

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-20926  
(Summary Calendar)

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ASHOK KUMAR KHANNA,

Defendant-Appellant.

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Appeal from United States District Court  
from the Southern District of Texas  
(CA H-94-3853; CR-H-88-190-3)

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(July 20, 1995)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:\*

Ashok Kumar Khanna was convicted by a jury of conspiracy to import, importing, and delivering over one kilo of heroin in violation of 21 U.S.C. §§ 841, 846, 952, 960, and 963. He was sentenced to 211 months' imprisonment and five years' supervised release. Khanna's conviction was affirmed on direct appeal. United States v. Singh, 922 F.2d 1169 (5th Cir.), cert. denied, 500 U.S. 938 (1991) and 502 U.S. 893 (1991).

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\* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Khanna filed this motion under 28 U.S.C. § 2255, alleging that his attorney was ineffective for advising him to go to trial. He alleged that his attorney had initially advised him to plead guilty, informing him that because the judge had denied his motion for severance, the spillover effect of the evidence against his co-defendants would result in a guilty verdict and a life sentence. His attorney informed him that if he pleaded guilty, he would receive a sentence of not more than ten years. His attorney also allegedly told him that if he pleaded guilty, he would receive a reduction in his sentence for minor participation and acceptance of responsibility. Khanna decided to plead guilty. His attorney then changed his advice, guaranteeing that if Khanna went to trial and paid him \$40,000, he would win the trial. Khanna changed his mind and went to trial. After the trial, his attorney advised him not to cooperate with the probation officer, which resulted in Khanna not receiving a downward adjustment for acceptance of responsibility.

The district court dismissed Khanna's § 2255 motion summarily, without requiring the government to respond and without a hearing, pursuant to Rule 4(b) of the Rules Governing § 2255 Proceedings. The district court did not state any reasons for the dismissal other than its conclusion that after considering the motion and the records of the criminal proceeding, Khanna was not entitled to relief.

#### DISCUSSION

Khanna argues that the district court erred in dismissing his motion summarily without making findings of fact and conclusions of

law. He requests that this court reverse and remand the case to the district court for proper factual findings and conclusions of law. He also argues the merits of his ineffective assistance of counsel claim.

Rule 4(b) of the Rules Governing § 2255 Proceedings states:

If it plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the movant to be notified. Otherwise, the judge shall order the United States Attorney to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate.

Unless the record conclusively shows that a defendant is entitled to no relief, the district court must set out its findings of fact and conclusions of law when ruling on a § 2255 motion. United States v. Edwards, 711 F.2d 633, 633 (5th Cir. 1983). A statement of findings of fact and conclusions of law is "indispensable to appellate review." Hart v. United States, 565 F.2d 360, 362 (5th Cir. 1978).

While Rule 4(b) does not expressly require findings of fact and conclusions of law when a motion "plainly" entitles the prisoner to no relief,<sup>1</sup> this Court requires that the district court at least state *why* it is so plain that relief is not warranted. As

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<sup>1</sup>Logically, no "finding" of fact or "conclusion" of law would seem to be required for a plainly nonmeritorious motion. Our use of these terms is somewhat of a misnomer in the context of a plainly nonmeritorious motion. The term "finding" necessarily implies a choice between two possible interpretations of the evidence. A summary dismissal is warranted only when there is no possible alternative but to conclude that movant is not entitled to relief.

such, the district court is expected to make some sort of "finding of fact" or "conclusion of law" explaining why the defendant is plainly unentitled to relief. Otherwise, the defendant is denied meaningful appellate review because the appellate court has no idea why the court summarily dismissed the motion, and must conduct guesswork to decide among the myriad of possible reasons (e.g., procedural defects) why the defendant "plainly" was not entitled to relief. See Hart v. United States, *supra*.

Although we state no opinion on the merits of Khanna's claim, we cannot determine whether it "plainly appears" that Khanna's motion is nonmeritorious. The district court should have, at the very least, entered findings of fact and conclusions of law to support its determination that the record conclusively showed that Khanna was not entitled to relief, in order to enable this court to conduct adequate appellate review. Edwards, 711 F.2d at 633. We vacate the district court's judgment and remand for the district court to make findings of fact and conclusions of law as to why it "plainly appears" that Khanna is not entitled to relief. If the court determines on remand that it does not "plainly appear[]" that Khanna is not entitled to relief, the United States Attorney should be ordered to respond, after which the court should determine whether an evidentiary hearing is required. See Rule 8 of the Rules Governing § 2255 Proceedings.