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5 **UNITED STATES DISTRICT COURT**
6 **SOUTHERN DISTRICT OF CALIFORNIA**
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8 UNITED STATES OF AMERICA,

9 Plaintiff,

10 v.

11 LEON ROSSETTO,

12 Defendant.

Case No: 3:06-cr-01435-DMS-2

**ORDER GRANTING MOTION TO
VACATE, SET ASIDE, OR CORRECT
SENTENCE UNDER 28 U.S.C. § 2255**

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15 This case returns to the Court on Defendant Leon Rossetto's *pro se* motion to vacate,
16 set aside or correct his sentence pursuant to 28 U.S.C. § 2255. For the reasons set out below,
17 the motion is granted.

18 On March 11, 2008, Defendant pled guilty to one count of conspiracy to commit a
19 violent crime in aid of racketeering ("VICAR") in violation of 18 U.S.C. §1959(a), and one
20 count of carrying a firearm during the commission of a crime of violence in violation of 18
21 U.S.C. § 924(c)(1)(A)(i). (ECF Nos. 78, 80.) On August 22, 2008, Defendant was
22 sentenced to a total of 180 months' incarceration. (ECF Nos. 99, 102, 118.)

23 On May 22, 2018, Defendant filed the present motion to vacate his conviction for
24 violating 18 U.S.C. § 924(c), arguing his § 1959(a) conviction does not qualify as a
25 predicate "crime of violence" under § 924(c), because the "residual clause" of § 924(c)'s
26 definition of "crime of violence" is unconstitutionally vague. (ECF No. 112.)
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1 The United States initially filed a response in opposition. (ECF No. 121.) While
2 Defendant’s motion was pending, the United States Supreme Court decided *United States*
3 *v. Davis*, 139 S. Ct. 2319 (2019), which held that the “residual clause” of § 924(c)(3)(B) is
4 unconstitutionally vague. Pursuant to the Court’s order, the United States filed a
5 supplemental briefing addressing the impact of *Davis* on Defendant’s motion. (ECF No.
6 129.) Also pending before the Court is Defendant’s motion to appoint counsel. (ECF No.
7 113.)

8 18 U.S.C. § 924(c)(1)(a)(i) prohibits any person from using or carrying a firearm
9 “during and in relation to any crime of violence.” A “crime of violence” is defined as a
10 felony offense that “(A) has as an element the use, attempted use, or threatened use of
11 physical force against the person or property of another,” or “(B) that by its nature, involves
12 a substantial risk that physical force against the person or property of another may be used
13 in the course of committing the offense.” 18 U.S.C. 924(c)(3). The Supreme Court refers
14 to the language of these subsections as the “elements clause” and the “residual clause,”
15 respectively.¹ *See Davis*, 139 S. Ct. at 2324.

16 In *Davis*, the Supreme Court struck down the “residual clause” of § 924(c) as
17 unconstitutionally vague. Accordingly, as the United States concedes, a conviction under
18 § 1959(a) no longer qualifies as a crime of violence under § 924(c)(3)(B). Nor does
19 Defendant’s § 1959(a) conviction qualify as a crime of violence under the “elements clause”
20 of § 924(c), because he pled guilty to conspiracy to commit murder, an offense which does
21 not have “as an element the use, attempted use, or threatened use of physical force against
22 the person or property of another.” 18 U.S.C. § 924(c)(A); *see United States v. McCollum*,
23 885 F.3d 300, 309 (4th Cir. 2018) (holding conspiracy to commit VICAR murder is not
24 categorically a crime of violence); *Bonilla v. United States*, No. 07 CR 0097, 2020 WL
25 489573, at *3 (E.D.N.Y. Jan. 29, 2020) (“[C]onspiracy to commit murder in-aid-of
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27 ¹ Courts also sometimes refer to subsection (A) as the “force clause.”
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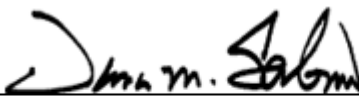
1 racketeering . . . is not categorically a crime of violence following *Davis* and therefore
2 cannot support a conviction under § 924(c).”)

3 In sum, the United States agrees Defendant’s conviction for VICAR conspiracy under
4 § 1959(a) no longer qualifies as a crime of violence capable of supporting his § 924(c)
5 conviction. Moreover, the United States no longer seeks to enforce the waiver of appeal
6 and collateral attack contained in Defendant’s plea agreement.

7 For these reasons, the Court VACATES Defendant’s conviction on Count 2 for
8 violation of 18 U.S.C. § 924(c). Defendant’s motion for appointment of counsel is DENIED
9 as moot.

10 **IT IS SO ORDERED.**

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12 Dated: March 30, 2021

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15 Hon. Dana M. Sabraw, Chief Judge
16 United States District Court
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