Record No. 06-4494

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee-Respondent,

v.

ZACARIAS MOUSSAOUI,

Defendant-Appellant-Petitioner.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
THE HONORABLE LEONIE M. BRINKEMA, PRESIDING

PETITION FOR REHEARING AND REHEARING *EN BANC*

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STATEMENT REQUIRED BY FEDERAL RULE OF APPELLATE PROCEDURE 35(b)(1)

This Petition raises issues of exceptional importance including, among other things: (1) whether a plea is uncounseled under the Sixth Amendment if, at the time of the plea, counsel was barred by court order from discussing with the client information that the court has found to be material and exculpatory as to the defendant; (2) whether failure to produce material and exculpatory evidence to a defendant, as opposed to his counsel, renders a plea unknowing and involuntary under *Brady v. Maryland*, 373 U.S. 83 (1963) and the Fifth Amendment Due Process Clause; (3) whether the "guilty plea bar" applies if a plea was not properly counseled; and (4) whether the Panel Opinion correctly denied Moussaoui's challenges to his sentence in this federal death penalty case.

<u>STATEMENT OF ISSUES MERITING *EN BANC* CONSIDERATION</u>

1. Is a defendant deprived of counsel in connection with a plea if his lawyer is barred, by court order, from discussing with the defendant evidence in the lawyer's possession that the court has held to be material and exculpatory as to the defendant?

2. If a defendant is deprived of material and exculpatory information in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), in connection with a plea, is that plea knowing and voluntary?

3. Does the "guilty plea bar" apply if the defendant was not permitted to fully discuss or strategize with his lawyers about the Government's case or the defense case?

4. Was the Panel Opinion correct in its legal and factual premises in affirming the sentence of life without the possibility of parole?

<u>SUMMARY OF ARGUMENT</u>

Before Zacarias Moussaoui pled guilty, the District Court and a Panel of this Court had held that the Government possessed material information that tended to show that Moussaoui was innocent of the charges in the indictment. *See* Brief of Appellant ("Appellant Br.") at 66-77; *see also United States v. Moussaoui*, 365 F.3d 292 (4th Cir.), *on rehearing*, 382 F.3d 453 (4th Cir. 2004). However, this material, exculpatory information happened to be contained in documents that also

contained classified information. Under the Classified Information Procedures Act ("CIPA"), 18 U.S.C. App. III §§ 1-16 (2007), the Government had a number of options available under those circumstances, including the options to redact the classified information, to produce a substitute (without the classified information), or to stipulate to the discoverable facts. However, the District Court did not follow CIPA. Instead, the District Court concluded that Moussaoui's Fifth and Sixth Amendment rights were vindicated if the material and exculpatory information was provided to Moussaoui's lawyers, even if they could not share or discuss the information with their client. Thus, at the time Moussaoui pled guilty, his lawyers recommended, on the record in court, that he should not plead guilty, but they could not explain to their client why.

As discussed below, the Panel Opinion raises a number of important issues that merit *en banc* consideration, and we incorporate by reference the prior briefs in this case. To be clear, all issues raised in the prior briefs and at argument are reserved both for further review on direct review, or in any subsequent petition filed under 28 U.S.C. § 2255. However, given the page limits for this Petition, we focus on four issues.

First, this Court should grant rehearing or rehearing *en banc* to review whether a defendant is deprived of counsel at the time of a plea if his lawyer is barred by court order from discussing evidence in the lawyer's possession that the

court has held to be material and exculpatory. The Panel Opinion concluded that Moussaoui was not deprived of counsel because Moussaoui knew and could discuss with his lawyers: (1) the fact that his lawyers possessed some kind of information tending to show he was not involved in the 9/11 attacks; and (2) how and when the classification process would have been completed had he not pled guilty. *See* 591 F.3d at 285-88. These restricted discussions were different from the meaningful discussions that a client must be permitted to have before entering a plea, in which the lawyer and client are able to discuss the evidence itself and to strategize together about how the known evidence, as well as the likely evidence, will be used at trial. This Court should grant rehearing *en banc* to review this important Sixth Amendment question.

Second, this Court should grant rehearing or rehearing *en banc* to review whether failure to provide material and exculpatory information to a defendant (as opposed to his counsel) – in violation of *Brady v. Maryland*, 373 U.S. 83 (1963) – in connection with a plea renders the plea unknowing and involuntary. On that score, in *United States v. Ruiz*, 536 U.S. 622 (2002), the Supreme Court reserved for future consideration the question of whether the deprivation of exculpatory (as opposed to impeachment) information in violation of *Brady* renders a plea unknowing or involuntary, and there is now a deep and mature split among the Circuits on this issue. *See* discussion *infra* at Part II. Here, there is no dispute that,

prior to Moussaoui's plea, both the District Court and this Court had specifically found that the Government had material, exculpatory information and had ordered that it be produced; indeed, a Panel of this Court held, before Moussaoui pled guilty, that this information was "material evidence on behalf of Moussaoui," "clearly of exculpatory value as to both guilt and penalty," and "essential to Moussaoui's defense." *Moussaoui*, 365 F.3d at 310-12. However, this information was produced to Moussaoui's lawyers, but not Moussaoui, and Moussaoui's lawyers were barred from sharing or discussing it with the defendant. Contrary to the holding of the Panel Opinion, Moussaoui could not have entered a knowing and voluntary plea.

Third, the Panel Opinion broadly expands the application of the "guilty plea bar" to appellate review. In the three cases commonly referred to as the "*Brady* Trilogy" – *Brady v. United States*, 397 U.S. 742 (1970); *McMann v. Richardson*, 397 U.S. 759 (1970), and *Parker v. North Carolina*, 397 U.S. 790 (1970) – the Supreme Court announced the general rule that a guilty plea, intelligently and voluntarily made, bars the later assertion of constitutional challenges to the pretrial proceedings. The Panel Opinion relies heavily on the guilty plea bar under the *Brady* Trilogy to foreclose inquiry into myriad constitutional violations that Moussaoui asserts on direct appeal. However, until this decision, it was clear that the guilty plea bar only applied where the defendant was able to fully discuss the

case and the lawyer's judgment about the Government's and defense's cases. As the *McMann* Court explained:

> As we said in [*Brady v. United States*] the decision to plead guilty before the evidence is in frequently involves the making of difficult judgments. All the pertinent facts normally cannot be known unless witnesses are examined and cross-examined in court. Even then the truth will often be in dispute. In the face of unavoidable uncertainty, the defendant and his counsel must make their best judgment as to the weight of the State's case. ***Counsel must predict how the facts, as he understands them, would be viewed by a court. If proved, would those facts convince a judge or jury of the defendant's guilt? On those facts would evidence seized without a warrant be admissible? Would the trier of fact on those facts find a confession voluntary and admissible? Questions like these cannot be answered with certitude; yet a decision to plead guilty must necessarily rest upon counsel's answers, uncertain as they may be.*** Waiving trial entails the inherent risk that the good-faith evaluations of a reasonably competent attorney will turn out to be mistaken either as to the facts or as to what a court's judgment might be on given facts.

McMann, 397 U.S. at 769-70 (emphasis added). There can be no serious dispute that Moussaoui and his lawyers were not permitted to do what *McMann* held was necessary in order for the guilty plea bar to apply – to discuss openly the case, the potential facts, and the potential witnesses. The Panel Opinion's holding broadly expands the application of the guilty plea bar and is thus critically important and deserving of rehearing or rehearing *en banc.*

Fourth, the Panel Opinion rejected Moussaoui's challenges to his sentence of life without the possibility of parole based on incorrect factual findings and legal premises. This Court should grant rehearing or rehearing *en banc* to review these findings.

This case also presents an important vehicle to review pre-trial procedures in a national security case involving classified information. The District Court found that information was material and exculpatory, but permitted the Government to produce substitutes that were still classified, instead of the *unclassified* substitutes required by CIPA. Whether that holding is correct or incorrect, it represents a change in the application of CIPA that should be reviewed by this Court *en banc*.

One final point bears emphasis. In most cases, when a defendant or appellant asserts a violation of *Brady v. Maryland*, the defendant is arguing that the evidence meets the strict test of that case – *i.e.*, that the evidence was material, exculpatory, and non-cumulative. Here, before Moussaoui pled guilty, either the District Court or a Panel of this Court, or both, had specifically held that the evidence on which this appeal rests was, in fact, *Brady* evidence. This case is therefore unique because, for the critical evidence in this case, the dispute is not *whether* the evidence is *Brady*, but rather what are the consequences of failing to allow the production of *Brady* evidence to the defendant so that it may be

discussed between the defendant and his lawyer. These issues are surely of sufficient importance to justify rehearing or rehearing *en banc*.

For these reasons and those below, and in order to provide clear guidance to the Government, defense counsel, and the trial courts in national security cases, this Court should grant rehearing or rehearing *en banc*.

ARGUMENT

I. This Court Should Grant Rehearing On The Panel Opinion's Holdings On The Right To Counsel.

The decision to enter a plea is perhaps the most important decision a criminal defendant makes. In connection with a plea, the Sixth Amendment right to counsel depends upon the ability to communicate freely with counsel and the right to obtain advice concerning the interplay of the law and evidence (or even expected evidence) at issue in the case. The Panel Opinion rejected Moussaoui's argument that he was denied counsel in connection with his plea. *United States v. Moussaoui*, 591 F.3d 263, 289 (4th. Cir. 2010) (citing *United States v. Cronic*, 466 U.S. 648, 654 n.11 (1984)). The Panel Opinion based its conclusions on two premises. First, the Panel Opinion noted that – as Moussaoui had acknowledged in briefs and at argument – the right to communicate with counsel is not absolute; the Panel Opinion concluded that those cases permitting narrow restrictions on attorney-client communications also supported the broad restrictions imposed here because this case involves classified information. *Id*. at 289-90. Second, the Panel

Opinion concluded that because Moussaoui knew and could discuss with his lawyers that (a) his lawyers had material, exculpatory information, and (b) Moussaoui eventually should have access to that information if he did not plead guilty, Moussaoui in effect had all of the advice of counsel to which he was entitled. *Id*. at 290. These holdings are so important that either alone would demand *en banc* review by this Court.

To illustrate the importance of these holdings as a practical matter, imagine that a defendant accused of conspiracy is contemplating pleading guilty, but before pleading guilty, he hears that a credible witness would testify that he was not involved in the conspiracy. Having been told that his lawyers have very important information, the defendant asks them if this is true. Although his lawyers know the answer, they are prohibited by law and court order not only from identifying the witness, but also from even confirming or denying whether any such witness exists. Instead, the lawyers are only able to tell their client that he should not plead guilty and that material, exculpatory information exists and that he may get it prior to, or at, trial. This client will have stilted, incomplete discussions with his lawyer, and will not be able to strategize in the manner contemplated under the *Brady* Trilogy. Many questions – "What will our case look like?" "What will the Government do at trial?" "What do you think of that witness?" – simply cannot be answered. Indeed, even if the client asks about newspaper reports mentioning the

witness, the lawyer would not be able to comment. If this hypothetical client pleads guilty, he could not properly assess counsel's recommendation, and the plea is simply not counseled. It is clear that this hypothetical defendant received the advice of counsel in form, but not in substance.

In addition, as a practical matter, material in discovery may appear to a lawyer to be very important, or not important at all, and it is only after discussing that information with the client that the lawyer and client can make a proper judgment about its importance. It is not atypical to bring evidence to a client, believing it to be very important, only to be told by the client that it is not. And, many times, during meetings between attorney and client, a seemingly innocent fact will turn out to be critically important. The point is that a defendant cannot determine whether to trust the lawyer's advice unless the defendant is able to discuss the reasons for the lawyer's recommendation, to undertake informed speculation about the facts, to discuss the likelihood of conviction, and to do all of the other things that are crucial to the attorney-client relationship. Just as a patient is unable to assess a doctor's treatment recommendation if the doctor is unable to fully explain why a given procedure is necessary, a defendant cannot be said to have the advice of counsel when attorney-client communication is restricted as it was in this case.

The holdings of the Panel Opinion are so fundamental to the right to counsel that this Court should review them *en banc.*

A. The Panel Opinion Incorrectly Held That Prior Cases Permitting Narrow Restrictions On Attorney-Client Communication Support The Broad Restrictions Here.

Until this case, no court, as far as we are aware, had held that a lawyer may be ordered not to discuss with his client information that the court has held to be material and exculpatory. Rather, courts have upheld a restriction on attorney-client communication only when the restriction was narrowly tailored to prevent discussion between the lawyer and client about highly sensitive information to which the client was not entitled. Appellant Br. at 79-84; Reply Brief of Appellant ("Appellant Reply Br.") at 23-31. We have summarized that case authority in the prior briefs, and we refer to those discussions, rather than repeating them here. Appellant Br. at 79-84; Appellant Reply Br. at 23-31.

It simply cannot be that a lawyer may be restricted from discussing with a client important information that tends to show that the client is not guilty of the charges. Thus, even if we assume that (1) ordinarily a court must not interfere with free communication between lawyer and client, but (2) there is a narrow exception that permits a court to restrict a lawyer from discussing sensitive information to which the defendant is not entitled, the Panel Opinion makes an enormous leap, expanding that narrow exception, such that a court may now bar a lawyer from

discussing material and exculpatory information with his client. This holding is devastating to the Sixth Amendment right to counsel and is surely extraordinary enough to justify *en banc* review.

Moreover, the fact that the material and exculpatory information appeared in documents that also contained classified information does not change the analysis. Under CIPA, if information is material and exculpatory, the Government has a number of options available to put the defendant in the place he would have been had he received the discoverable information, and none of those options require production of classified information. One option for the Government is to redact the classified information; another option is to produce a substitute for the original that conveys the discoverable facts without the classified information. However, if the Government chooses to produce an unclassified substitute, that substitute must be produced to the defendant. 18 U.S.C. App. III § 6(c)(1). Indeed, production of still-classified substitutes is contrary to the plain language of CIPA, and to the holding of this Court in *United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008). We have discussed this issue at length in our prior briefs, and we incorporate that discussion without repeating it here. Appellant Br. at 36-49; Appellant Reply Br. at 15-19.

With respect to virtually all of the material and exculpatory information in the classified documents, the District Court here never even asked the Government

to attempt to produce the important information in non-classified form before Moussaoui pled guilty. Thus, the Sixth Amendment violation here was created by the failure to follow CIPA in the first place. Having created a Sixth Amendment violation, the District Court was required to make sure it had been cured before accepting Moussaoui's plea; as it stood, the plea here was uncounseled.

No prior case law from any court supports the notion that a court may restrict a lawyer from discussing material and exculpatory information with a client, and CIPA, properly followed, does not require such a holding here.

B. The Panel Opinion Incorrectly Held That The Limited Information Moussaoui Could Discuss With His Lawyers Was Sufficient To Vindicate His Right to Counsel.

Under the approach taken by the Panel Opinion, Moussaoui had the benefit of counsel because he knew and could discuss with his lawyers that (1) three Enemy Combatant Witnesses ("ECWs") had material, exculpatory information; (2) the information did, in fact, tend to prove that he was innocent; and (3) he should receive the material, exculpatory information by the time of trial. This holding – that discussion of the mere *existence* of evidence that should be produced to the client at a later time is the functional equivalent of the advice of counsel to which the defendant is entitled under the Sixth Amendment – is similarly extraordinary and similarly justifies *en banc* review.

The plea here was uncounseled not merely because Moussaoui did not know the *facts* and was not permitted to discuss them his lawyers[1] – the plea also was uncounseled because Moussaoui could not be advised about the legal consequences of those facts or predicted facts. Under these circumstances, defense counsel were left with no choice but to provide Moussaoui with bare legal suggestions (*i.e.*, "we think you should/should not plead guilty") with no analysis of the facts underlying their recommendation on which Moussaoui could base an informed and counseled decision for himself, as is his constitutional right. Thus, even if Moussaoui had heard certain information from sources other than his lawyers, at the moment when he was deciding whether to plead guilty, he was left on his own to determine: (a) what facts existed pertaining to the Government's case and his defense; (b) the relative importance and legal consequences of those facts; and (c) whether pleading guilty or continuing to trial was the wisest course for him. A plea under these circumstances cannot be called counseled.

In addition, the amount of material, exculpatory evidence that Moussaoui could not discuss with his lawyers was extraordinary. Among other things, there was: (1) evidence that this Court and the District Court had concluded was material and exculpatory; (2) evidence that the District Court specifically concluded was

[1] For instance, if Moussaoui speculated about evidence that appeared in classified documents, the lawyers would not have been able speculate back, for fear that they would inadvertently confirm or deny classified information.

material and exculpatory, but that this Court had not yet reviewed at the time of Moussaoui's plea; (3) evidence that was plainly material and exculpatory – although not deemed so by the District Court. Moussaoui identified some of this evidence in the prior briefs to the Court and explained its importance to Moussaoui's case, Appellant Br. at 66-77; Appellant Reply Br. at 57-58, but the Panel Opinion only addresses a tiny fraction. The point is that the Government had produced to defense counsel a very large amount of material, exculpatory information – evidence tending to show that Moussaoui was not involved in any conspiracy that included the 9/11 attacks – but the District Court and the Government tied the lawyers' hands, such that they could not discuss this evidence with their client.

For instance, at the time Moussaoui pled guilty to conspiracies that included the 9/11 attacks as an object,[2] his lawyers had the following statements by Khalid Shaikh Mohammed, the acknowledged mastermind of the 9/11 attacks, that, among other things:

[2] If Moussaoui pled guilty to a conspiracy that did not include the 9/11 attacks, he would have never been eligible for the death penalty because no death would have resulted therefrom.

- Moussaoui was not going to participate in the 9/11 attacks (JA3988,[3] JA4019);
- If Moussaoui had been part of the 9/11 attacks, it would have disrupted the 9/11 attacks when Moussaoui was arrested (JA3989);
- Moussaoui was in fact kept separate from the 9/11 attackers, and KSM believed Moussaoui was incompetent to help even with a subsequent attack (JA4023-24);
- The 9/11 attacks were KSM's idea (JA3994);
- Someone other than Moussaoui was sent to the United States to be the so-called "20th hijacker" (JA4014).

Both the District Court and this Court had concluded, prior to Moussaoui's plea, that this evidence was material and exculpatory as to Moussaoui.

Had Moussaoui's lawyers been able to discuss this information with their client, he would at least have been able to understand why they were recommending that he not plead guilty to any conspiracy that included the 9/11 attacks. Whether he agreed with them or not, Moussaoui's decision would have been counseled.

The Panel Opinion also appears to have taken some comfort from the belief that some of the material, exculpatory information – or at least a summary thereof – was contained in public documents, including the prior opinion in this case in *United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004) ("*Moussaoui II*"), newspaper reports, and so forth. However, defense counsel who receive classified

[3] Cites to the "JA" are to the Joint Appendix. Cites to the "SJA" are to the Supplemental Joint Appendix. Cites to "2SJA" are to the Second Supplemental Joint Appendix, and so forth.

information are advised that, under the penalty of criminal prosecution, they cannot confirm or deny classified information, even if it appears in the newspaper or other public documents. This has a terrible effect on the attorney-client relationship, and, in some ways, a lawyer who has received classified information is worse off than a lawyer who has not: When the client asks counsel about that information, defense counsel can say nothing more than "I cannot comment on that." This response, in turn, must inevitably undermine the trust between attorney and client. In short, the fact that some version of the material, exculpatory information may have appeared publically does not cure the Sixth Amendment violation, because counsel and client could not discuss that public information either.

The Panel Opinion also notes that Moussaoui had a right to plead guilty. 591 F.3d at 290. While this is true, it raises an important question: what was the rush in having Moussaoui plead guilty before unclassified substitutes were available? By April 2005, Moussaoui had been in highly restricted custody for some three-and-a-half years, and there was no impending trial or release date. A major implied premise of the Panel Opinion is that Moussaoui would have eventually received the material and exculpatory information at issue, but, if that is the case, what prejudice would there have been in completing the CIPA review and producing the material and exculpatory information to Moussaoui before he entered his guilty plea? If that had been done, the Sixth Amendment violation

would have been cured, and if Moussaoui had pled guilty, it would have been a counseled plea. Instead, Moussaoui entered his guilty plea on April 22, 2005, and then a few days later, on April 28, the parties met again with the Court to discuss the production of declassified version of some of the same evidence. (*See* Dist. Ct. Docket Entry No. 1281.)

Under these circumstances, this Court should rehear this case.

II. THIS COURT SHOULD GRANT REHEARING OR REHEARING *EN BANC* ON THE PANEL'S HOLDINGS RELATING TO THE ALLEGED *BRADY* VIOLATION.

In *United States v. Ruiz*, 536 U.S. 622, 633 (2002), the Supreme Court reserved the issue of whether deprivation of exculpatory (as opposed to impeachment) information in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), renders a plea unknowing or involuntary, and there is now a deep and mature split among the Circuits on this issue. Six Circuits have held or suggested that "even a guilty plea that was [otherwise] 'knowing' and 'intelligent' may be vulnerable to challenge if it was entered without knowledge of material evidence withheld by the prosecution." *Miller v. Angliker*, 848 F.2d 1312, 1320 (2d Cir. 1988); *see also Sanchez v. United States*, 50 F.3d 1448, 1453 (9th Cir. 1995); *United States v. Wright*, 43 F.3d 491, 496 (10th Cir. 1994); *Ferrara v. United States*, 456 F.3d 278, 290-98 (1st Cir. 2006) (concluding that *Brady* violation along with other circumstances required vacatur of plea); *Campbell v. Marshall*, 769 F.2d 314, 317-

24 (6th Cir. 1985) (concluding there is no *per se* bar on collateral attack of a guilty plea based on an alleged violation of *Brady* but denying relief sought); *White v. United States*, 858 F.2d 416, 420-24 (8th Cir. 1988) (same). As the Seventh Circuit noted in discussing *Ruiz*, "it is highly likely that the Supreme Court would find a violation of the Due Process Clause if prosecutors or other relevant government actors have knowledge of a criminal defendant's factual innocence but fail to disclose such information to a defendant before he enters into a guilty plea." *McCann v. Mangialardi*, 337 F.3d 782, 788 (7th Cir. 2003). The Fifth Circuit, by contrast, has held that "a guilty plea precludes the defendant from asserting a *Brady* violation." *United States v. Conroy*, 567 F.3d 174, 178 (5th Cir. 2009).

The Panel Opinion rejected Moussaoui's Fifth Amendment argument based on three conclusions that are very similar to those on which the Panel Opinion rejected the Sixth Amendment arguments. Critically, the Panel Opinion only addressed a small fraction of the *Brady* information that was not shown or discussed with Moussaoui prior to his plea; indeed, samples of the other information was specifically identified in the prior briefs. *See* Appellant Br. at 66-77; Appellant Reply Br. at 57-58. The Panel Opinion concluded that Moussaoui's plea was knowing because he had been advised that there *was* exculpatory evidence that had not been provided to him. In addition, the Panel Opinion concluded that the production by the Government of classified evidence to

Moussaoui's lawyers distinguished this case from other cases involving a *Brady* violation – even though defense counsel could not discuss or share that information with Moussaoui. 591 F.3d at 286-88.

Both of those holdings are highly important and justify rehearing *en banc*. First, if the Government has *Brady* evidence, it must be produced in a form that can be shared with the defendant; otherwise, the *Brady* right is largely illusory. Second, knowing that exculpatory information exists is not the same as knowing the exculpatory information itself. Indeed, under the holding of the Panel Opinion, it would be difficult for any innocent person to ever raise a *Brady* challenge because, by definition, that innocent person would know that some exculpatory information exists. In addition, if the holding of the Panel Opinion stands, then the Government may fulfill its *Brady* obligation by merely informing the defense that it possesses material and exculpatory information that will be provided later.

In effect, the Panel Opinion holds that the Government may satisfy *Brady* by producing information to defense counsel, even if defense counsel cannot show it to the defendant. Given the split among the Circuits on this issue, and given the significance of the Panel Opinion's holding in this regard, this Court should grant *en banc* review on this issue.

III. THE PANEL OPINION INAPPROPRIATELY EXPANDS THE GUILTY PLEA BAR.

The Panel Opinion also inappropriately expands the applicability of the guilty plea bar. The "*Brady* Trilogy," *see supra* at 4, and decades of related authority, have established that the guilty plea bar only applies if the plea was knowing, voluntary, and counseled. The *McMann* Court made clear, as discussed *supra* at 5, that the reason a counseled plea waives antecedent constitutional errors is precisely because counsel and client can communicate freely, speculate about the evidence, and predict based on informed judgment how the case will go at trial in light of the evidence then available to lawyer and client. *See McMann*, 397 U.S. at 769 ("In the face of unavoidable uncertainty, the defendant and his counsel must make their best judgment as to the weight of the State's case.") (citing *Brady*, 397 U.S. at 756-57). Under those circumstances, there is full advice of counsel, there is a bar, and antecedent constitutional violations are waived.

Those were not the circumstances here. To the contrary, on the day that Moussaoui entered his guilty plea, his lawyers had evidence held to be material and exculpatory by both the District Court and this Court after close review, and yet counsel could not disclose or discuss it with Moussaoui. Moussaoui cannot be found to have full advice of counsel under these circumstances; nonetheless, the Panel Opinion applied the guilty plea bar to prevent review of all other antecedent constitutional violations.

Simply put, Moussaoui was deprived of the substantive advice of counsel to which he was entitled, and he then pled guilty. As a result of this uncounseled plea, he has also been deemed to have waived all other constitutional violations. This was an important expansion of the guilty plea bar, and this Court should grant *en banc* review of this holding.

IV. THIS COURT SHOULD GRANT REHEARING ON THE SENTENCING ISSUES.

At the time Moussaoui was sentenced, a jury had found Moussaoui to be "death eligible" but had declined to impose the death penalty. The District Court believed that because Moussaoui had been found death eligible, the only alternative sentence was life imprisonment without the possibility of parole, and the District Court sentenced him accordingly. Appellant Br. at 177-201; Appellant Reply Br. at 79-87. Under the Federal Death Penalty Act ("FDPA"), 18 U.S.C. § 3591(a)(2)(C), in order for Moussaoui to be death eligible, the Government had to prove that at least one death on 9/11 was the "direct result" of Moussaoui's lies to the Government.[4] Under the Government's theory, Moussaoui's lies "direct[ly]

[4] It is worth noting that when discussing death eligibility, the Panel Opinion stated that "the death-eligibility factor asserted by the Government was that Moussaoui 'intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and the victim died as a result of the act.'" In fact, the standard requires that the victim have died as a ***direct*** result of the act. *See* 18 U.S.C. § 3591(a)(2)(C).

result[ed]" in a death in the 9/11 attacks because: (1) had Moussaoui instead told the FBI in 2001 everything later written in the April 2005 Statement of Facts, the FBI would have investigated the case as it did after 9/11 and would have identified some of the hijackers; (2) the FBI would have conveyed the identity of some hijackers to the Federal Aviation Administration ("FAA"), and the FAA would have added those names to the "no fly" lists; and (3) at least one of the 9/11 hijackings would have been prevented. This causal chain is quintessentially "indirect," and Moussaoui should never have been found to be death eligible.

The Panel Opinion rejected Moussaoui's challenges to his sentence, but based its holding on factual findings and legal conclusions unsupported by the record. Thus, this Court should grant rehearing or rehearing *en banc* on Moussaoui's challenges to the sentences imposed.

First, the Panel Opinion erroneously found that defense counsel made a "strategic determination" to present the jury with only two sentence options (death or life without parole). 591 F.3d at 301. The Panel Opinion did not appear to consider the extensive evidence that the Government, the District Court, and defense counsel all mistakenly believed that there were only two sentencing options: death or life without parole.[5] For example, before the penalty trial even

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[5] *See*, *e.g*., 3SJA4, 6 (Government's proposed jury questionnaire); 3SJA10-11 (District Court's jury instructions); JA1589, 2SJA112, 2SJA28-29 (parties'

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began, the Government told the District Court in 2006, "we've got a mandatory life sentence here [] at least on one of the counts. . . if it's not death, it's life imprisonment[.]" JA1569. Near the penalty trial's end, the Government again stated that if the jury failed to reach a unanimous decision on death, the "default is life imprisonment." Appellant Reply Br. at 82, 3SJA79. On appeal, the Government acknowledged that it had been incorrect on this point. Brief for the United States ("United States Br.") at 185, 189.[6] The record thus proves that the defense, Government, and the District Court all conducted the entire penalty phase under the erroneous belief that only two sentences were possible. Unaware of the third option, a term of years, the defense never made a strategic decision to waive it. *See United States v. Quinones*, 511 F.3d 289, 319 (2d Cir. 2007) (defendant waived option of term of years).[7] This was clearly a mutual mistake on the part of all involved, and there was no strategic choice.

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proposed final penalty phase instructions); JA1596, JA4368 (District Court's statements regarding possible sentences); SJA6787-88 (presentence report); *see also* Appellant Br. at 172; Appellant Reply Br. at 77-78, 82, 84-85.

[6] As further evidence of the parties and the District Court's shared erroneous belief, no one asked for a correction to the 2006 Presentence Report. The Report stated that the only available statutory sentences on Count 3 were death or life imprisonment without parole. SJA6787-88.

[7] In addition, the District Court never examined defense counsel or Moussaoui on this purported waiver, and the Panel Opinion does not describe a knowing waiver by the defense.

Second, the Panel Opinion incorrectly concluded that the District Court was not in fact mistaken about the available sentences. In reaching that conclusion, the Panel Opinion appeared not to consider that ,starting in 2002, the entire case proceeded on the mistaken belief – shared by the District Court, the defense, and the Government – that at least one capital count mandated either death or life without parole. *See*, *e.g*., JA536 (District Court's statement that "Counts 2 and 3 only have the life or death option, so we're just correct about that"); JA1019 (District Court's statement that Count 3 required "either death or imprisonment for life" if the offense had resulted in a death). The Panel Opinion found essentially irrelevant certain misstatements by the District Court concerning the sentence during the 2005 plea proceeding, reasoning that the District Court was required to state only the maximum sentence possible. 591 F.3d at 304. The Panel Opinion is erroneous in this respect, and the Court should grant rehearing.[8]

CONCLUSION

For these reasons, this Court should grant rehearing or rehearing *en banc*.

[8] In addition, the Sentencing Guidelines were inapplicable, and the District Court erred in employing them. 591 F.3d at 302, 304-05 & n. 26. Section 3593(c) directs that no presentence report shall be prepared when a defendant pleads to a capital offense. *See Quinones*, 511 F.3d at 318 n.19 (Guidelines inapplicable).

Date: February 17, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of February, 2010, I caused the foregoing Petition for Rehearing and Rehearing En Banc to be served upon the following by the filing of it with the Court's CM/ECF system:

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