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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA

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9 United States of America,  
10 Plaintiff-Respondent,  
11 vs.  
12 Abraham Beltran-Moreno,  
13 Defendant-Movant.

No. CR05-0546-05-PHX-NVW  
No. CV10-0043-PHX-NVW (ECV)

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15 United States of America,  
16 Plaintiff-Respondent,  
17 vs.  
18 Jose Angel Beltran-Moreno,  
19 Defendant-Movant.

No. CR05-0546-03-PHX-NVW  
No. CV10-0205-PHX-NVW (JRI)

**ORDER**

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21 Before the Court in No. CV10-0043-PHX-NVW (ECV) is Abraham Beltran-  
22 Moreno's Amended Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct  
23 Sentence by a Person in Federal Custody (Doc. 7); Magistrate Judge Edward C. Voss's  
24 Report and Recommendation recommending denial of Beltran-Moreno's motion  
25 (Doc. 13); and Beltran-Moreno's objections to the report and recommendation (Doc. 14).

26 Also before the Court in No. CV10-0205-PHX-NVW (JRI) is Jose Angel Beltran-  
27 Moreno's Amended Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct  
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1 Sentence by a Person in Federal Custody (Doc. 5); Magistrate Judge Jay R. Irwin's  
2 Report and Recommendation recommending denial of Beltran-Moreno's motion  
3 (Doc. 12); and Beltran-Moreno's objections to the report and recommendation (Doc. 17).  
4 The Court will overrule Movants' objections to their respective Report and  
5 Recommendations, accept both Report and Recommendations, and clarify the  
6 circumstances of Movants' sentencings.

7 First, the Court has considered Movants' objections and reviewed each Report and  
8 Recommendation *de novo*. See Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1) (stating that  
9 the Court must make a *de novo* determination of those portions of the Report and  
10 Recommendation to which specific objections are made). Abraham Beltran-Moreno's<sup>1</sup>  
11 objection to Magistrate Judge Voss's Report and Recommendation specifically  
12 references this Court's statement at a January 11, 2007 hearing, "I see a 2255 written in  
13 capital letters, red ink, and bold." However, that statement does not support Abraham  
14 Beltran-Moreno's motion to vacate, set aside, or correct his sentence. The January 11,  
15 2007 hearing was intended to be a change-of-plea hearing as part of a plea bargain. In an  
16 attempt to establish an adequate factual basis for the guilty plea, the Court thoroughly  
17 questioned Abraham Beltran-Moreno about his involvement in the crimes to which he  
18 intended to plead guilty. Abraham Beltran-Moreno's answers were often evasive or  
19 incomplete, and the Court eventually concluded that it could not establish an adequate  
20 factual basis for a guilty plea. Without such a factual basis, the Court concluded that the  
21 plea bargain could not go forward. The remark about "a 2255 written in capital letters,  
22 red ink, and bold" simply referred to the lack of an adequate factual basis to support a  
23 guilty plea; it does not indicate that Abraham Beltran-Moreno's current motion under 28  
24 U.S.C. §2255 is well-founded.

25 Having reviewed the Report and Recommendations and considered the objections  
26 thereto, the Court agrees with the magistrate judges' determinations in both cases, accepts

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27 <sup>1</sup> No. CV10-0043-PHX-NVW (ECV).  
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1 their recommended decisions within the meaning of Fed. R. Civ. P. 72(b), and overrules  
2 each Movant's objections. *See* 28 U.S.C. § 636(b)(1) (stating that the district court "may  
3 accept, reject, or modify, in whole or in part, the findings or recommendations made by  
4 the magistrate").

5 Additionally, the Court of Appeals' opinion in the direct appeals of Movants'  
6 convictions suggests the need for a clarification about prior proceedings in this Court that  
7 led to the unique circumstances of Movants' sentences. *See United States v. Beltran-*  
8 *Moreno*, 556 F.3d 913 (9th Cir. 2009). The Court of Appeals' opinion stated:

9 After pleading guilty to a multiple-count indictment charging,  
10 inter alia, two independent firearms counts under 18 U.S.C.  
11 § 924(c), Jose and Abraham Beltran-Moreno benefitted from  
12 the district court's erroneous construction of that statute at  
13 sentencing. They should have quit while they were ahead.  
14 As the Supreme Court made clear fifteen years ago in *Deal v.*  
15 *United States*, 508 U.S. 129 (1993), when the government  
16 charges more than one § 924(c) offense in a single  
17 indictment, each additional count is to be treated as a "second  
18 or subsequent conviction" for purposes of 18 U.S.C.  
19 § 924(c)(1)(c)(I) and therefore carries a mandatory minimum  
20 sentence of twenty-five years. Because § 924(c)(1)(D)(ii)  
21 requires that "no term of imprisonment imposed on a person  
22 under this subsection shall run concurrently with any other  
23 term of imprisonment imposed," each independent § 924(c)  
24 count in the indictment imposes a consecutive sentence in  
25 addition to any other sentence imposed, either under § 924(c)  
26 or under any other counts for which the defendant has been  
27 convicted.

22 In this case, the defendants pled guilty to various drug  
23 offenses that, taken together, imposed a mandatory minimum  
24 sentence of ten years. They also pled guilty to two § 924(c)  
25 charges, the first of which required a mandatory minimum  
26 sentence of five years and the second of which required an  
27 additional sentence of twenty-five years. Because the statute  
28 does not allow any of these sentences to run concurrently, the  
mandatory minimum sentence for both defendants was forty  
years in prison.

1 The district court, however, was not familiar with *Deal*.  
2 Accordingly, despite the government’s argument for a forty-  
3 year minimum sentence, the court held, quite understandably,  
4 that multiple § 924(c) counts in a single indictment do not  
5 trigger the “second or subsequent” provision. As a result, the  
6 court added only two five-year sentences — as opposed to a  
7 five-year sentence and a twenty-five-year sentence — to the  
8 ten-year minimum required by the drug offenses. This was  
9 error, the result of which was the calculation of a mandatory  
10 minimum sentence of twenty years, which was twenty years  
11 lower than that required by statute, a sentence that would  
12 seem quite reasonable, but for the Court’s decision in *Deal*.

13 *Id.* at 915 (footnote and certain citations omitted).

14 This account of the previous proceedings before this Court is incomplete. On  
15 March 8, 2007, Movants appeared before this Court at a status conference, at which time  
16 their respective attorneys unexpectedly informed the Court that Movants had decided to  
17 plead guilty. The Court asked the parties if they could return later that same day for a  
18 change-of-plea hearing, and all parties agreed. When the parties returned, less than an  
19 hour later, for the change-of-plea hearing, the Court informed them:

20 I have not yet gone through and calculated what the  
21 maximum sentences are for each of these offenses, of which I  
22 must advise the defendants in the plea hearing. And rather  
23 than keeping you waiting further, we will simply go through  
24 it and I would like to have the benefit of all counsel’s  
25 concurrence in those calculations rather than keeping you  
26 waiting longer while I figured them out at the risk of possibly  
27 making a mistake.

28 A valid guilty plea requires the Court to inform the defendant, among other things, of  
“any maximum possible penalty, including imprisonment, fine, and term of supervised  
release.” Fed. R. Crim. P. 11(b)(1)(H). When it came time to inform Movants of their  
maximum possible sentences, the Court stated, “Now, Counsel, as I said, I did not  
calculate the maximum penalties,” and asked counsel for the United States whether he  
had those calculations at hand. Counsel for the United States replied, “I do, Your Honor.

1 Would you like me to go down the list by count?” The Court responded, “Yes, would  
2 you, please. And then I will rely on your recitation and ask the defendants whether they  
3 understand that.” When counsel for the United States came to the second § 924(c) count  
4 — the one which would carry a mandatory 25-year minimum sentence under *Deal* —  
5 counsel stated, “The mandatory minimum term is five years.” Relying in part on this  
6 information, Movants pled guilty.

7 Movants were sentenced on July 25, 2007. The Presentence Investigation Report  
8 noted the 25-year minimum sentence for a second or subsequent § 924(c) offense.  
9 Counsel representing the United States at the sentencing<sup>2</sup> argued for the 25-year  
10 minimum, but prudently noted, “[A]t the time of the change of plea, I’m not sure the  
11 defendants were notified of that, of the mandatory minimum.” The Court was similarly  
12 concerned, eventually concluding, “I think if I read the statute [to require the 25-year  
13 minimum sentence], we would have to set aside these guilty pleas.” Because the Court  
14 relied on the government’s inaccurate representation about the mandatory minimum  
15 sentence at the change-of-plea hearing, the government invited the error that Movants  
16 were not informed at the change-of-plea hearing of the maximum potential sentences.  
17 Because Movants could only be sentenced within the maximum penalties of which they  
18 had been informed, the government was left to either set aside the guilty pleas — and  
19 thus likely proceed to a three to four week trial for the last two of fourteen original  
20 defendants in this matter — or accept Movants being sentenced to terms that were below  
21 the mandatory minimums. Therefore, in these circumstances, the Court did not impose  
22 the mandatory 25-year minimum sentence.

23 Without this background explaining the circumstances resulting in Movants’  
24 sentences, the Court of Appeals suggested that Movants’ “appellate counsel . . . exhibited  
25 anything but good sense” by choosing to appeal sentences which were more lenient than

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26 <sup>2</sup> Different attorneys represented the United States at the change-of-plea hearing  
27 and Movants’ sentencing. Counsel representing the United States at Movants’ sentencing  
28 had not appeared at the change-of-plea hearing.

1 the mandatory minimum under *Deal. Beltran-Moreno*, 556 F.3d at 917. However, in  
2 these specific circumstances, appellate counsels' decisions to honor their clients'  
3 instructions to appeal their sentences are explicable. In light of the background explained  
4 above, it becomes clear that "the government[']s decision to] . . . exercise[] its discretion  
5 not to seek on appeal the additional years of incarceration for which the statute  
6 provides[]" likely was not done "out of a sense of justice or mercy," *id.*, but rather out of  
7 recognition that the unlawfully low sentences resulted from the government's error at the  
8 change-of-plea hearing. Moreover, if the government had successfully appealed the  
9 sentences, the result could not have been an increase in the sentences to the true statutory  
10 maximum. At most, the government would have succeeded in invalidating Movants'  
11 guilty pleas, which would have required the government to either secure Movants' guilty  
12 pleas again or proceed to trial. Had the Court of Appeals been aware of this background  
13 information,<sup>3</sup> it might have forborne any criticism of appellate counsel.

14 IT IS THEREFORE ORDERED in No. CV 10-0043-PHX-NVW (ECV) that:

- 15 1. Magistrate Judge Edward C. Voss's Report and Recommendation (Doc. 13)  
16 is accepted.
- 17 2. Abraham Beltran-Moreno's Amended Motion Under 28 U.S.C. § 2255 to  
18 Vacate, Set Aside or Correct Sentence by a Person in Federal Custody  
19 (Doc. 7) is denied and dismissed.
- 20 3. The Clerk of the Court shall enter judgment denying the motion and  
21 terminate this action.
- 22 4. A certificate of appealability is denied.

23 IT IS FURTHER ORDERED in No. CV 10-0205-PHX-NVW (JRI) that:

- 24 1. Magistrate Judge Jay R. Irwin's Report and Recommendation  
25 recommending denial of Beltran-Moreno's motion (Doc. 12) is accepted.

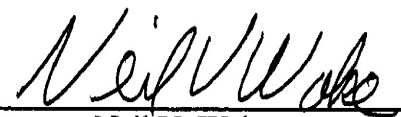
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26 <sup>3</sup> The narrow issue raised on appeal did not give Movants occasion to discuss this  
27 procedural history; the government's brief did not inform the Court of Appeals of it  
28 either.

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2. Jose Angel Beltran-Moreno's Amended Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody (Doc. 5) is denied and dismissed.
3. The Clerk of the Court shall enter judgment denying the motion and terminate this action.
4. A certificate of appealability is denied.

Dated this 9th day of December, 2011.



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Neil V. Wake  
United States District Judge