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5 UNITED STATES DISTRICT COURT  
6 CENTRAL DISTRICT OF CALIFORNIA  
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8 UNITED STATES OF AMERICA,  
9 Plaintiff,  
10 v.  
11 JAMES MICHAEL BARCLAY,  
12 Defendant.

NO. 5:11-CR-00061-JLO-1  
NO. 2:11-CR-00687-JLO-1  
NO. 5:12-CR-00043-JLO  
NO. 5:16-CV-01507-JLO  
NO. 5:16-CV-01508-JLO  
NO. 5:16-CV-01509-JLQ

ORDER RE: MOTION TO VACATE

13  
14 BEFORE THE COURT is Defendant Barclay's *pro se* Motion under U.S.C. § 2255  
15 to Vacate, Set Aside, or Correct a Sentence (ECF No. 218) ("Motion"). Defendant seeks to  
16 vacate his conviction for Possession of a Firearm in Furtherance of a Drug Trafficking  
17 Crime in violation of 18 U.S.C. § 924(c)(1)(A)(i) under Cause Number 5:12-CR-00043-  
18 JLQ.

19 Defendant bases his Motion on the Supreme Court decision in *Johnson v. U.S.*, 135  
20 S. Ct. 2551 (2015), which held the "residual clause" of the Armed Career Criminal Act's  
21 ("ACCA") definition of "crime of violence" in 18 U.S.C. § 924(e)(2) void for vagueness.  
22 Defendant asserts his possession of a firearm in furtherance of a drug trafficking crime is  
23 unconstitutionally vague because the statute of conviction contains a similar definition of  
24 "crime of violence" as that in *Johnson*.

25 **I. Background**

26 On June 4, 2012, Defendant pled guilty to: Theft of Government Property (Cause  
No. 11-CR-00687); Manufacture of Marijuana; Possession of a Machinegun; Felon in

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1 Possession of a Firearm (Cause No. 11-CR-00061-JLQ-1); and Possession of a Firearm in  
2 Furtherance of a Drug Trafficking Crime (Cause No. 12-CR-00043). On August 28, 2012,  
3 the court sentenced Defendant to 108 months incarceration on all counts except for the  
4 924(c) firearm offense wherein Defendant received a mandatory minimum 60 month  
5 sentence consecutive to the 108 month sentence. Defendant appealed the sentence  
6 imposed on the 924(c) offense, but did not appeal the conviction. *See* (ECF No. 37). He  
7 later withdrew his appeal. *See* (ECF No. 56).

## 8 **II. Discussion**

9 18 U.S.C. § 924 makes it a crime for any person who “during and in relation to any  
10 crime of violence or drug trafficking crime ... uses or carries a firearm, or in furtherance of  
11 any such crime, possesses a firearm.” 18 U.S.C. § 924(c)(1)(A). The statute requires a five  
12 year minimum sentence and such sentence must run consecutive to any other sentences.  
13 *See* 18 U.S.C. §§ 924(c)(1)(A)(i), (c)(1)(D)(ii). For the purposes of the statute, “drug  
14 trafficking crime” is defined as “any felony punishable under the Controlled Substances  
15 Act (21 U.S.C. 801 et seq.).” 18 U.S.C. § 924(c)(2). The statute defines “crime of  
16 violence” as “an offense that is a felony and-- (A) has as an element the use, attempted  
17 use, or threatened use of physical force against the person or property of another, or (B)  
18 that by its nature, involves a substantial risk that physical force against the person or  
19 property of another may be used in the course of committing the offense.” 18 U.S.C. §  
20 924(c)(3).

21 In *Johnson*, the Supreme Court considered whether “or otherwise involves conduct  
22 that presents a serious potential risk of physical injury to another” (also known as the  
23 “residual clause”) in 18 U.S.C. § 924(e)(2) was unconstitutionally vague. *Johnson*, 135 S.  
24 Ct. at 2555. For a defendant with three qualifying convictions, the ACCA increases the  
25 mandatory minimum period of incarceration to 15 years which is above the otherwise  
26 applicable statutory maximum. *See* 18 U.S.C. § 924(e)(1). Although the residual clause

1 had been upheld by four prior decisions, in *Johnson*, the Supreme Court found the residual  
2 clause was void for vagueness. In finding the residual clause of the ACCA void for  
3 vagueness, the Supreme Court also stated other laws containing “substantial risk,” “grave  
4 risk,” and “unreasonable risk” were not automatically void for vagueness based on the  
5 holding in *Johnson*. See (*id.* at 2561).

6 In this matter, Defendant was charged with “Possession of a Firearm in Furtherance  
7 of a **Drug Trafficking Crime**.” (ECF No. 1) (emphasis added). The Information further  
8 identified the drug trafficking crime as “manufacture of marijuana, in violation of 21  
9 U.S.C. §§ 841(a)(1), (b)(1)(B)(vii)” as charged under Cause Number 11-CR-00061-JLQ.  
10 See (ECF No. 1 at 1-2). Defendant pled guilty to the 18 U.S.C. § 924(c) charge in the  
11 Information alleging possession of a firearm during a drug trafficking crime. There was no  
12 evidence Defendant possessed a firearm in furtherance of a crime of violence nor was he  
13 charged with such. See, e.g., (ECF No. 1); (ECF No. 8); (ECF No. 32).

14 Defendant’s Motion cites to an opinion from the Eastern District of California  
15 which applied *Johnson* to 18 U.S.C. § 924(c). See *U.S. v. Thongsouk Theng Lattanaphom*,  
16 159 F. Supp. 3d 1157 (E.D. Cal. 2016). There, the defendant was charged with “use of a  
17 firearm during a crime of violence.” (*Id.* at 1159). The court evaluated *Johnson*, found it  
18 applied to 18 U.S.C. § 924(c)(3), and dismissed the firearm charge. See (*id.* at 1161-64).

19 *Lattanaphom* is factually different from the matter *sub judice*. The district court in  
20 *Lattanaphom* did not consider or address whether the definition of “drug trafficking  
21 crime” was void for vagueness. Additionally, in *Johnson*, the Supreme Court made clear  
22 its holding only affected the residual clause of 18 U.S.C. § 924(e)(1) and did not touch the  
23 remainder of the Armed Career Criminal Act’s definition of violent felony. *Johnson*, 135  
24 S. Ct. at 2563 (“Today’s decision does not call into question application of the [Armed  
25 Career Criminal Act] to the four enumerated offenses, or the remainder of the [Armed  
26 Career Criminal Act’s] definition of violent felony”).

1 Defendant's possession of a firearm during a drug trafficking crime conviction did  
2 not charge or rely on the residual clause or any portion of the "crime of violence"  
3 definition either in 18 U.S.C. § 924(c) or § 924(e). His conviction rests upon the definition  
4 of "drug trafficking offense" which Defendant does not challenge as being  
5 unconstitutional. Accordingly, *Johnson* provides the Defendant no relief. For these  
6 reasons, the Motion is Denied.

7 **IT IS HEREBY ORDERED:**

8 The Motion To Vacate, etc. (ECF No. 218) is **DENIED**.

9 **IT IS SO ORDERED.** The Clerk is hereby directed to enter this Order and furnish  
10 copies to counsel for the Government and to Defendant Barclay.

11 Dated March 27, 2017.

12 s/ Justin L. Quackenbush  
13 JUSTIN L. QUACKENBUSH  
14 SENIOR UNITED STATES DISTRICT JUDGE  
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