion to dismiss count two in an order filed on August 3, 2018. (DCD 55). The court entered an order on August 21, 2018 denying Green's motion to suppress "to the extent that the defendant challenges the issuance of the search warrant by Judge Jackson on July 21, 2017." (DCD 56, pp. 6-7). The court further ordered that "Matters requiring an evidentiary hearing will be held, as scheduled, on August 23, 2018. (DCD 56, p. 7).

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[1] In this brief, the following abbreviations will be used:

"DCD" — district court clerk's record, followed by docket entry and page number, where noted;
"Plea Tr." — Plea transcript, followed by page number;
"MTS Tr." — Hearing on motion to suppress, followed by page number;
"Sent. Tr." — Sentencing hearing transcript, followed by page number;

An evidentiary hearing was held on Green's motion to suppress on August 23, 2018. (MTS Tr. at 1). The court denied Green's motion to suppress. (MTS Tr. at 27). Green then entered into a partially negotiated plea agreement with the Government on September 19, 2018. (DCD 67; Plea Tr. at 22-23). The plea agreement required Green to plead guilty to count 1 in exchange for the Government dismissing count 2. (DCD 67, p. 1). No agreement was reached as to any guideline issues. *See* (DCD 67, pp. 6-7). Green pled guilty to count 1, (Plea Tr. at 37), and the magistrate court recommended that Green's guilty plea be accepted. (DCD 68). The district court entered an order on October 4, 2018 accepting the magistrate court's recommendation and accepting Green's guilty plea to count 1 of the indictment. (DCD 70, p. 2).

The initial presentence report (PSR) was filed on November 16, 2018. (DCD 71). The initial PSR calculated Green's case offense level at 22 under U.S.S.G. § 2G2.2(a)(2). (DCD 71, p. 12). Two points were added to Green's base offense level under U.S.S.G. § 2G2.2(b)(2) because the material involved a minor under the age of 12. (DCD 71, p. 12). Four points were added under U.S.S.G. § 2G2.2(b)(4) because the material involved sadistic or masochistic conduct or other depictions of violence. (DCD 71, p. 12). Two points were added under U.S.S.G. §2 G2.2(b)(6) because the offense "involved the use of a computer or an interactive computer service for the possession, transmission, receipt, or distribution of the material or for accessing with intent to view the material." (DCD 71, p. 12). Four points were added under U.S.S.G. § 2G2.2(b)(7)(C) because the offense involved between 300 and 600 images. (DCD 71, p. 13). Two points were subtracted under U.S.S.G. § 2G2.2(b)(1) because the offense

was limited to receipt of the material. (DCD 71, p. 12). Green received a three-point reduction for acceptance of responsibility. (DCD 71, p. 13). Probation calculated Green's total offense level at 29. (DCD 71, p. 13). With a criminal history category of III, (DCD 71, p. 15), Probation calculated Green's guideline range at 108 to 135 months. (DCD 71, p. 24).

Green filed a written objection to the PSR on November 28, 2018, (DCD 72), objecting to the two-point enhancement for "use of computer" under U.S.S.G. §2G2.2(b)(6). *See* (DCD 72, pp. 1-4). The Government did not object to the PSR. *See* (DCD 73). The final PSR was filed on January 28, 2019. (DCD 77). Probation's initial guideline calculation remained unchanged. (DCD 77, pp. 13-14; 25). Green filed a sentencing memorandum maintaining his objections to Probation's guideline determination on February 2, 2019. (DCD 79. pp. 2-8). The Government filed a sentencing memorandum regarding its position on this issue on January 31, 2019. (DCD 78).

Sentencing occurred on February 7, 2019. (Sent. Tr. at 1). The court found that the cell phone on which the child pornography was located was,

> a Samsung Galaxy Note5 cell phone. Like all modern smart phones, it has access to the Internet, storage capability, and computer functions. There are a number of pieces of technology today that use computer chips that don't have that ability. That's what causes this to be a computer within the meaning of federal law. I find that it is a computer and that the enhancement applies and that a void for vagueness challenge can't be made under these circumstances. (Sent. Tr. at 5).

The court thereafter determined that Green's guideline range was 108 to 135 months, (Sent. Tr. at 6), as calculated by Probation. (DCD 77, p. 25). The court thereafter

sentenced Green to 120 months on Count 1, to be followed by five years of supervised release, and $27,000 in restitution. *See* (Sent. Tr. 18-19; DCD 82, pp. 2-7). Green filed a timely notice of appeal on February 14, 2019. (DCD 86).

2. Direct Appeal

Green argued three points on appeal: "First, the district court should have suppressed the child-pornography evidence found on his phone. Second, the district court applied an unconstitutionally vague sentencing enhancement, unfairly increasing his recommended prison time. Third, the district court abused its discretion in ordering him to pay $27,000 to the victims of his crimes." *United States v. Green,* 954 F.3d 1119, 1122 (8th Cir. 2020).

As it relates to the U.S.S.G. § 2G2.2(b)(6) enhancement for "use of a computer," the Eighth Circuit Court of Appeals determined that "Green cannot directly challenge the constitutionality of § 2G2.2(b)(6) itself. According to the Supreme Court, 'the Guidelines are not amenable to a vagueness challenge.'" *Id.* (citing *Beckles v. United States,* —— U.S. ——, 137 S. Ct. 886, 894 (2017)). The Court noted that "Green acknowledges as much in his brief. Instead, Green challenges as vague 18 U.S.C. § 1030(e)(1), from which the Guidelines draws its definition of 'computer.'" *Id.* (citing U.S.S.G. § 2G2.2(b)(6) cmt. n.1).

The Court determined that "Green cannot evade *Beckles* by challenging the statute upon which a Guidelines definition is based. The Guidelines are at issue here, not 18 U.S.C. § 1030(e)(1). And we are not about to 'speculate about possible vagueness in hypothetical situations not before the Court.'" *Id.* at 1124 (citations

omitted). The Court ultimately held that "Because the statutory definition *cannot* be unconstitutionally vague as applied to Green — i.e., in a Sentencing-Guidelines context — his vagueness argument necessarily fails." *Id.* (citing *Beckles*, 137 S. Ct. at 894) (emphasis original).

Green petitions this Court for a writ of certiorari to review the judgment of the Eighth Circuit Court of Appeals.

X. REASONS FOR GRANTING THE WRIT

The question presented here is whether *Beckles v. United States*, — U.S. —, 137 S. Ct. 886 (2017) forecloses a vagueness challenge to a sentencing guideline when the operative term in that guideline is defined by a criminal statute, which *is* subject to a vagueness challenge.

Probation assessed a two-point increase in offense level under U.S.S.G. § 2G2.2(b)(6) because it determined that "the offense involved the use of a computer or an interactive computer service for the possession, transmission, receipt, or distribution of the material or for accessing with intent to view the material." (DCD 77, p. 13). Probation cited paragraphs 19 through 25 as the factual basis for this two-point increase. (DCD 77, p. 13). Green objected to his offense level being increased by two levels, (DCD 72, p. 1-5), under U.S.S.G. § 2G2.2(b)(6), which provides that "If the offense involved the use of a computer or an interactive computer service for the possession, transmission, receipt, or distribution of the material, or for accessing with intent to view the material, increase by 2 levels." However, the evidence that Probation cited in paragraphs 19 through 25 do not provide a sufficient factual basis

for this enhancement because a "computer or an interactive computer service" was not used to receive the child pornography that was recovered in this case.

Paragraph 19 of the PSR describes the execution of the search warrant, which resulted in multiples items of digital evidence being seized from 1125 Warren Street in Davenport. (DCD 77, p. 9). These items included "personal computers, tablets, cellular telephones, flash drives, and SD cards." (DCD 77, p. 9). Green identified an LG G6 cell phone as belonging to him. (DCD 77, p. 9). Paragraph 20 of the PSR indicated that "Forensic examination of the digital evidence seized during the search warrant at Green's residence revealed evidence of child pornography activities on two devices: a Compaq Presario desktop computer and the LG G6 cell phone owned and used by Green." (DCD 77, p. 9). However, all child pornography forming the basis of the charges in this case was located on Green's LG G6 cell phone—not his Compaq Presario computer. *See* (DCD 77, p. 9).

The PSR noted that "There were approximately 370 images of child pornography located in Green's cell phone. No child pornography videos were located. However, the child pornography images indicated Green visited child pornography websites that contained video content." (DCD 77, p. 9). The PSR further indicated that "The majority of the child pornography images appeared to be screen shots from websites visited by Green while using the phone, as they captured the names and/or URLs of approximately 37 different websites. The FBI was able to locate some of the websites, but not others." (DCD 77, p. 10). The PSR also noted that "It appeared the Compaq Presario computer was also used to browse the internet for child

pornography as evidenced by visits to the websites whose names suggest underage sexual content...on dates as yet unknown." (DCD 77, p. 10).

However, while it appears that Green's computer was used to view "websites whose names suggest underage content," there is no evidence that Green's Compaq Presario computer was used "for the possession, transmission, receipt, or distribution of the material, or for accessing with intent to view the material." The LG G6 phone was the only device on which actual child pornography was located. (DCD 77, p. 9). There was also no evidence that Green transferred images from his Compaq computer to his LG G6 phone. In fact, the evidence in the PSR suggests that the phone was used to directly download at least two of the images from the Kik phone app. *See* (DCD 77, p. 10).

The cell phone on which the child pornography was located should not be considered a "computer" within the meaning of U.S.S.G. § 2G2.2(b)(6). The application note for U.S.S.G. § 2G2.2(b)(6) states that "'*Computer*' has the meaning given that term in 18 U.S.C. § 1030(e)(1)," which provides that "the term 'computer' means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar device."

The Eighth Circuit has held that "cellular phones are not excluded" by the definition of "computer" found in 18 U.S.C. § 1030(e)(1). *See United States v. Kramer*,

631 F.3d 900, 903 (8th Cir. 2011). However, as the Eighth Circuit noted, the definition of computer in 18 U.S.C. § 1030(e)(1) is "exceedingly broad." *Id.* at 902. Green submits that the definition of "computer" contained in 18 U.S.C. § 1030(e)(1) is so broad as to render this provision of 18 U.S.C. § 1030(e)(1) void for vagueness, thus making it inappropriate to impose this enhancement under U.S.S.G. § 2G2.2(b)(6), which incorporates by reference 18 U.S.C. § 1030(e)(1)'s definition of "computer."

The void-for-vagueness doctrine protects persons by providing "fair notice" of a statute's applicability and by preventing "arbitrary and discriminatory prosecutions" of a statute's enforcement. *United States v. Mabie*, 663 F.3d 322, 333 (8th Cir. 2011) (citing *Skilling v. United States,* 130 S.Ct. 2896, 2933 (2010)). "The vagueness doctrine recognizes that '[a] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.' " *Id.* (citing *United States v. Birbragher,* 603 F.3d 478, 484 (8th Cir.2010), quoting *United States v. Washam,* 312 F.3d 926, 929 (8th Cir.2002)). " 'Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed.' " *Id.*, citing *Washam,* 312 F.3d at 929 (quoting *United States v. Nat'l Dairy Prods. Corp.,* 372 U.S. 29, 32–33 (1963)).

A "computer," as defined by 18 U.S.C. § 1030(e)(1), is "an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or

communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar device." "[C]ommon household items that include microchips and electronic storage devices...will satisfy the statutory definition of 'computer'" under 18 U.S.C. § 1030(e)(1). *Kramer*, 631 F.3d at 902–03 (8th Cir. 2011) (quoting Kerr, Orin S., *Vagueness Challenges to the Computer Fraud and Abuse Act*, 94 Minnesota Law Review 1561, 1577 (2010)).

This would include "coffeemakers, microwave ovens, watches, telephones, children's toys, MP3 players, refrigerators, heating and air-conditioning units, radios, alarm clocks, televisions, and DVD players, in addition to more traditional computers like laptops or desktop computers. Plus, the definition of 'computer' arguably extends to flash drives, CDs, DVDs, and other electronic storage devices, as the definition 'includes any data storage facility . . . directly related to or operating in conjunction with' an 'electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions.' " *Id.*, citing Kerr, *supra* at 1577-78.

Kerr's article, which was cited by the Eighth Circuit in *Kramer*, 631 F.3d at 902, was published in 2010. *Id.* Microchips and storage devices are contained within most common household devices now and will likely be contained in all household devices in the future. The "Internet of Things[2]," which is only made possible by

[2] *See, e.g.*, Neil M. Richards, *The Dangers of Surveillance*, 126 Harv. L. Rev. 1934, 1940 (2013) ("The incentives for the collection and distribution of private data are on the rise. The past fifteen years have seen the rise of an Internet in which personal

imbedding microprocessors and storage devices in even the most pedestrian items like our coffeemakers, has made most "things" in the modern world a "computer" within the meaning of 18 U.S.C. § 1030(e)(1). When the things in our modern world have all become computers, men of common intelligence must necessarily guess at the meaning of the term "computer" and differ as to its application. In such instances, a statute is unconstitutionally vague. *See Mabie*, 663 F.3d at 333.

The Eighth Circuit acknowledged in *Kramer* that "a 'basic' cellular phone might not easily fit within the colloquial definition of 'computer.' " *Kramer*, 631 F.3d at 903. It also acknowledged that it was "bound, however, not by the common understanding of that word, but by the specific—if broad—definition set forth in § 1030(e)(1)." *Id.* The *Kramer* court stated that "it may be that neither the Sentencing Commission nor Congress anticipated that a cellular phone would be included in that definition." *Id.* As technology continues to develop, § 1030(e)(1) may come to capture still additional devices that few industry experts, much less the Commission or Congress, could foresee. *Id.* at 903-04. But to the extent that such a sweeping definition was unintended or is now inappropriate, it is a matter for the Commission or Congress to correct. *Id.* at 904. The *Kramer* court concluded that it "cannot provide relief from plain statutory text." *Id.* (citing *United States v. Mitra*, 405 F.3d 492, 495

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computers and smartphones have been the dominant personal technologies. But the next fifteen will likely herald the 'Internet of Things,' in which networked controls, sensors, and data collectors will be increasingly built into our appliances, cars, electric power grid, and homes, enabling new conveniences but subjecting more and more previously unobservable activity to electronic measurement, observation, and control.").

(7th Cir.2005)) ("As more devices come to have built-in intelligence, the effective scope of [§ 1030(e)(1)] grows. This might prompt Congress to amend the statute but does not authorize the judiciary to give the existing version less coverage than its language portends.").

While it is true that this court "cannot provide relief from plain statutory text," *Kramer*, 631 F.3d at 904, "the greatest deterrent to the enactment of unconstitutional statutes by a legislature is the power of the courts to invalidate such statutes," *Illinois v. Krull*, 480 U.S. 340, 352 (1987), which is what Green asked the Court of Appeals to do. Green was not arguing, as Kramer merely did, "that the district court incorrectly interpreted the term 'computer' to include a 'basic cell phone' being used only to call and text message the victim." *Kramer*, 631 F.3d at 902. Rather, Green asked the Eighth Circuit to extend its finding that "The language of 18 U.S.C. § 1030(e)(1) is exceedingly broad" to hold that the term "computer," as used within 18 U.S.C. § 1030(e)(1), is in fact so broad as to render the statute unconstitutional.

The Government cited *Beckles* for the proposition that "the Guidelines are not subject to a vagueness challenge under the Fifth Amendment Due Process Clause." (DCD 78, p. 3). The Eighth Circuit agreed. See *Green*, 954 F.3d at 1124 ("Green cannot evade *Beckles* by challenging the statute upon which a Guidelines definition is based."). But the Court did not cite any authority as to why Green could not lodge a void-for-vagueness challenge to a term used in the Guidelines that was defined by a criminal statute that would be subject to a void-for-vagueness challenge.

Beckles should not apply in such situations because *Beckles* concerned a vagueness challenge to the "residual clause" of U.S.S.G. § 4B1.2(a), which is self-contained in the guideline. *Id.* at 891. The term "computer" is not defined within U.S.S.G. § 2G2.2(b)(6). Rather, the application note for U.S.S.G. § 2G2.2(b)(6) states that "'*Computer*' has the meaning given that term in 18 U.S.C. § 1030(e)(1)," which is contained in the Computer Fraud and Abuse Act (CFAA).

The CFAA is a statute "defining elements of crimes" and fixing their sentences. *See, generally*, 18 U.S.C.A. § 1030. Therefore, the term "computer" contained with the CFAA is subject to a vagueness challenge, *Johnson v. United States*, 135 S.Ct. 2551, 2556-57 (2015) ("The prohibition in criminal statutes 'is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law,' and a statute that flouts it 'violates the first essential of due process.'...These principles apply not only to statutes defining elements of crimes, but also to statutes fixing sentences...") (internal citations omitted), despite *Beckles*' holding. *Cf. Beckles*, 137 S. Ct. at 892 (2017) ("Unlike the ACCA, however, the advisory Guidelines do not fix the permissible range of sentences.").

The Due Process Clause 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." *Beckles*, 137 S. Ct. 886, 892 (citing *Johnson*, 135 S.Ct., at 2556, citing *Kolender v. Lawson*, 461 U.S. 352, 357–358 (1983)). The Supreme Court 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. *Id.* For the former, the Court has explained that "the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." For the latter, the Supreme Court has explained that "statutes fixing sentences," must specify the range of available sentences with "sufficient clarity." *Id.* (citations omitted).

The Supreme Court held in *Beckles* that "the advisory Guidelines do not fix the permissible range of sentences. To the contrary, they merely guide the exercise of a court's discretion in choosing an appropriate sentence within the statutory range. Accordingly, the Guidelines are not subject to a vagueness challenge under the Due Process Clause." *Id.* This case does not involve a vagueness challenge to the guideline itself—rather, it involves a vagueness challenge to a term used by the guideline that is defined by a statute "defining elements of crimes." The question, then, is whether, notwithstanding *Beckles*' holding, a defendant can challenge a guideline on vagueness grounds if the guideline relies on a term that is defined by a criminal statute.

The *Beckles* court observed that the Guidelines "do not implicate the twin concerns underlying vagueness doctrine—providing notice and preventing arbitrary enforcement." *Id.* at 894. All of the notice required is provided by the applicable statutory range, which establishes the permissible bounds of the court's sentencing discretion. *Beckles*, 137 S. Ct. at 894. The advisory Guidelines also do not implicate the vagueness doctrine's concern with arbitrary enforcement. Laws that "regulate

persons or entities," the Court has explained, must be sufficiently clear such "that those enforcing the law do not act in an arbitrary or discriminatory way." *Id.* (citations omitted).

The prohibition of vagueness in criminal statutes "is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law," and a statute that flouts it "violates the first essential of due process." *Johnson v. United States,* 576 U.S. 591, 595-96 (2015) (citing *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)). These principles apply not only to statutes defining elements of crimes, but also to statutes fixing sentences. *Id.* (citing *United States v. Batchelder*, 442 U.S. 114, 123 (1979)). The *Johnson* court was "convinced that the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges. Increasing a defendant's sentence under the clause denies due process of law." *Id.* at 597.

The same concerns are present in this case that were present in *Johnson*. The indeterminacy of the wide-ranging inquiry required to determine whether a device is a "computer" both denies fair notice to defendants and invites arbitrary enforcement by judges, even though the Guidelines remain advisory. If a defendant's advisory guideline range will be elevated because he or she used a computer to commit the offense conduct in question, that defendant should receive notice of that, just as he should receive notice of a statutory sentencing range. The fair notice concerns that inform the Court's vagueness doctrine are aimed at ensuring that a "'person of

ordinary intelligence [has] a reasonable opportunity to know what is prohibited, so that he may act accordingly.'" *Id.* at 630 (citing *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982), quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)). Accordingly, due process should prevent the District Court from imposing a sentence that was based, at least in part, on consideration of a sentencing guideline that employs a vague term defined by a criminal statute, when such notice would give a defendant "a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Id.* Where the term "computer" is vaguely defined by criminal statute, it also could lead to arbitrary enforcement by judges because the district court would be left to define the term itself.

Beckles should not foreclose a void-for-vagueness challenge to a sentencing guideline when the operative term in that guideline is defined by a criminal statute. Where the Eighth Circuit reached the opposite conclusion, it's opinion should be reversed.

XI. CONCLUSION

For the foregoing reasons, Green respectfully requests that this Court issue a writ of certiorari to review the judgment of the Eighth Circuit Court of Appeals.

Respectfully submitted,

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XII. Appendix