

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

JACKIE McGEORGE,)	
)	Civil Action No. 7:00CV00788
Petitioner,)	
)	
v.)	<u>MEMORANDUM OPINION</u>
)	
UNITED STATES OF AMERICA,)	
)	
Respondent.)	By: Samuel G. Wilson
)	Chief United States District Judge

This is a motion pursuant to 28 U.S.C. § 2255 by Jackie McGeorge challenging his convictions of conspiracy to distribute cocaine and possession of marijuana. McGeorge maintains that he was denied the effective assistance of counsel at sentencing because his counsel failed to “adequately argue” against a role enhancement and failed to request a downward departure on the ground that McGeorge was suffering from post-traumatic stress disorder. McGeorge also maintains that his conviction violated *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000). The court finds that McGeorge’s counsel performed well within the bounds of competency required by the Sixth Amendment and that McGeorge’s *Apprendi* claim cannot be raised in this collateral proceeding.

I.

The facts of this case were detailed by the Court of Appeals for the Fourth Circuit in McGeorge’s direct appeal, *see United States v. McGeorge*, No. 98-4238, 1999 WL 102159 (4th Cir. Feb. 12, 1999) (per curiam), and only will be summarized briefly here. McGeorge and his brother, Ronald Lee Jones, owned and operated a business in Roanoke, Virginia, called Mac Brothers Complete Car Care, Inc. (“Mac Brothers”). Norma Marie Underwood was a secretary

for Mac Brothers. Essentially, Mac Brothers served as the nerve center for a cocaine distribution ring run by Jones with the assistance of Underwood and McGeorge.

II.

The probation officer added three points pursuant to sentencing guideline § 3B1.1 to McGeorge's offense level because he concluded that McGeorge was a manager or supervisor of criminal activity that involved five or more participants. McGeorge's counsel objected to the enhancement but made no further argument on the issue at sentencing. The court overruled the objection and adopted the report. McGeorge argues that his counsel was ineffective for not pressing the issue. The court disagrees.

To establish an ineffective assistance of counsel claim, McGeorge must prove that his counsel's performance was unconstitutionally deficient and that the deficiency prejudiced his defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1987). He can establish neither.

The court heard the evidence at trial and was satisfied by a preponderance of the evidence, direct and circumstantial, that the conspiracy involved five or more participants and that McGeorge was, at a minimum, a manager or supervisor. McGeorge's jointly owned business—Mac Brothers—was, in effect, the nerve center for the conspiracy, and he managed or supervised, at least in part, the activities of Mac Brothers' secretary, Norma Underwood, in furtherance of the conspiracy. Given the number of participants in the conspiracy, that management and supervision sufficed for the role enhancement. *See U.S. v. Payne*, 63 F.3d 1200, 1212 (2d Cir. 1995); *U.S. v. Okoli*, 20 F.3d 615, 616 (5th Cir. 1994). The court cannot fault

counsel's performance for not pressing a losing issue.¹ Accordingly, the court will dismiss the claim.

III.

Sentencing Guideline § 5K2.13 provides for diminished capacity departures:

If the defendant committed a non-violent offense while suffering from significantly reduced mental capacity not resulting from voluntary use of drugs or other intoxicants, a lower sentence may be warranted to reflect the extent to which reduced mental capacity contributed to the commission of the offense, provided that the defendant's criminal history does not indicate the need for incarceration to protect public.

McGeorge claims that his counsel was ineffective for not seeking a downward departure on the ground that, at the time he committed the offenses, McGeorge was suffering from post-traumatic stress disorder caused by his military service in Operation Desert Storm. The court finds no deficiency in counsel's performance.

McGeorge dealt in large quantities of cocaine over a lengthy period of time. His involvement appeared deliberate, rational, and continuous, not irrational and quixotic. Under the circumstances, his counsel cannot be faulted for concluding that he would have had extreme difficulty demonstrating that McGeorge's alleged reduced mental capacity contributed to the commission of the offense. It follows that counsel's failure to seek a downward departure was not constitutionally deficient. Accordingly, the court denies the claim.

IV.

Finally, relying on *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000), McGeorge contends that the court could not sentence him based on the quantity of drugs involved because the

¹ Indeed, closer scrutiny may have subjected McGeorge to an additional role enhancement as an organizer because of his recruitment of distributors and couriers.

quantity was not alleged in the indictment or submitted to the jury as an element of the offense. McGeorge's argument fails on its merits and is barred procedurally. It fails on its merits because the court sentenced McGeorge to 168 months, which was below the statutory maximum. *See United States v. Obi*, 239 F.3d 662, 667 (4th Cir. 2001); *United States v. Kinter*, 235 F.3d 192, 201 (4th Cir. 2000). It fails procedurally because *Apprendi* does not apply retroactively on collateral review. *See United States v. Sanders*, 247 F.3d 139, 146 (4th Cir. 2001).

V.

For the reasons stated, the court denies McGeorge's § 2255 motion. An appropriate order will be entered this day.

ENTER this June 13, 2001.

CHIEF UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

JACKIE MCGEORGE,)	
)	
Petitioner,)	
)	Civil Action No. 7:00CV00788
v.)	
)	<u>FINAL ORDER</u>
UNITED STATES OF AMERICA,)	
)	By: Samuel G. Wilson
Respondent.)	Chief United States District Judge

In accordance with the written Memorandum Opinion entered this day, it is hereby **ORDERED** and **ADJUDGED** as follows:

- (1) McGeorge's motion under 28 U.S.C. § 2255 is hereby **DENIED**; and
- (2) this action is stricken from the active docket of the court.

McGeorge is advised that he may appeal this decision pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure by filing a notice of appeal with this court within sixty (60) days of the date of entry of this Order, or within such extended period as the court may grant pursuant to Rule 4(a)(5).

The Clerk is directed to send certified copies of this Order and accompanying Memorandum Opinion to McGeorge and to counsel of record for the Government.

ENTER this June 13, 2001.

CHIEF UNITED STATES DISTRICT JUDGE

