No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

_____

CHAROD BECTON,
Petitioner.

vs.

UNITED STATES OF AMERICA,
Respondent.

_____

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

_____

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

Should this Court abrogate the judicially established *Pinkerton* doctrine, announced in *Pinkerton v. United States,* 328 U.S. 640 (1946), holding that a conspirator can be charged with and convicted of crimes committed by his co-conspirators, if the crimes were committed in furtherance of the conspiracy and were reasonably foreseeable to the conspirator, even though the conspirator did not agree with or participate in the commission of the crime? Does the *Pinkerton* doctrine, which judicially criminalizes an act without any legislative authority making the act a crime, conflict with this Court's holdings in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Alleyne v. United States*, 570 U.S. 99 (2013), teaching that punishment may be imposed only upon a jury finding (or an admission in a guilty plea) that the legislatively established elements or ingredients of a crime have been proven? In the context of Mr. Becton's guilty plea, did the application of the *Pinkerton* doctrine violate the Fifth and Sixth Amendments and the prohibition against judge-made common-law crimes?

List of Parties

All parties to the appeal to the Second Circuit appear in the caption of the case on the cover page. In the district court, there were three co-defendants: Darryl Henderson; Amin Wilson, AKA Amin Idi, AKA IDI, AKA 13; and Naatifah Costello, AKA Natty.

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No. _____

In the

Supreme Court of the United States

October Term, 2020

CHAROD BECTON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

Petitioner Charod Becton respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit dated September 21, 2020.

Opinions Below

The decision of the Court of Appeals is an unpublished summary affirmance

and is set forth in the Appendix, *infra*.[1]

Jurisdiction

The Court of Appeals opinion in this case was filed on September 21, 2020. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The basis for subject matter jurisdiction in district court was 18 U.S.C. § 3231 (jurisdiction over offenses against the United States). The basis for the jurisdiction of the court of appeals was 28 U.S.C. § 1291 (appeals from final judgments of district courts), Rule 4(b), Fed. R. App. Proc. (appeals from criminal convictions), 18 U.S.C.§ 3557 and 18 U.S.C. § 3742 (appeals from sentences) and Rule 35 (en banc determinations).

Constitutional and Statutory Provisions Involved

U.S. Constitution, Amendment V

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

[1]In this petition, "App." refers to the Appendix to this Petition for Certiorari, which follows the petition. "A" refers to the appendix filed by the petitioner in the Court of Appeals and "SA" refers to the sealed appendix filed in that Court.

compensation.

U.S. Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Statement of the Case

Charod Becton pleaded guilty in the Southern District of New York to a fifteen-count indictment that charged that he, along with three others, had committed a number of different offenses, including three murders that were committed in the course of a narcotics conspiracy, in violation of 21 U.S.C. § 848(e)(1)(A).

Count ten of the indictment charged that Charod Becton had attempted to destroy an apartment building with an explosive, in violation of 18 U.S.C. §844(I). During the guilty-plea proceeding, the prosecutor set forth the elements of the offense: "first, that the defendant attempted to set a fire or cause an explosion for the purpose of damaging or destroying property; second, that the property affected interstate commerce; and third, that the defendant acted maliciously." Plea Tr. 15,

A 127. When the court asked of Mr. Becton "what you did that is causing you to take a plea of guilty to fifteen counts of this indictment?," *id.* at 19, A 131, Mr. Becton responded, with respect to count ten, that "[d]uring the course of the robbery one of the participants turned on the gas to the apartment which I learned about later." *Id.* at 21, A 133. The prosecutor pressed Mr. Becton on the point, and Mr. Becton said "I didn't do anything to stop it and one of the participants did do it and I found out about it later who the participant was, but I didn't actually see him do it, and so, it was Darryl Henderson." *Id.* at 26, A 138.

In connection with a post-plea agreement, Mr. Becton concurred in a Statement of Uncontested Facts. With respect to count ten, the statement provided that after committing the murders:

> one or more of Becton, Henderson, and Edwards attempted to cover up the crime scene by trying to blow up the building, going into the kitchen, knocking out the gas line to the oven, going to the living room, and lighting candles, presumably hoping that the gas that was now leaking into the apartment would ignite and explode. Before that could happen, a neighbor called Consolidated Edison about the smell of gas, and a ConEd worker discovered the crime scene, entering the apartment to investigate and shut off the gas leak.

Statement of Uncontested Facts at 3, SA 21.

Becton argued on appeal that he should be permitted to withdraw his plea to count ten because there was no factual basis to support it: during the course of his plea canvass he had asserted that he had not known that one of his co-defendants had tried to blow up the building by breaking open a gas line and lighting candles that were intended to ignited the escaping gas, and nothing in the Statement of

Uncontested Facts contradicted his assertions. Becton Brief 30-32.

The Court of Appeals disagreed:

> We are . . . unpersuaded by Becton's factual basis challenge. Becton argues that the district court erred by entering judgment on his plea to Count Ten of the superseding indictment, which charged Becton with attempted arson, in violation of 18 U.S.C. § 844(I). As relevant here, the indictment alleged that Becton participated in a conspiracy to rob a drug stash house and that, during the robbery, he and his co-conspirators murdered the occupants and attempted to set fire to the building. At his plea hearing, Becton testified that he did not personally try to start the fire and that he learned only afterwards that one of his co-conspirators was responsible. Becton argues on appeal that this testimony was insufficient to support an attempted arson conviction under § 844(I) and that he should be permitted to withdraw his guilty plea to Count Ten.
>
> Regardless of whether Becton personally tried to start the fire, we conclude that there was a factual basis for his plea to Count Ten. "[W]e have held that a conspirator can be held responsible for the substantive crimes committed by his co-conspirators to the extent those offenses were reasonably foreseeable consequences of acts furthering the unlawful agreement, even if the conspirator did not himself participate in the substantive crimes." *United States v. Salameh*, 152 15 F.3d 88, 151 (2d Cir. 1998) (per curiam); *see Pinkerton v. United States*, 328 U.S. 640, 647 (1946).
>
> This is true even where the substantive crime at issue is an attempt. *See, e.g.*, *United States v. Romero*, 897 F.2d 47, 51–52 (2d Cir. 1990). Here, the attempted arson was reasonably foreseeable, particularly given that Becton and his co-conspirators had just murdered the three witnesses to their robbery. This conclusion is bolstered by Becton's concession, in a statement of uncontested facts entered in connection with his plea modification agreement, that he and his co-conspirators were jointly responsible for the crimes committed in the stash house. Moreover, even if the foreseeability of the attempted arson were a close question, it was not plain error for the district court to conclude that a factual basis existed for Becton's guilty plea to Count Ten.

Summary Order at 3-4, App. 3-4.

Reasons for Granting the Petition

In 1946, this Court announced the *Pinkerton* doctrine, a rule allowing a conspirator to be convicted of substantive offenses committed by his co-conspirators if those offenses were reasonably foreseeable and were committed in furtherance of the conspiracy, even if the conspirator had not himself agreed that the offense should be committed and had done nothing to further it. *Pinkerton v. United States,* 328 U.S. 640, 647 (1946).

This basis for criminal liability was not authorized by statute in 1948, federally at least, and Congress has not codified the rule in the nearly sixty years since it was announced. Despite various criticisms,[2] the Pinkerton rule has become widely accepted and is frequently and successfully employed by federal prosecutors in all of the circuits.[3] It was, however, rejected by drafters of the

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[2] Antkowiak, Bruce, The Pinkerton Problem, 115 PENN. ST. L. REV. 607 (2011); Ingram, Andrew, Pinkerton Short-Circuits the Model Penal Code 64 VILLANOVA LAW REVIEW 71 (2019); Kreit, Alex, Vicarious Criminal Liability and the Constitutional Dimensions of Pinkerton, 57 AM. U. L. REV. 585, 597-98 (2008); Noferi, Mark, Towards Attenuation: A "New" Due Process Limit on Pinkerton Conspiracy Liability, 33 AM. J. CRIM. L. 91, 113-16 (2006).

[3] *See, e.g.*:

First circuit: United States v. Hernandez-Roman, 18-2133 (12/1/2020)

*Second circui*t: United States v. Miley, 513 F.2d 1191, 1208 (2d Cir.1975)

Third circuit: United States v. Fattah, 914 F.3d 112, 169 (3rd Cir. 2019)

Fourth circuit: United States v. Denton, 944 F.3d 170, (4th Cir. 2019)

Fifth circuit: United States v. Dean, 59 F.3d 1479, 1490 (5th Cir. 1995)

Model Penal Code[4] and enjoys a mixed reaction among the states.

The Pinkerton rule is probably most often used today to convict drug conspirators of substantive drug[5] and gun[6] charges, even though the particular conspirator may not have possessed the drugs or guns in question. The rule is not infrequently used to convict defendants of a wide variety of other substantive offenses that they themselves did not themselves commit, including crimes as serious as murder[7] or, as here, attempted arson. Generally speaking, federal prosecutors may use the Pinkerton doctrine to convict a defendant of any substantive offense, even though he did not himself commit it, as long as the

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Sixth circuit: United States v. Hamm, 952 F.3d 728 (6th Cir. 2020)

Seventh circuit: United States v. Jones, 900 F.3d 440, 446 (7th Cir. 2018)

Eighth circuit: United States v. Jenkins-Watts, 574 F.3d 950, 959 (8th Cir. 2009)

Ninth circuit: United States v. Bingham, 653 F.3d 983, 997 (9th Cir. 2011)

Tenth circuit: United States v. Rosalez, 711 F.3d 1194, 1206 (10th Cir. 2013)

Eleventh circuit: United States v. Silvestri, 409 F.3d 1311, 1335-36 (11th Cir. 2005)

D.C. Circuit: United States v. McGill, 815 F.3d 846, 917 (D.C. Cir. 2016)

[4] MODEL PENAL CODE § 2.06 commentary at 311 (1985).

[5] *See, e.g.*, United States v. Navarrete-Barron, 192 F.3d 786 (8th Cir. 1999).

[6] *See, e.g.,* United States v. Alvarez-Valenzuela, 231 F.3d 1198 (9th Cir. 2000).

[7] *See, e.g.,* United States v. Curtis, 324 F.3d 501 (7th Cir. 2003).

defendant was a member of the conspiracy and the substantive offense was reasonably foreseeable and was committed by a coconspirator in furtherance of the conspiracy -- although some courts have suggested that there are due process limitations on the application of the Pinkerton rule to minor participants in extensive conspiracies.[8]

The Pinkerton doctrine is a judicially created rule. It creates criminal liability where Congress has not done so by statute.

The extent to which courts may impose criminal liability where a jury has not found that a legislatively established element of an offense has been proven, or where a defendant has not admitted that element in a guilty plea, has changed significantly since the decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Alleyne v. United States*, 570 U.S. 99 (2013). As explained in *Alleyne*, the Sixth Amendment "provides that those accused of a crime have the right to a trial by an impartial jury," and "[t]his right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to the jury beyond a reasonable doubt." 570 U.S. at 104. To ensure this right, it is necessary to make a "proper designation of the facts that are elements of the crime." *Id*. at 104-05. In

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[8] *See* United States v. Christian, 942 F.2d 363, 367 (6th Cir. 1991) ("The foreseeability concept underlying Pinkerton is also the main concern underlying a possible due process violation."); United States v. Chorman, 910 F.2d 102, 112 (4th Cir. 1990) (finding that convictions were not "so attenuated as to run afoul of possible due process limitations on the Pinkerton doctrine"); United States v. Johnson, 886 F.2d 1120, 1123 (9th Cir. 1989) ("We recognize the potential due process limitations on the Pinkerton doctrine in cases involving attenuated relationships between the conspirator and the substantive crime."). Kreit, supra note 2 , at 604 n.106 (collecting cases).

this context, *Apprendi* held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum" constitutes an element of the crime that "must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. *Alleyne* expanded on *Apprendi,* and held that any fact which increases a mandatory minimum also "constitutes an 'element' or 'ingredient' of the charged offense" and must be submitted to the jury. 570 U.S. at 107-08. It is not enough that these elements or ingredients be found by a judicial authority. A natural consequence of these decisions is that it is not enough if these elements or ingredients, even if presented to a jury, have been *established* by a judicial authority.

In 1812, this Court declared that there can be no federal common law crimes. *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812). As the Court stated in *Hudson*:

> If [the adoption of a constitution] may communicate certain implied powers to the general Government, it would not follow that the Courts of that Government are vested with jurisdiction over any particular act done by an individual in supposed violation of the peace and dignity of the sovereign power. The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence.

United States. v. Hudson & Goodwin, 11 U.S. at 34.

The *Pinkerton* rule, as illustrated by Mr. Becton's plea, criminalizes an act without any legislative authority making the act a crime, in violation of the Fifth and Sixth Amendment requirements that punishment may be imposed only upon a jury finding (or an admission in a guilty plea) that the legislatively established

elements or ingredients of a crime have been proven, and in violation of the prohibition against judge-made common-law crimes. This Court should grant certiorari in order to abrogate the *Pinkerton* rule, in light of the developing Fifth and Sixth Amendment jurisprudence of this Court, exemplified by *Apprendi* and *Alleyne.*

Conclusion

For the reasons set forth above, the petitioner, Charod Becton, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Second Circuit.

Respectfully submitted,

/s/

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Date: December 9, 2020

No. _____

In the

Supreme Court of the United States

October Term, 2020

CHAROD BECTON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Appendix to the Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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19-132-cr
United States v. Becton

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 21st day of September, two thousand twenty.

Present:

ROBERT D. SACK,
ROBERT A. KATZMANN,
RICHARD C. WESLEY,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v. No. 19-132-cr

DARRYL HENDERSON, AMIN WILSON, AKA AMIN IDI, AKA IDI, AKA 13, NAATIFAH COSTELLO, AKA NATTY,

Defendants,

CHAROD BECTON, AKA FAMS,

Defendant-Appellant.

For Appellee: MICHAEL D. MAIMIN (Anna M. Skotko, *on the brief*), Assistant United States Attorneys,

for Audrey Strauss, Acting United States Attorney for the Southern District of New York, New York, NY.

For Defendant-Appellant: JEREMIAH DONOVAN, Old Saybrook, CT.

Appeal from a judgment of the United States District Court for the Southern District of New York (Castel, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Charod Becton appeals from a judgment entered on November 30, 2018, by the United States District Court for the Southern District of New York (Castel, *J.*). On November 1, 2006, Becton pleaded guilty to a 15-count superseding indictment before the late Judge Owen. Becton later entered into a plea modification agreement before Judge Castel, pursuant to which the government agreed to dismiss one of the 15 counts. In the plea modification agreement, Becton waived his right to appeal any sentence of or below life plus five years' imprisonment, and on November 28, 2018, Judge Castel sentenced Becton to life plus five years' imprisonment. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

First, Becton argues that Judge Owen failed to comply with Federal Rule of Criminal Procedure 11(b)(1)(D) because he did not inform Becton during his plea hearing that he was entitled to court-appointed counsel. Becton also argues that there was no factual basis for his plea to Count Ten of the superseding indictment, which charged Becton with attempted arson. *See* Fed. R. Crim. P. 11(b)(3). Becton is permitted to raise these challenges notwithstanding his appeal waiver. *See United States v. Lloyd*, 901 F.3d 111, 118 (2d Cir. 2018), *cert. denied*, 140 S. Ct. 55 (2019); *United States v. Adams*, 448 F.3d 492, 497 (2d Cir. 2006). However, because Becton failed

to raise these challenges below, we review them for plain error. *See United States v. Garcia*, 587 F.3d 509, 515 (2d Cir. 2009); *United States v. Torrellas*, 455 F.3d 96, 103 (2d Cir. 2006). "To satisfy the plain-error standard, the defendant must demonstrate, *inter alia*, that (1) there was error, (2) the error was plain, and (3) the error prejudicially affected his substantial rights." *Torrellas*, 455 F.3d at 103.[1] "In order to demonstrate that a Rule 11 error affected his substantial rights, a defendant must show a reasonable probability that, but for the error, he would not have entered the plea." *Id.* "In determining whether the defendant has made such a showing, we consider, inter alia, any record evidence tending to show that a misunderstanding was inconsequential to a defendant's decision to plead guilty, as well as the overall strength of the Government's case." *Id.*

Beginning with Becton's Rule 11(b)(1)(D) challenge, we conclude that the district court did not plainly err because there is no reasonable probability that Becton would not have entered his guilty plea if Judge Owen had informed him that he was entitled to court-appointed counsel. Although Judge Owen stated only that Becton was "entitled to a speedy and public trial by a judge and a jury, with the assistance of counsel, at all stages," App'x 118:23–24, Becton had been informed at multiple prior proceedings—including at his initial appearance and his arraignments on two superseding indictments—that a lawyer would be appointed for him if he could not afford one. Perhaps more significantly, Becton was represented by appointed counsel for most of the time between his 2002 arrest and his 2006 plea, including at the plea hearing itself. We do not see how informing Becton at his plea hearing of his right to appointed counsel could have caused him not to plead guilty.[2]

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[1] Unless otherwise indicated, in quoting cases, all internal quotation marks, alterations, emphases, footnotes, and citations are omitted.

[2] On June 14, 2006, the district court entered an order authorizing interim payments to Becton's appointed counsel "[b]ecause of the expected length of the trial in this case, and the

We are also unpersuaded by Becton's factual basis challenge. Becton argues that the district court erred by entering judgment on his plea to Count Ten of the superseding indictment, which charged Becton with attempted arson, in violation of 18 U.S.C. § 844(i).[3] As relevant here, the indictment alleged that Becton participated in a conspiracy to rob a drug stash house and that, during the robbery, he and his co-conspirators murdered the occupants and attempted to set fire to the building. At his plea hearing, Becton testified that he did not personally try to start the fire and that he learned only afterwards that one of his co-conspirators was responsible. Becton argues on appeal that this testimony was insufficient to support an attempted arson conviction under § 844(i) and that he should be permitted to withdraw his guilty plea to Count Ten.

Regardless of whether Becton personally tried to start the fire, we conclude that there was a factual basis for his plea to Count Ten. "[W]e have held that a conspirator can be held responsible for the substantive crimes committed by his co-conspirators to the extent those offenses were reasonably foreseeable consequences of acts furthering the unlawful agreement, even if the conspirator did not himself participate in the substantive crimes." *United States v. Salameh*, 152 F.3d 88, 151 (2d Cir. 1998) (per curiam); *see Pinkerton v. United States*, 328 U.S. 640, 647 (1946). This is true even where the substantive crime at issue is an attempt. *See, e.g.*, *United States v.*

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anticipated hardship on counsel in undertaking representation full-time for such period without compensation." Dist. Ct. Dkt. No. 118. Becton argues that if he had seen this order without knowing that he was entitled to appointed counsel, he might have become concerned that his counsel would withdraw during trial as a result of financial hardship. We find this argument unpersuasive. Not only is there no evidence that Becton saw the order in question, but it is also implausible that he would have inferred from the authorization of payments to his counsel that later payments might not be authorized. Moreover, as noted above, by the time of Becton's plea hearing in 2006, his appointed counsel had been representing him for more than four years.

[3] As relevant here, § 844(i) makes it a crime to "maliciously damage[] or destroy[], or attempt[] to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." 18 U.S.C. § 844(i).

Romero, 897 F.2d 47, 51–52 (2d Cir. 1990). Here, the attempted arson was reasonably foreseeable, particularly given that Becton and his co-conspirators had just murdered the three witnesses to their robbery. This conclusion is bolstered by Becton's concession, in a statement of uncontested facts entered in connection with his plea modification agreement, that he and his co-conspirators were jointly responsible for the crimes committed in the stash house. Moreover, even if the foreseeability of the attempted arson were a close question, it was not plain error for the district court to conclude that a factual basis existed for Becton's guilty plea to Count Ten.

In addition to raising his Rule 11(b)(1)(D) and factual basis challenges, Becton argues that his sentence was procedurally and substantively unreasonable. Unlike the arguments above, Becton's challenge to his sentence is barred by the appeal waiver in his plea modification agreement. *See United States v. Burden*, 860 F.3d 45, 51 (2d Cir. 2017) (per curiam). Becton argues that his appeal waiver was not made knowingly and voluntarily because Judge Castel failed to instruct him about various kinds of appeals that he was permitted to bring, and because Judge Castel's description of his appeal waiver was "unduly restrictive." Appellant's Br. 22. But Becton does not identify any appeals that he wishes to bring, or any arguments that he would like to raise, that are barred by Judge Castel's purportedly erroneous instruction. Moreover, Judge Castel's discussion of Becton's appeal waiver is materially indistinguishable from other colloquies that we have endorsed in prior cases. *See, e.g.*, *United States v. DeJesus*, 219 F.3d 117, 121 (2d Cir. 2000) (per curiam). Because Becton has failed to identify an error—let alone a plain error, *see United States v. Cook*, 722 F.3d 477, 479 (2d Cir. 2013)—in Judge Castel's instructions, we hold that Becton's appeal waiver is enforceable, and his challenge to his sentence is barred.

We have considered Becton's remaining arguments on appeal and have found in them no basis for reversal. For the foregoing reasons, the judgment of the district court is **AFFIRMED**.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk