

1 UNITED STATES COURT OF APPEALS  
2  
3 FOR THE SECOND CIRCUIT  
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6  
7 August Term, 2007  
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9 (Submitted: November 16, 2007

Decided: December 4, 2007 )

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11 Docket No. 06-1930-cr  
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17 UNITED STATES OF AMERICA,

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19 *Appellee,*

20  
21 – v. –  
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23 KEITH EDWARD RICHTER,

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25 *Defendant-Appellant.*  
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31 Before: CALABRESI, SOTOMAYOR, and WESLEY, *Circuit Judges.*  
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33 Appeal of the district court's denial of a writ of *audita querela* sought by Appellant in  
34 order to attack collaterally a criminal sentence pursuant to *United States v. Booker*, 543 U.S. 220  
35 (2005). The writ of *audita querela* is available where the absence of any other avenue of  
36 collateral attack would raise serious constitutional questions about the laws limiting those  
37 avenues. That is not the case here, however, because *Booker* does not apply retroactively to  
38 cases on collateral review, and therefore no serious constitutional questions are raised.

39 The judgment of the district court is affirmed.  
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42 Peter A. Norling, Assistant United States Attorney, *for*  
43 Roslynn R. Mauskopf, United States Attorney for the  
44 Eastern District of New York (David C. James, Assistant  
45 United States Attorney, *on the brief*), Brooklyn, N.Y., *for*



1 v. *Valdez-Pacheco*, 237 F.3d 1077, 1079 (9th Cir. 2001) (per curiam) (noting that the writ  
2 “survive[s] only to the extent that [it] fill[s] ‘gaps’ in the current systems of postconviction  
3 relief”).

4 We have previously indicated that a writ of *audita querela* “might be deemed available if  
5 [its] existence were necessary to avoid serious questions as to the constitutional validity of both  
6 § 2255 and § 2244.” *Triestman v. United States*, 124 F.3d 361, 380 n.24 (2d Cir. 1997). As the  
7 Third Circuit has noted, “[w]ere no other avenue of judicial review available for a party who  
8 claims that s/he is factually or legally innocent as a result of a previously unavailable statutory  
9 interpretation, we would be faced with a thorny constitutional issue.” *In re Dorsainvil*, 119 F.3d  
10 245, 248 (3d Cir. 1997). In such a situation, the *Dorsainvil* court said that the writ of *audita*  
11 *querela* might be available. *Id.* But the court did not ultimately decide that question because it  
12 held that § 2241 habeas relief was in fact available in the case before it. *Id.* In other words, if  
13 the absence of any avenue of collateral attack would raise serious constitutional questions about  
14 the laws limiting those avenues, then a writ of *audita querela* would lie.

15 The instant case, however, does not present such a situation. “*Booker* does not apply  
16 retroactively to cases on collateral review . . . .” *Guzman v. United States*, 404 F.3d 139, 140 (2d  
17 Cir. 2005). There is, therefore, no colorable claim of a constitutional violation, and, hence, the  
18 absence of other avenues of collateral attack does not give rise to serious constitutional  
19 questions. As a result, a writ of *audita querela* does not lie. The judgment of the district court is  
20 AFFIRMED.