

N.D.N.Y.
95-cr-232-30
McAvoy, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

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 18th day of October, two thousand seventeen.

Present:

Amalya L. Kearse,
José A. Cabranes,
Richard C. Wesley,
Circuit Judges.

United States of America,

Appellee,

v.

16-3793

Archie Joyner, et al.,

Defendants,

Raymond A. Collins, AKA Ray, AKA Ron Turner,

Defendant-Appellant.

Appellant moves for appointment of counsel under the Criminal Justice Act ("CJA"). 18 U.S.C. § 3006A. Upon due consideration, it is hereby ORDERED that the motion is DENIED and the appeal is DISMISSED. See *United States v. Reddick*, 53 F.3d 462, 464-65 (2d Cir. 1995) (holding that the appointment of CJA counsel is discretionary in the context of an 18 U.S.C. § 3582 proceeding); *Pillay v. I.N.S.*, 45 F.3d 14, 17 (2d Cir. 1995) (holding that this Court has inherent authority to dismiss an appeal lacking an arguable basis in law or fact).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk




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

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 28th day of December, two thousand seventeen.

United States of America,

Appellee,

v.

Archie Joyner, et al.,

Defendants,

Raymond A. Collins, AKA Ray, AKA Ron Turner,

Defendant-Appellant.

ORDER

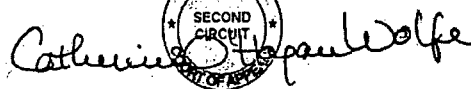
Docket No: 16-3793

Appellant, Raymond A. Collins, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request as a motion for reconsideration, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the motion and petition are denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

UNITED STATES OF AMERICA,

V.

3:95-cr-00232-TJM-30

RAYMOND A. COLLINS,

Defendant.

THOMAS J. McAVOY,
Senior United States District Judge

DECISION & ORDER

I. INTRODUCTION

Defendant Raymond A. Collins ("Collins" or "Defendant") moves this Court pursuant to 18 U.S.C. § 3582(c) for a reduction of his life sentence. *See* dkt. # 2207. His motion is brought primarily under § 3582(c)(2) and Amendment 591 to the United States Sentencing Guidelines (the "Guidelines" or "U.S.S.G."). For the reasons discussed below, the motion is denied.

II. BACKGROUND

Defendant was indicted and prosecuted for crimes committed on behalf of an organization of drug dealers that operated in the Binghamton, New York area. *See* Second Superseding Indictment, dkt. # 469; *see United States v. Joyner*, 201 F.3d 61, 66-68 (2d Cir. 2000) ("*Joyner I*"), *decision clarified on denial of reh'g*, 313 F.3d 40 (2d Cir. 2002) ("*Joyner II*"). In this regard, Defendant was charged with conspiracy to commit arson in violation of 18 U.S.C. § 371 (Count 3), and with arson in violation of 18 U.S.C. §§ 844(i) and 2 (Count 4). *See* Second Sup. Indict., dkt. # 469. Count 3

charged that between January of 1994 and June 17, 1994, in the Northern District of New York and elsewhere, Collins and four others conspired to destroy, by means of fire or the use of an explosive, the building known as Dels Palaz, located at 156-158 Court Street, Binghamton, New York, and its contents, all of which were used in interstate commerce and in activities affecting interstate commerce in violation of 18 U.S.C. § 371. *See* Second Sup. Indict., dkt. # 469. The Second Superseding Indictment charged eight overt acts in furtherance of this conspiracy, the fifth of which alleged: “[O]n or about May 16, 1994, Melvin E. Dove and Raymond A. Collins broke into Dels Palaz, spread gasoline around the building and ignited the gasoline, causing the destruction of the building and the death of Willard Allen.” *Id.*

Count 4 charged that on or about May 16, 1994, in the Northern District of New York and elsewhere, Collins and four others aided and abetted one another in destroying, by means of fire and the use of an explosive, Dels Palaz and its contents, including such items as liquor stock, video and arcade games and telephones, all of which were used in interstate commerce and in activities affecting interstate commerce. Count 4 further charged that as a direct and proximate result of the conduct charged, Willard Allen died, all in violation of 18 U.S.C. §§ 844(i) and 2. *See* Second Sup. Indict., dkt. # 469.

Collins’ trial commenced on April 3, 1996 and concluded on June 4, 1996. Neither the Court’s instructions to the jury nor the jury questionnaire specifically instructed or asked the jury to decide whether Collins’ arson resulted in the death of Mr. Allen. *See* 5/22/96 Transcript, dkt. # 1330; dkt. # 915 (Verdict Sheet Packet), pp. 35-36. After deliberating, the jury returned a verdict convicting Collins on Counts 3 and 4. *See* dkt. # 915, pp. 35-36.

The matter then proceeded to sentencing. In its Presentence Investigation Report (“PSR”),

the United States Probation Office for the Northern District of New York recommended that, for purposes of arriving at Collins' U.S.S.G. sentence, Counts 3 and 4 should be grouped into a single group in accordance with U.S.S.G. § 3D1.2. PSR, ¶ 28.¹ Under U.S.S.G. §§ 3D1.2(b), § 3D1.2 Application Note 4, and § 3D1.3, the offense level for the Group was the offense level of the most serious of the counts comprising the Group. *See* PSR, ¶ 28. The Probation Office concluded that the conspiracy count and the arson count resulted in the same offense level. *Id.*

The Probation Office then analyzed the base offense level for arson in violation of 18 U.S.C. §§ 844(i). In this regard, the PSR provided:

Base Offense Level: The United States Sentencing Commission Guideline for violation of 18 U.S.C. § 844(i) is found in U.S.S.G. § 2K1.4 and calls for a base offense level of 24, if the offense (A) created a substantial risk of death or serious bodily injury to any person other than a participant in the offense, and that risk was created knowingly; or (B) involved the destruction or attempted destruction of a dwelling. In this case the building destroyed by the arson housed a bar and two apartments. The Specific Offense Characteristics are not applicable in this case. The cross reference at U.S.S.G. § 2K1.4(c)(1) instructs if death resulted, or the offense was intended to cause death or serious bodily injury, apply the most analogous guideline from Chapter Two, Part A (Offenses Against the Person) if the resulting offense level is greater than that determined above. In accordance with 18 U.S.C. § 1111, First Degree Murder is by definition every murder ... committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping As a result, the most analogous guideline from Chapter Two, Part A is U.S.S.G. § 2A1.1, First Degree Murder, which calls for a base offense level of 43.

PSR ¶ 29.

The Probation Office recommended a 2 level upward Adjustment for Obstruction of Justice based upon evidence indicating that Collins had attempted to convince co-defendant Melvin Dove to

¹The Probation Office reasoned that because the conspiracy count and the substantive count of arson involved the same victim and two or more acts or transactions connected by a common criminal objectives or constituting part of a common scheme or plan, the counts should be grouped in accordance with U.S.S.G. § 3D1.2(b).

sign an affidavit admitting complete responsibility for the arson, thereby exonerating Collins. *Id.* ¶ 33. Thus, the Adjusted Offense Level recommended by the Probation Office was 45. *Id.* ¶ 34. However, in arriving at Collins' Total Offense Level, the Probation Office noted that "[a]ccording to U.S.S.G., Chapter 5, Part A, Application Note 2, an offense level in excess of 43 is to be treated as an offense level 43." *Id.* ¶ 37. Consequently, Collins' Total Offense Level was calculated by the Probation Office as level 43. *Id.* ¶ 39.

After a review of Collins' criminal history, the Probation Office calculated that Collins had 13 criminal history points, resulting in a Criminal History Category VI. *Id.* ¶ 51. The Probation Office then concluded that "[p]ursuant to U.S.S.G. §§ 2K1.4 and 2A1.1, based on a total offense level of 43 and a criminal history category of VI, the guideline range for imprisonment is life." *Id.* ¶ 73. The Probation Office also noted that the statutory maximum term of imprisonment for Count 3 is 5 years pursuant to 18 U.S.C. § 371,² and that the statutory maximum term of imprisonment for Count 4 is life imprisonment pursuant to 18 U.S.C. § 844(i).³ PSR ¶ 72.

At sentencing, Collins argued that because the jury was not asked whether to impose a life sentence, the imposition of a life sentence by the Court would violate the *Ex Post Facto* Clause. *See*

²Section 371 of Title 18 provides in pertinent part that "[i]f two or more persons conspire . . . to commit any offense against the United States, . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both."

³Section 844(i) of Title 18 provides in pertinent part:

Whoever maliciously damages or destroys, or attempts 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 shall be imprisoned for not less than 5 years and not more than 20 years, fined under this title, or both; . . . and if death results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall also be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment.

18 U.S.C. § 844(i).

Sent. Trans., pp. 5-6, dkt. # 1422; *see also Joyner I*, 201 F.3d at 80 ("At the time of Collins's arson, Section 34 of 18 U.S.C. provided that a defendant convicted of arson, which resulted in the death of a person, could be subject to the death penalty or life imprisonment only if the jury so directed. The jury-directive requirement was eliminated in 1994.") (citing Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, tit. VI, § 60003(a)(1), 108 Stat. 1796, 1968 (1994)). The Court rejected this argument, finding that the imposition of a life sentence after the 1994 amendment to Section 34 did not amount to an *Ex Post Facto* Clause violation. *See* Sent. Trans., pp. 6-10. This decision was subsequently affirmed by the Second Circuit Court of Appeals. *See Joyner I*, 201 F.3d at 80.⁴

Defendant also objected to the assessment of a two-level adjustment for obstruction of justice based upon the allegation that Collins attempted to encourage co-defendant Melvin Dove to sign an affidavit accepting full responsibility for the arson. In this regard, defense counsel argued:

When the Court is making a determination, scoring determination is sentencing based upon certain facts, the Court has to make specific findings as to those facts. If they were the ultimate facts that the jury decided, then the Court could rely on the jury's decision and here we basically have, as far as Mr. Collins is concerned, a general verdict. So, of course, the Court can rely on the jury's verdict that Mr. Collins set the fire, the fire happened and Willard Allen died. That was the jury's determination. And we are not asking the Court to make any separate findings concerning that.

But as to the testimony of Melvin Dove regarding his affidavit, this was not - - - this was certainly part of the government's case but was not an essential part of the government's case. And I would ask the Court to consider the credibility issues regarding Melvin Dove which were raised at trial and I submit that his credibility can be seriously questioned and under all the circumstances there is insufficient evidence to make a determination that it is, in fact, what occurred. In other words, that Mr.

⁴The Second Circuit found that "a change in law that reduces or eliminates the jury's role in determining the crime or punishment of a defendant does not violate the *Ex Post Facto* Clause because it does not change the substantive definition of the crime, increase the punishment, or eliminate any defense with respect to the offense of arson," and thus provided Collins no basis to challenge his sentence on the ground that the jury was not asked whether to impose a life sentence. *See Joyner I*, 201 F.3d at 80.

Collins did create that affidavit to suborn perjury as alleged by the government.

Sent. Trans., pp. 11-12.

After making this argument, however, defense counsel acknowledged that if the Court arrived at an offense level of 43, which calls for a life sentence, then the obstruction of justice adjustment would be moot. *Id.* p. 12. The Court found by a preponderance of the evidence that, based on the testimony of Melvin Dove and the circumstances surrounding the affidavit, Collins had attempted to obstruct justice in this case. Thus, the Court determined to assign a two-level upward adjustment for obstruction of justice, *id.* pp. 23-24, but, as addressed below, it made no difference in Defendant's sentence.

Defendant also moved for a downward departure as provided in the commentary to U.S.S.G. § 2A1.1, Application Note 1, asserting that the evidence did not establish that he intentionally or knowingly caused Willard Allen's death. *Id.* pp. 12-18. Thus, defense counsel argued, the Court should depart downward to a level 33 to arrive at a term of incarceration that, taking into account Collins' life expectancy, did not amount to a life sentence. *Id.* pp. 18-19. The Court rejected the argument, finding that it would have been obvious to anyone who approached the building that people would be inside the building. *Id.* p. 24-25. In this regard, the Court found that Collins, through his conduct, displayed a reckless and depraved indifference to whether human life would be present in the building or in an adjoining building. *Id.*

Ultimately, the Court agreed with the Probation Office's assessment that Collins had a total offense level of 43 and a Criminal History Category VI, resulting in a Guideline range of life imprisonment. *Id.* p. 25. Therefore, the Court ruled that upon Collins' conviction on Counts 3 and 4 of the Second Superseding Indictment, and pursuant to the Sentencing Reform Act, Collins was

committed to the custody of the Bureau of Prisons to be imprisoned for five years on Count 3 and life on Count 4, to be served concurrently. *Id.* p. 26. Defendant was also ordered to pay restitution in the total amount of \$1,846,637.40, jointly and severally with co-defendants Joyner, Perry, Dove and Gillespie. *Id.* If released from imprisonment, Collins would be placed on a term of supervised release for a term of three years on Count 3, and five years on Count 4, with the terms of supervised release to run concurrently. *Id.* p. 27; *see* Am. Judgment, dkt.# 1947.

Collins appealed his conviction and sentence to the United States Court of Appeals for the Second Circuit, raising numerous grounds. *See Joyner I*, 201 F.3d at 78-81. The Second Circuit set aside the restitution order and remanded for further consideration on this issue, but affirmed in all other respects. *Id.*

After the Second Circuit's decision in *Joyner I*, the Supreme Court issued its decision in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed.2d 435 (2000), holding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. Because *Apprendi* applied retroactively to cases pending on direct review or not yet final (like Collins' case), and because this Court had not instructed the jury to determine beyond a reasonable doubt whether Collins' arson led to the death of the victim, the Circuit applied the *Apprendi* rule to Collins' case. *Joyner II*, 313 F.3d at 45.⁵ In doing so, the Circuit found that the failure to submit to the jury the question of whether Collins' arson resulted in the death of the victim was plain error that affected Collins' substantial rights, but also found that the error did not

⁵("In this case, the district court did not instruct the jury to determine beyond a reasonable doubt whether Collins' arson led to the death of the victim. This omission was erroneous under *Apprendi*, although the district court had no reason to rule otherwise at trial, *Apprendi* having not yet been issued.")

substantially affect the fairness, integrity, or public perception of the fairness of Collins' trial. *Id.* at 45-46 (citing *Johnson v. United States*, 520 U.S. 461, 466-67, 117 S. Ct. 1544, 137 L. Ed.2d 718 (1997))("Before an appellate court can correct an error not raised at trial, there must be (1) error, (2) that is plain, and (3) that affect[s] substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.")(internal quotation marks and citation omitted)(alteration in original) and *United States v. Cotton*, 535 U.S. 625, 122 S. Ct. 1781, 1786, 152 L. Ed.2d 860 (2002)(upholding conviction where indictment omitted drug quantity after applying *Johnson* plain error review)). In so holding, the Circuit wrote:

Collins never contested the fact that the fire he set caused a death. In fact, the defendant's own brief acknowledges Willard Allen's death in the fire. Collins Br. of Nov. 24, 1997, at 8. At sentencing his attorney characterized the major issue in scoring the offense as only a question of intent—whether or not the defendant intended to kill Allen, Collins Appx. at 173, and a review of the sentencing hearing transcript as a whole makes clear that the fact of Allen's death in the fire is undisputed. We will not reverse for plain error where there is no disagreement as to “the truth of the pertinent facts, and the record as a whole casts no doubt on the accuracy of that [fact].” [*United States v. Gutierrez Rodriguez*, 288 F.3d 472, 477 (2d Cir. 2002)].

Id.

Defendant's petition for a writ of certiorari to the United States Supreme Court was denied on February 23, 2004. *See Collins v. United States*, 540 U.S. 1201 (2004). Defendant's numerous post-conviction collateral attacks were rejected by this Court, and the Second Circuit. *See generally*, dkt.

Defendant now moves pursuant to 18 U.S.C. § 3582(c) for a reduction of his life sentence. He contends, primarily, that his life sentence for his convictions under 18 U.S.C. § 371 (arson conspiracy) and 18 U.S.C. § 844(i) (arson) was improper under U.S.S.G. Amendment 591 because the Court arrived at the sentence based on judicial findings of actual conduct, not on the statute (or

offense) of conviction.

III. DISCUSSION

A. Section § 3582

“A sentencing court may not modify a sentence once it has been imposed except under the limited conditions set forth in 18 U.S.C. § 3582.” *Poindexter v. United States*, 556 F.3d 87, 89 (2d Cir. 2009). Section 3582(c)(2) provides that a court may reduce the term of imprisonment of a defendant who has been sentenced based on a sentencing range that has subsequently been lowered by an amendment to the Guidelines. 18 U.S.C. § 3582(c)(2); *see also* U.S.S.G. § 1B1.10(a). The relevant policy statement is § 1B.10 of the Guidelines, which provides that “[a] reduction in the defendant's term of imprisonment is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2) if ... [Amendment 591] does not have the effect of lowering the defendant's applicable guideline range.” U.S. Sentencing Guideline Manual §§ 1B1.10(a)(2)(B), (c).

“District courts considering a defendant's motion under § 3582(c)(2) perform a two-step inquiry.” *United States v. Vondette*, No. 97-CR-1010 (JFB), 2016 WL 4148334, at *1 (E.D.N.Y. Aug. 4, 2016)(citing *Dillon v. United States*, 560 U.S. 817, 827 (2010)).

First, the court must determine if the prisoner is eligible for a sentence modification because an applicable amendment has reduced the defendant's sentencing range. *Dillon*, 560 U.S. at 827. Amendment 591 to the Sentencing Guidelines is such an applicable amendment supporting relief under § 3582(c)(2). *See* U.S.S.G. § 1B1.10(c). Second, if the defendant is eligible for a sentence reduction, the court must then consider any applicable 18 U.S.C. § 3553(a) factors, along with “the nature and seriousness of the danger to any person or the community that may be posed by a reduction in the defendant's term of imprisonment,” to determine whether the reduction is warranted in whole or in part under the particular circumstances of the case. *Dillon*, 560 U.S. at 827.

Vondette, 2016 WL 4148334, at *1.

B. Amendment 591

“Amendment 591 [was] a reaction to case law that selected an offense guideline based on actual conduct not underlying the offense of conviction.” *United States v. Rivera*, 293 F.3d 584, 587 (2d Cir. 2002) (citations omitted). As the Second Circuit explained in *Rivera*:

The [Commentary to Amendment 591] makes plain that the Amendment rejects ... cases [that selected an offense guideline based on actual conduct not underlying the offense of conviction]:

[T]he amendment deletes Application Note 3 of § 1B1.2 (Applicable Guidelines), which provided that in many instances it would be appropriate for the court to consider the actual conduct of the offender, even if such conduct did not constitute an element of the offense. This application note describes a consideration that is more appropriate when applying § 1B1.3 (Relevant Conduct), and its current placement in § 1B1.2 apparently has caused confusion in applying that guideline's principles to determine the offense conduct guideline in Chapter Two most appropriate for the offense of conviction. In particular, the note has been used by some courts to permit a court to decline to use the offense guideline referenced in the Statutory Index in cases that were allegedly “atypical” or “outside the heartland.” *See United States v. Smith*, [186 F.3d 290 (3d Cir. 1999)].”

Id., (quoting U.S.S.G. Manual, Supp. to App. C, amend. 591, cmt. at 32 (Nov. 1, 2000)).

Thus, “Amendment 591 . . . ‘requires that the initial selection of the offense guideline be based only on the statute (or offense) of conviction rather than on judicial findings of actual conduct’” *United States v. Rodriguez*, No. 93CR.339(JGK), 2009 WL 2033087, at *2 (S.D.N.Y. July 8, 2009)(quoting *Rivera*, 293 F.3d at 585); *see United States v. Mungin*, 470 F. App'x 49, 50 (2d Cir. 2012)(same); *Poindexter*, 556 F.3d at 88 (same). “The Amendment was intended to emphasize that the sentencing court must apply the offense guideline referenced in the Statutory Index [at the back of the Sentencing Guidelines Manual] for the statute of conviction.” *Rivera*, 293 F.3d at 585 (bracketed

text in original) (internal citation and quotation marks omitted); *see also Vondette*, 2016 WL 4148334, at *2 (“Amendment 591 instructs that the appropriate offense guideline is determined by locating the statute of conviction in the Statutory Index to the Guidelines and then selecting the corresponding offense guideline, rather than the judge selecting ‘a guideline which might be applicable to other relevant conduct that was not the subject of the offense of conviction.’”) (*quoting United States v. Augarten*, 84 Fed. Appx. 564, 566 (6th Cir. 2003)). “[F]or example, Amendment 591 prohibits the court from applying U.S.S.G. § 2D1.2, which imposes heightened penalties for drug sales occurring in a ‘protected location,’ unless the jury specifically convicted the defendant of violating a statute for which the Statutory Index identifies § 2D1.2 as the corresponding guideline section. Amendment 591 makes clear that the court could not, in this example, select § 2D1.2 based on its own conclusion that the trafficking occurred in a protected area.” *Vondette*, 2016 WL 4148334, at *2 (citing *Augarten*, 84 Fed. Appx. at 566; *United States v. Baez*, No. 89 CR 133 (MBM), 2002 WL 1163575, at *2 (S.D.N.Y. June 3, 2002)).

However, “‘Amendment 591 applies only to the choice of the appropriate offense guideline, not to the selection of the base offense level’ set forth by the guideline.” *United States v. Ferranti*, 411 F. App’x 373, 375 (2d Cir. 2011) (*quoting Rivera*, 293 F.3d at 586); *see United States v. Minicone*, 347 Fed. Appx. 637, 638 (2d Cir. 2009) (same). Moreover, Amendment 591 does not affect a court’s ability to use underlying activity “in the course of applying cross references that appear in offense guidelines designated by the statutory index.” *United States v. Hurley*, 374 F.3d 38, 40-41 (1st Cir. 2004) (*per curiam*); *see Mungin*, 470 F. App’x at 51 (“[T]he sentencing court properly adjusted the base offense level further upward pursuant to section 2A1.5’s provision that ‘[i]f the offense resulted in the death of a victim, apply § 2A1.1,’ which provides for a base offense level of

43. It is only the initial selection of the offense guideline—not the cross-references contained therein for the purposes of calculating the base offense level—that Amendment 591 prohibits sentencing judges from determining based on ‘judicial findings of actual conduct’ not made by a jury, such as the death of a victim.”); *United States v. Ross*, 37 Fed. Appx. 714, 2002 WL 1219167, at *1 (5th Cir. 2002)(holding that “Amendment 591 does not bar either the district court's application of [the Guideline's] cross-reference or its consideration of [the defendant's] relevant conduct ... in applying that cross-reference.”); *United States v. Mungin*, No. 97 CR 1105 HB, 2011 WL 1886392, at *2 (S.D.N.Y. May 9, 2011)(“As the First Circuit cogently explained, using relevant conduct to determine an appropriate cross reference—after the initial selection of the applicable offense guideline—is mandated by the Guidelines and consistent with Amendment 591; to accept defendant's argument to the contrary ‘would largely nullify the numerous cross references appearing in Chapter Two a result that the Commission clearly did not contemplate in promulgating the amendment.’”) (quoting *Hurley*, 374 F.3d at 40); *United States v. Rodriguez*, No. 93CR339(JGK), 2009 WL 2033087, at *2 (S.D.N.Y. July 8, 2009)(collecting cases).

C. Defendant’s Amendment 591 Argument

Collins argues that the imposition of his life sentence was based upon the Court’s determination that the arson of which he was convicted resulted in the death of Willard Allen and, therefore, the sentence was arrived at in violation of the dictates of Amendment 591. The Court disagrees.

As indicated above, Amendment 591 applies only to the initial selection of the offense guideline referenced in the Statutory Index at the back of the Sentencing Guidelines Manual based on the statute (or offense) of conviction. *Ferranti*, 411 F. App’x at 375; *Rivera*, 293 F.3d at 586. It does

not prevent the Court from using the underlying activity when “applying cross references that appear in offense guidelines designated by the statutory index.” *Hurley*, 374 F.3d at 40-41.

The Court calculated Collins’ Guideline sentence by initially selecting the offense guideline referenced in the Statutory Index at the back of the Sentencing Guidelines Manual. For the arson conviction in violation of 18 U.S.C. § 844(i), this directed the Court to U.S.S.G. § 2K1.4. The cross reference at U.S.S.G. § 2K1.4(c)(1) instructs that “[i]f death resulted, or the offense was intended to cause death or serious bodily injury, apply the most analogous guideline from Chapter Two, Part A (Offenses Against the Person) if the resulting offense level is greater than that determined above.” U.S.S.G. § 2K1.4(c)(1). The evidence at trial was incontrovertible that the arson at Dels Palaz caused Mr. Allen’s death. Indeed, as defense counsel argued at sentencing, “here we basically have, as far as Mr. Collins is concerned, a general verdict. So, of course, the Court can rely on the jury’s verdict that Mr. Collins set the fire, the fire happened and Willard Allen died. That was the jury’s determination.” Sent. Trans. pp 11-12. Accordingly, the Court looked to the most analogous guideline from Chapter Two, Part A, which is the guideline for first degree murder, U.S.S.G. § 2A1.1. *See Ferranti*, 411 F. App’x at 375 (“As explained by the District Court ..., [the defendant] was properly sentenced [for his convictions for arson homicide in violation of 18 U.S.C. § 844(i) and arson conspiracy in violation of 18 U.S.C. § 371] under the first degree murder guideline, which was the most analogous Guideline provision. . . . We agree.”)(citing 18 U.S.C. § 1111(a) (murder committed by arson is murder in the first degree)). The Court applied U.S.S.G. § 2A1.1, which yielded a base offense level of 43. Although the Court assessed a two level upward adjustment for obstruction of justice, the Total Offense Level was calculated at 43 in accordance with U.S.S.G., Chapter 5, Part A, Application Note 2, which indicates that an offense level in excess of 43 is to be treated as an offense level 43. Further,

although Defendant's criminal history qualified him as a Career Offender within the meaning of U.S.S.G. § 4B1.1, the offense level determined under U.S.S.G. § 2A1.1 was greater than the Career Offender offense level under U.S.S.G. § 4B1.1. Thus, Defendant's Total Offense Level was calculated as level 43. Defendant also had 13 total criminal history points, which established a Criminal History Category of VI in accordance with the sentencing table at U.S.S.G. Chapter 5, Part A. Based on a Total Offense Level of 43 and a Criminal History Category of VI, the Guideline range for imprisonment was life.

Because the Court used the underlying activity (arson that caused a death) in the course of applying a cross reference that appears in the offense guideline designated by the statutory index (U.S.S.G. § 2K1.4(c)(1)), Amendment 591 provides Collins no relief. Put another way, Collins is not eligible for a sentence reduction by calculating the Guidelines range that would have been applicable had Amendment 591 been in place at the time he was originally sentenced. Consequently, his motion under Section 3582(c)(2) must be denied. *See Ferranti*, 411 F. App'x at 375 ("[T]he District Court did not err in denying defendant's motion for sentencing under Section 3582(c)(2).").

D. Defendant's Other Arguments

1. Jury Determination of Life Sentence/Death of Willard Allen

Section 3582(c) of Title 18 of the United States Code provides Collins no basis for a sentence reduction on the grounds that, pursuant to the 1994 amendment to Section 34, the jury should have been asked whether to impose a life sentence. *See* 18 U.S.C. § 3582(c)(1) & (2); *Poindexter*, 556 F.3d at 89 ("A sentencing court may not modify a sentence once it has been imposed except under the limited conditions set forth in 18 U.S.C. § 3582."). Moreover, this issue was rejected both by this Court and by the Second Circuit in the context of Collins' *Ex Post Facto* Clause argument. Further,

the Second Circuit found no *Apprendi* rule violation because the question of whether the arson caused Mr. Allen's death was not submitted to the jury. Collins cannot reargue these issues under the guise of a Section 3582(c) motion. Accordingly, the motion in this respect is denied.

2. *Peugh v. United States*

Collins also argues that he is entitled to a sentence reduction under the holding of *Peugh v. United States*, — U.S. —, 133 S. Ct. 2072, 186 L. Ed.2d 84 (2013). “In *Peugh*, the Supreme Court held that there is an *Ex Post Facto* Clause violation when the defendant is sentenced under Guidelines that are promulgated after he committed his criminal acts, and the new version provides a higher Guidelines sentencing range than the version in place at the time of the offense.” *United States v. Karkenny*, 79 F. Supp. 3d 494, 496 (S.D.N.Y. 2015), *appeal dismissed* (July 23, 2015)(citing *Peugh*, 133 S. Ct. at 2078); *see also United States v. Delarosa*, No. 04 CR 424-1 RWS, 2015 WL 7147569, at *1 (S.D.N.Y. Nov. 13, 2015) (*Peugh* held that where a later edition of the Sentencing Guidelines increases a defendant's recommended range of imprisonment above the range that applied at the time he or she committed the crime, applying the later and harsher Guidelines range constitutes an *ex post facto* violation.”)(citing *Peugh*, 133 S. Ct. at 2078, 2084, 2088).

Peugh provides Collins no relief. The Court based Collins' sentence on the Probation Office's U.S.S.G. calculations, which derived from the 1995 edition of the Guidelines Manual. *See* PSR, ¶ 27. The 1995 edition of the Guidelines Manual provides in the cross reference at § 2K1.4(c)(1) that “if death resulted, or the offense was intended to cause death or serious bodily injury, apply the most analogous guideline from Chapter Two, Part A (Offenses Against the Person) if the resulting offense level is greater than that determined above.” The 1994 edition of the Guidelines Manual is substantively identical, providing in the cross reference at § 2K1.4(c)(1)(B) that “if death resulted,

[apply] the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.” 1994 U.S. Sentencing Guidelines Manual, § 2K1.4(c)(1)(B).⁶ Further, the 1994 edition of the Guidelines Manual, like the 1995 edition, provides at § 2A1.1(a) that the base offense level for First Degree Murder is 43. *Id.* at § 2A1.1(a).⁷

Thus, the use of the 1995 version of the Guidelines Manual did not increase Collins’ sentencing range from that which existed under the version of the Guidelines Manual in effect in 1994 when Collins committed his crimes.⁸ Consequently, he presents neither an *ex post facto* violation nor a viable claim under *Peugh*.

3. Post-Incarceration Rehabilitation

Collins’ post-incarceration rehabilitation efforts, while commendable, do not provide a basis for relief under 18 U.S.C. § 3582(c). Thus, because there will be no re-sentencing, these rehabilitative efforts are not germane to the motion before the Court.

VI. CONCLUSION

For the reasons discussed above, Collins’ motion pursuant to 18 U.S.C. § 3582(c) [dkt. # 2207] is, in all respects, **DENIED**.

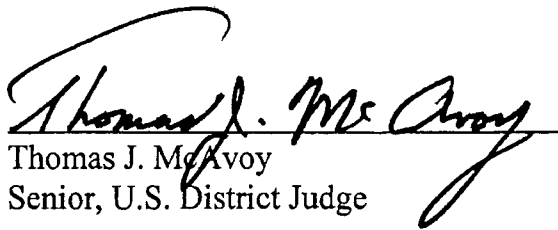
IT IS SO ORDERED.

Date: October 25, 2016

⁶<http://www.ussc.gov/guidelines/2015-guidelines-manual/archive/1994-partk>

⁷<http://www.ussc.gov/guidelines/2015-guidelines-manual/archive/1994-parta>

⁸It should also be noted that Application Note 1 for § 2A1.1 in the 1994 edition of the Guidelines Manual provides the same basis for downward departure as did the 1995 edition. See 1994 U.S.S.G. Guidelines Manual, § 2A1.1, Appl. Note 1 (“If the defendant did not cause the death intentionally or knowingly, a downward departure may be warranted.”). However, Collins’ application for a downward departure on this basis was rejected by the Court at the time of sentencing, see Sent. Trans., pp. 24-25, and thus provides no basis for a claim under *Peugh*.


Thomas J. McAvoy
Senior, U.S. District Judge

**Additional material
from this filing is
available in the
Clerk's Office.**