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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

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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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