1	UNITED STATES COURT OF APPEALS
2 3	FOR THE SECOND CIRCUIT
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7	August Term, 2007
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9	(Submitted: November 16, 2007 Decided: December 4, 2007 )
10	Docket No. 06-1930-cr
11 12	Docket No. 00-1930-cf
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17	UNITED STATES OF AMERICA,
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19	Appellee,
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22	KEITH EDWARD RICHTER,
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25	Defendant-Appellant.
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31	Before: CALABRESI, SOTOMAYOR, and WESLEY, Circuit Judges.
32 33	Appeal of the district court's denial of a writ of audita querela sought by Appellant in
33	order to attack collaterally a criminal sentence pursuant to United States v. Booker, 543 U.S. 220
35	(2005). The writ of <i>audita querela</i> 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 <i>Booker</i> 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	Appellee.
2 3 4 8 7	Keith Edward Richter, pro se, Lewisburg, Pa., Defendant- Appellant.
8 9	PER CURIAM:
10	Defendant-Appellant Keith Richter was convicted in 1998 of conspiracy and attempted
11	murder in aid of racketeering and assault with a dangerous weapon in aid of racketeering, both in
12	violation of 18 U.S.C. § 1959(a). He was sentenced to 192 months in prison, and he did not file
13	a direct appeal. In 2006, he petitioned for a writ of audita querela in order, pursuant to United
14	States v. Booker, 543 U.S. 220 (2005), to attack his sentence collaterally. The district court
15	(Denis, J.) denied his petition; Appellant appeals that denial.
16	Appellant claims that, because his sentence was based on a statutory regime that was held
17	unconstitutional in Booker, his sentence is a nullity. And because he is time-barred from
18	bringing this Booker claim under 28 U.S.C. §§ 2255, 2241, or 2244, he asserts that a writ of
19	audita querela is both the appropriate and the only available avenue of relief.
20	We review de novo a district court's grant or denial of a writ of audita querela. See
21	United States v. Holt, 417 F.3d 1172, 1174 (11th Cir. 2005) (per curiam); United States v.
22	Hovsepian, 359 F.3d 1144, 1153 (9th Cir. 2004); United States v. Johnson, 962 F.2d 579, 581
23	(7th Cir. 1992). The writ has been abolished with respect to civil cases, see Fed. R. Civ. P.
24	60(b), but it remains available in limited circumstances with respect to criminal convictions.
25	Specifically, it "is probably available where there is a legal, as contrasted with an equitable,
26	objection to a conviction that has arisen subsequent to the conviction and that is not redressable
27	pursuant to another post-conviction remedy." United States v. LaPlante, 57 F.3d 252, 253 (2d
28	Cir. 1995) (citing United States v. Holder, 936 F.2d 1, 5 (1st Cir. 1991)); see also United States

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v. Valdez-Pacheco, 237 F.3d 1077, 1079 (9th Cir. 2001) (per curiam) (noting that the writ
"survive[s] only to the extent that [it] fill[s] 'gaps' in the current systems of postconviction
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 <i>audita querela</i> 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.

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