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The Revitalization of the Common-Law Civil Writ of Audita Querela as a Post-Conviction Remedy in Criminal Cases: The Immigration Context and Beyond

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ARTICLES

THE REVITALIZATION OF THE COMMON-LAW CIVIL WRIT OF AUDITA QUERELA AS A POST-CONVICTION REMEDY IN CRIMINAL CASES: THE IMMIGRATION CONTEXT AND BEYOND

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I. INTRODUCTION

An alien lawfully enters the United States in 1972. He gets a job, gets married, and becomes a productive worker in the community. He is subsequently convicted of a felony, such as making false statements on a loan application. As a result, the Immigration and Naturalization Service (INS) brings deportation proceedings against him. The individual will seek any means possible to vacate the conviction, in order to stay in this country.[1]

This Article explores whether the writ of audita querela,[2] primarily used to provide post-judgment relief in civil cases at common law, can be used to challenge criminal convictions in these circumstances and others. At common law, audita querela provided post-judgment relief in two situations: first, it provided relief against the consequences of a judgment because of a defense or discharge that had arisen since the judgment that could not be utilized otherwise;[3] second, it provided relief when there were matters that had arisen before judgment that the defendant was prevented from raising in defense.[4]

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1. *See infra* notes 222-49 and accompanying text (describing factual situations in which individuals have sought to vacate criminal convictions to avoid immigration consequences).

2. The full title of the writ was *audita querela defendentis*, Latin for "complaint of the defendant hath been heard." 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 405-06 (William D. Lewis ed. 1900).

3. *See* BLACK'S LAW DICTIONARY 131 (6th ed. 1990) (defining audita querela as "the initial process in an action brought by a judgment defendant to obtain relief against the consequences of the judgment on account of some matter of defense or discharge arising since its rendition and which could not be taken advantage of otherwise"); BLACKSTONE, *supra* note 2, at 405-06 (stating that audita querela lies "where a defendant, against whom judgment is recovered, and who is therefore in danger of execution, or perhaps actually in execution, may be relieved upon good matter of discharge, which has happened since the judgment"); WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 24 (1980) (defining audita querela as the "initial process in an action brought by a defendant to obtain relief against the consequences of an adverse judgment").

4. *See* BLACK'S LAW DICTIONARY 131 (6th ed. 1990) (describing audita querela as providing

Although audita querela initially was used by judgment debtors against creditors where the debtors had paid the debt and the creditors still tried to press the claims,[5] its availability at common law was expanded to encompass a wide variety of factual situations.[6] Primarily a civil remedy at common law,[7] audita querela has recently been used to provide post-conviction relief for criminal defendants where the party convicted suffered adverse immigration consequences as a result of the conviction.[8] Despite this recent use, however, the question of its availability as a criminal remedy and its scope as such a remedy has not been clearly defined. As one commentator succinctly summarized, the writ of audita querela is "shrouded in ancient lore and mystery."[9]

Part II of this Article examines the background of audita querela, starting with its English origins and continuing to its early federal and state uses in the United States. It focuses on the substantive uses of the writ and illustrates how the writ expanded to grant relief in a great variety of situations. Part III, through an analysis of coram nobis, a similar common-law writ, establishes that audita querela still exists as a criminal post-conviction remedy today. It shows that both the abolishment of the writ as a civil remedy by the Federal Rules of Civil Procedure and the presence of other statutory criminal remedies do not bar use of audita querela in this way. Part IV reviews the recent cases that have analyzed the writ of audita querela as a means to vacate criminal convictions in the immigration context. This Part also delineates the elements that are necessary for audita querela relief to be granted. Part V considers these elements outside the immigration setting to examine, as one example, whether defendants can use the writ to vacate prior convictions in order to avoid the consequences of recidi-

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relief "for matters arising before judgment where the defendant had no opportunity to raise such matters in defense").

5. *See, e.g.*, Coffin v. Ewer, 46 Mass. 228, 231 (1842) (finding that "usual form" of audita querela is by judgment debtor against creditor); GEORGE B. MANSEL, A TREATISE ON THE LAW AND PRACTICE OF DEMURRERS xc (1928) ("An audita querela is where a defendant, against whom judgment is recovered, and who is therefore in danger of execution, or perhaps actually in execution, may be relieved upon some good matter of discharge, which has happened since the judgment, as if the plaintiff hath given him a general release; or if the defendant hath paid the debt to the plaintiff without procuring satisfaction to be entered on the record."); CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2851 (1973 & Supp. 1990) (defining audita querela as "a common law writ to afford relief to a *judgment debtor* against a judgment or execution because of some defense or discharge arising subsequent to the rendition of the judgment or the issue of the execution") (emphasis added); *see also infra* notes 48-63 and accompanying text (discussing cases in which audita querela relief was granted in judgment-debtor situation).

6. *See infra* notes 36-73 and accompanying text (discussing expansion of uses of audita querela in early United States common law).

7. *But see infra* notes 192-218 and accompanying text (discussing situations at state common law in which audita querela relief could be granted as criminal remedy).

8. *See infra* note 219 (citing cases in which audita querela was used to provide post-conviction relief to parties in immigration setting).

9. FED. R. CIV. P. 60(b) advisory committee notes.

vist statutes. Finally, the Article concludes that audita querela can play a constructive and active role in the system of criminal post-conviction remedies in the United States.

II. BACKGROUND OF THE WRIT OF AUDITA QUERELA

A. *English Origins*

The writ of audita querela was first authorized in 1336 as a remedy for judgment debtors.[10] The writ issued from Chancery and was directed to the judges of either the King's Bench or the Common Pleas, ordering them to hear both parties and to "do speedy justice to the debtor."[11] The writ was intended "to permit the defendant to raise matters which in ordinary cases he could have raised by way of plea in common law actions."[12] The writ of audita querela

> replaced the action of deceit and the writ of error to a large extent in matters arising under the statutes of merchants and staple, and later in the middle ages was used as a general remedy for those who had been the victims of the forgery or fraudulent manipulation of any type of procedure and records.[13]

This fraudulent-manipulation rationale was important, as it became a basis for granting the writ in the United States.[14]

The case of *Turner v. Davies*,[15] in 1670, addressed the writ of audita querela at great length. The court defined the writ as

> an equitable action which lies for a person who either is in execution, or in danger of being so, upon a judgment, statute-merchant, statute-staple, or recognisance, when he has matter to shew that such execution ought not to have issued, or should not issue, against him; and is of a most remedial nature, and seems to have been invented, lest in any case there would be an oppressive defect of justice, where the party has a good defence, but had not, nor has any other means to take advantage of it.[16]

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10. *See* THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 394 (5th ed. 1956) (concluding that writ originated out of failure by Parliament to provide for defenses of debtor).

11. *Id; see* 1 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 224 (3d ed. 1922) (outlining process of writ).

12. PLUCKNETT, *supra* note 10, at 394.

13. *Id.; see also* MANSEL, *supra* note 5, at xci ("And [audita querela] is usually brought where one is bound in a statute merchant, statute staple, or recognizance, or judgment is given against him for a debt, and his body is in execution thereupon at the complaint of the party upon suggestion of some just cause why execution should not be granted as a release or other exception.").

14. *See infra* notes 54-58 and accompanying text (discussing relief by audita querela for judgments obtained through fraudulent conduct).

15. 85 Eng. Rep. 871 (1670).

16. *Id.* at 878-79.

Procedurally, the writ was brought in the same court that issued the original judgment.[17] The writ could not be used where the defendant lost the defense due to his or her own neglect[18] or where there was not yet a judgment against him.[19] Further, the party seeking audita querela relief must have been the party aggrieved.[20]

Substantively, the writ was mostly used by judgment debtors to release them from judgment when they had paid the debt or had otherwise been discharged from the obligation. In *Ognel v. Randol*,[21] for example, the court found that, if the defendant had paid and satisfied the judgment, and subsequently was taken in execution, he could be granted audita querela relief.[22] Similarly, in *Corbett v. Barnes*,[23] the court concluded that, if one of the defendants had satisfied a claim and was therefore released from judgment, then the other defendants could be granted audita querela relief since the plaintiff should not have his judgment satisfied twice.[24] Despite this early use, however, the writ became obsolete in England, as parties seeking relief eventually came to apply to the Chancery for an injunction or for a motion to the court that had heard the original action.[25] It has now been statutorily replaced by the current rules of practice for the Supreme Court of Judicature.[26]

Considerable debate has focused on the nature of the writ. Historian William Holdsworth claimed that audita querela was of "essentially equitable character,"[27] and supported that claim by pointing to two sources. First, he cited Judge Stonor of King Edward III's reign who,

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17. *Id.* at 883; *see also* MANSEL, *supra* note 5, at civ ("This writ shall be granted out of the court where the record upon which it is founded remains, or it may be returnable to the same court.").

18. *Turner*, 85 Eng. Rep. at 879; Young v. Collet, 83 Eng. Rep. 49, 49 (1803).

19. *Turner*, 85 Eng. Rep. at 879.

20. *Id.* at 880.

21. 79 Eng. Rep. 23 (1701).

22. *Id.*

23. 79 Eng. Rep. 985 (1792).

24. *Id.*

25. HOLDSWORTH, *supra* note 11, at 224-25. *See* Marsh v. Haywood, 25 Tenn. (6 Hum.) 210, 214 (1845) (stating that "the indulgence of the court in granting summary relief, upon motion, where the remedy was formerly by audita querela, has occasioned this remedy to be very rarely resorted to in England"); BLACKSTONE, *supra* note 2, at 406 (concluding that writ was almost useless since courts began granting relief upon motion); MANSEL, *supra* note 5, at xci (concluding that court's willingness to grant "summary relief on motion, in cases of evident oppression, has almost rendered useless the writ of audita querela and driven it quite out of practice").

26. O. 45, r. 11, Rules of Supreme Court Practice, Enforcement of Judgments and Orders: General. The rule states:

> Without prejudice to Order 47, rule 1, a party against whom a judgment has been given or an order made may apply to the Court for a stay of execution of the judgment or order or other relief on the ground of matters which have occurred since the date of the judgment or order, and the Court may by order grant such relief, and on such terms, as it thinks just.

Id. The comment to the rule states: "This rule was taken from the former O. 42, r. 27, which had put an end to proceedings by audita querela." *Id.*

27. HOLDSWORTH, *supra* note 11, at 224.

in one of the earliest cases discussing audita querela, stated: "I tell you plainly that Audita Querela is given rather by equity than by common law, for quite recently there was no such suit."[28] Second, Holdsworth cited Blackstone's *Commentaries*, according to which the writ was said to lie "in the nature of a bill in equity, to be relieved against the oppression of the plaintiff."[29] Holdsworth argued that the fact that relief could be granted by audita querela shows that lawyers at that time "were not indifferent to the claims of *abstract justice*."[30] In other words, Holdsworth argued that audita querela was a method used to provide relief where the equities suggested it should be granted.

This view was rejected, however, by historian Theodore Plucknett. He argued that the purpose of the writ of audita querela was to allow a defendant "to raise matters which in ordinary cases he could have raised by way of plea in common law actions."[31] In this sense, it did "not seem to extend beyond the common law's traditional relief against the abuse of legal procedure."[32] Plucknett believed that Judge Stonor's statement that audita querela was to be given in equity, accorded so much weight by Holdsworth, simply meant "that the writ allows the debtor to plead common law defences, although the statutes deliberately deprived him of that opportunity."[33] Thus, he concluded that "there seems to be no ground for regarding audita querela as being particularly equitable in nature."[34] In his view, the writ was to be granted only in a narrow set of circumstances allowing judgment debtors to plead previously available defenses. The confusion over the true nature of the writ has continued, with each view receiving support by courts at various times.[35]

B. *Development of the Writ in the United States*

The writ of audita querela made its way across the Atlantic and was adopted by some state courts in the United States. Procedurally, it was found to be an independent common-law action,[36] the complaint

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28. 2 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 593 (1922) (citing Y.B. 18 Ed. III (R.S.) 308).

29. HOLDSWORTH, *supra* note 11, at 224 (citing 3 BLACKSTONE, *supra* note 2, at 406). Blackstone also stated that the writ "seems to have been invented lest in any case there should be an oppressive defect of justice, where a party who hath a good defence is too late to make it in the ordinary forms of law." BLACKSTONE, *supra* note 2, at 406.

30. HOLDSWORTH, *supra* note 28, at 593 (emphasis added).

31. PLUCKNETT, *supra* note 10, at 394.

32. *Id.*

33. *Id.*

34. *Id.*

35. *See infra* notes 78-85 and accompanying text (discussing equitable nature of writ); *see also supra* note 9 and accompanying text (noting that precise nature of relief provided by audita querela is "shrouded in ancient lore and mystery").

36. *See* Avery v. United States, 79 U.S. (12 Wall.) 304, 307 (1870) (stating that "audita querela is a regular suit in which parties may plead and take issue on the merits"); Stone v.

sounded in tort, the proper plea was "not guilty," and damages were recoverable if a tort was actually committed.[37] As was true in England, even though it was an independent action, audita querela had to be brought in the trial court that rendered the original judgment.[38] Injury, or danger of injury, was essential to maintaining the action.[39] Audita querela had to be between the parties to the former proceedings.[40] It required that each defendant join in the audita querela action unless the defendant was alone in execution on the judgment and the only purpose was to set aside or relieve the defendant from execution.[41] Otherwise, the party could be subject to the writ upon the complaint of each of the prior defendants.[42] In addition, audita querela could be used in conjunction with other remedies.[43] In modern practice, motions upon notice,[44] statutory remedies,[45] and bills in chancery[46] have been substituted for the writ.

Although it is difficult to delineate the precise contours of the writ of audita querela, since its uses varied so greatly, broadly speaking the writ was used primarily in two circumstances: first, as in England, it

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Seaver, 5 Vt. 549, 554 (1833) (describing audita querela as being "in the nature of an original suit").

37. *See* Walter v. Foss, 32 A. 643, 643 (Vt. 1895) (finding that audita querela sounded in tort); Little v. Cook, 1 Aik. 363, 366 (Vt. 1826) (stating that audita querela complaint "sounds in tort, the proper plea is not guilty; and damages are recovered of the one" who committed tort); 1 ABRAHAM C. FREEMAN, A TREATISE ON THE LAW OF JUDGMENTS § 257 (1925) (stating that audita querela "has the usual incidents of a regular suit, with its issues of law and of fact, its trial and judgment").

38. *See* Jones v. Watts, 142 F.2d 575, 576 (5th Cir. 1944) (stating that audita querela is ancient remedy in courts that rendered original judgment); Coffin v. Ewer, 46 Mass. 228, 231 (1842) (requiring audita querela "to be brought in the same court in which the judgment was rendered"); Shumway v. Sargeant, 27 Vt. 440, 442 (1855) (concluding that audita querela is issued from court in which record is held); Gleason v. Peck, 12 Vt. 56, 58-59 (1840) (finding that audita querela "must always be to the court having the record").

39. *See* Bryant v. Johnson, 24 Me. 304, 306-07 (5th Cir. 1944) (holding that audita querela "was never designed to admit of taking advantage of mere clerical errors, or technical irregularities, having no connection with the substantial justice of the case").

40. *See Gleason*, 12 Vt. at 59 (holding that audita querela, like "all other judicial writs, . . . must be between the parties to the former proceeding").

41. Titlemore v. Wainwright, 16 Vt. 173, 175 (1844).

42. *See* Starbird v. Moore, 21 Vt. 529, 534 (1848) (finding that "if a judgment against several persons be vacated as to one by this process, it must be vacated as to all."); *Titlemore*, 16 Vt. at 175 (reasoning that "[t]he judgment and execution cannot be in part good and in part bad, — good against one of the defendants, and not good against the other").

43. *See* Lovejoy v. Webber, 10 Mass. 101, 103 (1813) (stating that audita querela "is a concurrent remedy with others; as in cases where redress may be had by summary proceedings on motion"); Porter v. Vaughn, 24 Vt. 211, 215 (1852) (stating that audita querela "should at least be a concurrent remedy, with that relief which is granted on motion").

44. *See* Jones v. Watts, 142 F.2d 575, 576 (5th Cir. 1944) (stating that audita querela was replaced by motion in cause in modern practice); Reid v. O'Brien, 86 Ill. App. 128, 131 (1898) (stating that relief by audita querela at common law could be obtained by notice).

45. *See Watts*, 142 F.2d at 576 (finding audita querela replaced by statutory remedies in modern practice).

46. *See* Marsh v. Haywood, 25 Tenn. (6 Hum.) 210, 214 (1845) (holding that "audita querela is obsolete in this country, and therefore, if the case present [sic] complication and difficulty, or where the facts may be in the knowledge of the other party, a bill in chancery is the proper remedy").

was used when a matter, such as a defense or discharge, could not be taken advantage of because it had arisen since judgment;[47] second, the writ was expanded to grant relief in certain situations for matters that had arisen prior to judgment.

In the judgment-debtor scenario, audita querela relief was available when, after the creditor had obtained a valid judgment that the debtor had paid, the creditor nevertheless sought to execute the judgment. In *Dodge v. Hubbell*,[48] for example, the Vermont Supreme Court concluded that the writ would be granted where a debtor had paid the debt "and procured a discharge, since judgment was obtained, and yet the creditor be pursuing his execution."[49] Two aspects of these cases were central to the court's decisions to grant the writ. The first aspect was that the judgment had been satisfied by the debtor having paid the debt. As the Massachusetts Supreme Judicial Court stated in *Lovejoy v. Webber*,[50] audita querela relief lies "where a man *satisfies* a judgment, and afterwards is taken in execution."[51] The second aspect was that the debtor had not had the opportunity to present the defense, and therefore had not had his or her day in court.[52] If these conditions were met, relief would be granted to alleviate "the oppression of the plaintiff."[53]

The courts used the concept of a person never having had his or her day in court to stretch the writ to grant relief in another category of situations: where the matter had occurred *prior* to judgment.[54] In this

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47. *See* Manning v. Phillips, 65 Ga. 549, 550 (1880) (stating that "audita querela in England was a form of action which lies for a defendant to recall or prevent an execution on account of some matter occurring after judgment, amounting to a discharge") (citation omitted); BLACKSTONE, *supra* note 2, at 405-06 (explaining that audita querela relief is appropriate "where a defendant, against whom judgment is recovered, and who is therefore in danger of execution, or perhaps actually in execution, may be relieved upon good matter or discharge, which has happened since the judgment"); *see also supra* notes 10-26 and accompanying text (outlining original use of audita querela in England).

48. 1 Vt. 491 (1829).

49. *Id.* at 496; *see* Bryant v. Johnson, 24 Me. 304, 306 (1844) (stating that audita querela "lies where, after judgment, the debt has been paid or released, and yet the debtor is arrested, or is in danger of being arrested, on an execution issued on such judgment").

50. 10 Mass. 101 (1813).

51. *Id.* at 104 (emphasis added); *see* Pyle v. Crebs, 112 Ill. App. 480, 484 (1903) (concluding that audita querela relief should be granted when "it is represented that the judgment has been paid ought therefore to be satisfied and discharged of record"); *see also supra* notes 21-25 and accompanying text (discussing cases in England in which relief was granted because judgment had been satisfied).

52. *See* Thatcher v. Gammon, 12 Mass. 267, 270 (1815) ("And an audita querela, to prevent or recall an execution, may be sustained upon some ground which occurred after the rendition of judgment; so that the debtor had no opportunity to plead it to the action or give it in evidence."); Dodge v. Hubbell, 1 Vt. 491, 496 (1829) ("The ground rule is, that, when there is a judgment against a man, and he fears an execution, or one is already out against him, and he has a good defence, of which he has had no opportunity to avail himself, because it has arisen since the judgment, he shall have the remedy by audita querela.").

53. *See* Bryant v. Johnson, 24 Me. 304, 306 (1844) (citing BLACKSTONE, *supra* note 2, at 405-06).

54. *See* Porter v. Vaughn, 24 Vt. 211, 214 (1852) (concluding that audita querela is generally

guise, audita querela was often used to aid judgment debtors where the creditor had obtained judgment in an improper way. In *Lovejoy v. Webber*, for example, the plaintiff claimed that he had issued a promissory note to the defendant for forty dollars, payable in sixty days.[55] The note was not repaid and the defendant sued out a writ, which was paid by the plaintiff.[56] Thereafter, the defendant entered an action and recovered a judgment for the sum of the note plus costs, and the plaintiff sought a writ of audita querela to be discharged from execution of the judgment.[57] The court granted the writ, since the judgment had been obtained fraudulently.[58]

In other judgment-debtor cases in which the matter had arisen prior to judgment, relief was granted to a defendant who had satisfied a claim prior to the commencement of the suit and the plaintiff had fraudulently obtained a judgment by telling the defendant that the plaintiff would dismiss the suit.[59] Relief was also accorded to a defendant who had paid a claim during the pendency of the suit but was prevented from using it as a defense due to an accident over which he had no control.[60] In addition, the writ was used when a plaintiff took a default judgment after negotiations that caused the defendant to believe that the suit would be discontinued.[61] It was also granted where

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"confined to matters arising subsequent to the rendition of the judgment," but that it "has been held to extend to matters arising previous to the judgment, if the party has been deprived of an opportunity in court, to avail himself of the matters in his discharge").

55. 10 Mass. at 101.

56. *Id.*

57. *Id.* at 101-02.

58. *Id.* at 104.

59. *See* Bower, Inc. v. Silverstein, 18 N.E.2d 385, 386-87 (Ill. Ct. App. 1939) (allowing relief since judgment was fraudulently obtained). In *Bower*, the defendant had paid the plaintiff $1100 in satisfaction of plaintiff's claim against the defendant. *Id.* at 386. The plaintiff subsequently brought suit against the defendant, and when the defendant questioned the plaintiff about this, the latter said that he would dismiss the action. *Id.* The court allowed the relief, since the judgment had been obtained fraudulently. *Id.* at 387.

60. *See* Humphreys v. Leggett, 50 U.S. (9 How.) 297, 314 (1850) (putting defendant in same position to use writ as if defense had arisen after judgment because defendant had lost defense through accident beyond his control).

It is important to note, however, that the writ would not be granted if it was the defendant's fault that he or she had not previously brought the defense. *See, e.g.*, Avery v. United States, 79 U.S. (12 Wall.) 304, 307 (1870) (finding rule, therefore, that audita querela does not lie where party had time and opportunity to take advantage of matter that discharges him, and has neglected it); Thatcher v. Gammon, 12 Mass. 267, 270 (1815) (explaining that writ of audita querela could not be sustained "because it was the folly of the party, that he had not the advantage of it before judgment rendered"); Lovejoy v. Webber, 10 Mass. 101, 103-04 (1813) (stating that "audita querela does not lie, where the party had time and opportunity to take advantage of the matter which discharges him, and has neglected it"); Walter v. Foss, 32 A. 643, 643 (1895) (disallowing writ if injury to plaintiff caused by plaintiff's own neglect). The reasons for this rule were twofold. First, the rule was necessary to put an end to litigation. *Lovejoy*, 10 Mass. at 103; Wintle v. Wright, 117 A.2d 68, 70 (Me. 1955). Second, and closely related, without the rule there would be perpetual disputes that would embarrass "the administration of justice." *Id.* at 70 (citations omitted).

61. *See* Perkins v. Cooper, 28 Vt. 729, 731 (1856) (concluding that, since judgment was obtained by fraud, there is no principle better settled than that audita querela will lie to provide relief in such circumstances).

the defendant was not notified of the suit.[62] In these cases, the courts awarded relief to the debtor because the judgment had been obtained fraudulently and, therefore, the debtor had not received his or her day in court.[63]

The writ was expanded further by some courts to grant relief where an error in the proceeding had been made by the court, and not merely where the opposing party had acted improperly. In *Tyler v. Lathrop*,[64] for example, the court found audita querela to be a proper remedy where a magistrate had wrongly refused to allow an appeal.[65] The magistrate had rendered judgment on a note and the defendant appealed.[66] The magistrate refused to allow it, however, incorrectly believing that actions brought on such a note were not appealable.[67] The reviewing court held that the magistrate should have granted the appeal, and allowed the use of audita querela to provide relief.[68]

Similarly, the United States Supreme Court appears to have author-

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Audita querela was not available for a plaintiff to *enforce* a judgment, however. In Kelley v. Kelley, 290 S.W. 624 (Mo. Ct. App. 1927) and Boynton v. Boynton, 172 S.W. 1175 (Mo. Ct. App. 1914), both involving divorce settlements, the Missouri courts were faced with the following facts. The wife obtained a judgment from her husband at the time of divorce. She signed a satisfaction for the balance of the judgment, and later sought to enforce the original judgment through a writ of audita querela. *Kelley*, 290 S.W. at 625; *Boynton*, 172 S.W. at 1176. The *Boynton* court granted the remedy. *Id.* The *Kelley* court criticized that result, finding that the *Boynton* court incorrectly "assumed that the writ of audita querela at common law was available to one in whose favor the judgment had been rendered for the purpose of aiding in its enforcement by setting aside its release on satisfaction." *Kelley*, 290 S.W. at 628. The court ruled that "[n]o such remedy could be procured by a writ of audita querela at common law." *Id.*

62. *See* Harmon v. Martin, 52 Vt. 255, 257 (1880) (reiterating rule that audita querela relief was available where judgment is rendered "by default against a defendant who was without the State when the writ was served, and is without notice to him, and the plaintiff enters into no recognizance to refund upon a writ of review") (citations omitted).

63. *See* Lovejoy v. Webber, 10 Mass. 101, 104 (1813) (granting relief because debtor had not had opportunity to present defense of having paid debt); Wintle v. Wright, 117 A.2d 68, 70 (Me. 1955) (concluding that audita querela could be used to prove defense not used at trial if there was "fraud and deceit" that prevented such use); Walter v. Foss, 32 A. 643, 643 (1895) ("The peculiar office of audita querela is to vacate a judgment that has been procured by the fraud or other misconduct of the other party."); Kimball v. Randall, 56 Vt. 558, 559 (1884) (stating that audita querela "lies to vacate a judgment where the complainant was deprived of his day in court by the fraud of the defendant"); Lincoln v. Flint, 18 Vt. 247, 249-50 (1846) ("No man should be bound by a judgment rendered against him; when he has had no day in court; and if a judgment be so rendered, the audita querela is an appropriate remedy to set it aside."); Tyler v. Lathrop, 5 Vt. 170, 172 (1832) (holding that audita querela was proper remedy "because the party aggrieved is liable to execution, without having had his full day in court"); Little v. Cook, 1 Aik. 363, 366 (Vt. 1826) (holding that audita querela should be granted when other party "obtained a judgment without the complainant's having had his day in court").

64. 5 Vt. 170 (1832).

65. *Id.* at 172 (deciding that audita querela was appropriate remedy in this case, partly because defendants had not had their day in court). *But see* Spear v. Flint, 17 Vt. 497, 498 (1845) (denying audita querela relief where defendant had not been granted jury trial, without deciding whether defendant had that right; also holding that, as to errors of trial judge, *Tyler* should be followed only in "precisely identical" cases).

66. *Tyler*, 5 Vt. at 170.

67. *Id.*

68. *See id.* at 171 (stating that court had "long since sanctioned this remedy" in this situation).

ized this use of the writ. In 1852, in *Harris v. Hardeman*,[69] the writ was used successfully to challenge the validity of a judgment where there was a lack of jurisdiction over the defendant.[70] In another situation, audita querela was used where the default judgment rendered by a justice of the peace was taken after the action had been discontinued by failure of the parties to appear for trial.[71] In addition, a judgment against an insane person who had not been represented by a guardian in the action was vacated through use of audita querela.[72] The same result was obtained in situations involving unrepresented infants.[73] In all of these cases, relief was granted where an error had been made by the court, rather than by the opposing party in the original proceeding.

Not all courts, however, shared the view that the writ could be expanded in such a way. In *Little v. Cook*,[74] for example, the Vermont court stated that "the process of audita querela bears solely upon the acts of the opposite party, and not at all upon the judgment of the Court."[75] In that case, Little had based an audita querela complaint against Cook on two grounds: first, that the court had wrongly refused him a trial and, second, that Cook had taken an execution without the court making such an award.[76] The court concluded that audita querela was not the "proper remedy" since "[t]his complaint is against the party recovering the judgment, and yet complains of the doings of the Court in rendering that judgment."[77]

The underlying rationale in many of these cases was that audita querela relief was to be granted where the equities demanded a remedy. Indeed, the reason often cited by courts when granting relief to a

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69. 55 U.S. (14 How.) 345 (1852).

70. *See id.* at 345 (allowing remedy regardless of whether record showed lack of jurisdiction).

71. *See* Pike v. Hill, 15 Vt. 183, 184 (1843) (holding that audita querela was proper remedy to set aside judgments after suit has been discontinued).

72. *See* Lincoln v. Flint, 18 Vt. 247, 250 (1846) (utilizing writ to vacate judgment rendered by justice of peace against insane person who had guardian, but guardian was not notified of suit and no guardian was appointed for him by court).

73. *See* Starbird v. Moore, 21 Vt. 529, 533 (1848) (vacating judgment against infant by audita querela because no guardian had been appointed for infant and infant was incapable of appointing attorney); Judd v. Downing, Brayt. 27, 27 (Vt. 1816) ("An Audita Querela will lie to set aside judgment rendered by a Justice Peace against an infant, who had no guardian notified, or appointed by the court.").

In another issue of attorney representation, where an attorney had made an unauthorized appearance on behalf of his client, the writ was found not to afford relief. *See* Abbott v. Duncan, 44 Vt. 546, 551 (1872) (stating that direct application to court, or writ of error, was proper remedy in that situation).

74. 1 Aik. 363 (Vt. 1826).

75. *Id.* at 366 (also stating that audita querela "should be, not that the Court rendered a wrong judgment, or refused to render a correct one, but that the party has done so and so, not warranted by his judgment, or has imposed upon the Court, and obtained a judgment without the complainant's having had his day in court"); *see also* Walter v. Foss, 32 A. 643, 643 (1895) (stating that audita querela was not available "to correct an error of the court in rendering the judgment").

76. 1 Aik. at 365.

77. *Id.* at 366.

debtor who had paid his or her debt after judgment was rendered was to alleviate "the oppression of the plaintiff."[78] Furthermore, many courts, following Holdsworth's view of the writ, emphasized the equitable nature of audita querela. The Vermont Supreme Court in *Porter v. Vaughn*,[79] for example, stated:

> The writ of audita querela was considered . . . to be in the nature of a bill in equity, and designed to afford specific and certain relief from the wrongful acts of a party who is seeking to enforce the final process of a court of law, in cases where it has become illegal and *inequitable* to have it thus enforced.[80]

The Massachusetts court in *Lovejoy v. Webber* wrote that, to allow the writ, "the case supposed must be one where legal process has been abused, and injuriously employed to purposes of fraud and oppression."[81]

Other courts, however, found that the writ was not particularly equitable in nature. In *Starbird v. Moore*,[82] for example, the writ of audita querela was granted to vacate a judgment against an infant who had not been represented by a guardian in the action.[83] At first glance, this appears to be a case in which the writ was issued on equitable grounds, since it seems inherently inequitable to uphold a judgment against an infant when no guardian appeared in court on his behalf. The infant in *Starbird*, however, had actually been represented by counsel; and the court found that the interests of the infant were as well protected by counsel "as if a guardian had appeared and defended for him."[84] The

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78. *See supra* notes 48-53 and accompanying text (describing requirements for relief to be granted for matters arising after judgment).

79. 24 Vt. 211 (1852).

80. *Id.* at 214 (emphasis added) (citing Staniford v. Barry, 1 Aik. 321 (Vt. 1825)). *See* Oliver v. City of Shattuck, 157 F.2d 150, 153 (10th Cir. 1946) (stating that audita querela is "essentially equitable in nature"); Coffin v. Ewer, 46 Mass. 228, 230-31 (1842) (stating that audita querela is a proceeding "where the defendant in the original suit will be unjustly deprived of his rights, if the judgment or execution . . . is allowed to be treated as valid"); State v. Hall, 17 S.W.2d 935, 937 (Mo. Ct. App. 1928) (stating that audita querela "is founded upon some matter of equity, or fraud, or release, or something of the like nature, which has transpired since the rendition of the judgment, and which would render its enforcement inequitable and unjust").

Many courts cited Blackstone for the proposition that the writ was in the nature of a bill in equity. *See, e.g.*, Humphreys v. Leggett, 50 U.S. (9 How.) 297, 313 (1850) (stating that audita querela was " 'invented lest in any case there should be an oppressive defect of justice, where a party who has a good defence is too late in making it in the ordinary forms of law' "); Lovejoy v. Webber, 10 Mass. 101, 103 (1813) (stating that audita querela "is said to be in the nature of a bill in equity"); Boynton v. Boynton, 172 S.W. 1175, 1177 (Mo. Ct. App. 1914). As discussed earlier, it is unclear whether this definition was intended to imply that the remedy was equitable in nature or merely that relief should be sought in a court of equity. *See supra* notes 27-35 and accompanying text (discussing differences of opinion on whether audita querela was equitable in nature).

81. 10 Mass. at 103.

82. 21 Vt. 529 (1848).

83. *Id.* at 530.

84. *Id.* at 533.

court nevertheless granted the relief, reasoning that, because the infant was not represented by a guardian and had not been legally capable of appointing an attorney, he did not have his day in court.[85] The courts' analyses in the foregoing cases is critical, as the debate over the equitable nature of the writ continues today.

The instances in which audita querela relief could be granted varied considerably. As to matters occurring after an otherwise valid judgment, the rationale for granting relief was that the defendant had fully satisfied the judgment. This satisfaction of judgment, had it occurred prior to judgment, would have been a valid defense; thus, the defendant could be said not to have had his or her day in court.[86] The courts seized upon this rationale and granted the relief for matters occurring prior to judgment if the defendant had been prevented from asserting a defense by virtue of the opposing party's fraud.[87] The writ was enlarged even further by some courts to embrace errors of the court as well.[88] An important factor stressed by many of these courts was the equitable nature of the writ.

These characteristics of audita querela are important in analyzing the applicability of the writ in the modern criminal context. For example, one who has been convicted of a crime and has served the sentence imposed can be said to have "satisfied" the judgment. And in the immigration context, in which a person may face draconian measures, such as deportation, as the result of a conviction, the consequences of the judgment often can be regarded as inequitable. Given the elastic nature of the writ at common law, therefore, I now turn to an evaluation of whether the writ of audita querela can provide post-conviction relief in the criminal context.

III. THE EXISTENCE OF AUDITA QUERELA AS A POST-CONVICTION REMEDY IN CRIMINAL CASES

Simply stated, a judgment of conviction ensues when one is found guilty of a crime.[89] To seek relief from a conviction, an individual can either seek direct remedies (such as appeal), or post-conviction reme-

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85. *Id.*

86. *See supra* notes 50-53 and accompanying text (explaining use of audita querela in situation in which matters have arisen after judgment).

87. *See supra* notes 54-63 and accompanying text (discussing use of audita querela in this situation).

88. *See supra* notes 64-73 and accompanying text (highlighting use of audita querela to grant relief where courts below had erred).

89. This statement is too obvious to require citation. The skeptical reader might refer, however, to DONALD E. WILKES, FEDERAL AND STATE POSTCONVICTION REMEDIES AND RELIEF § 1-1 (2d ed. 1987). In the immigration context, see Evangeline G. Abriel, *Presumed Ineligible: The Effect of Criminal Convictions on Applications for Asylum and Withholding of Deportation Under Section 515 of the Immigration Act of 1990*, 6 GEO. IMMIGR. L.J. 27, 77-83 (1992).

dies,[90] or both. Currently, the three groups of federal and state post-conviction remedies are "(1) the writ of habeas corpus remedies; (2) the writ of error coram nobis remedies; and (3) the remedies in the nature of the writ of error coram nobis."[91] The question here is whether audita querela can be added to this list.

An application for post-conviction relief will be granted only if it "sufficiently alleges a claim recognized as a ground for relief where relief is sought."[92] For audita querela to be recognized as a ground for relief, several obstacles must be overcome. First, it must be ascertained whether Rule 60 of the Federal Rules of Civil Procedure, which abolished the writ of audita querela as a post-judgment remedy in civil cases,[93] prohibits its use as a criminal remedy. Second, it must be determined whether 28 U.S.C. § 2255,[94] which delineates criminal post-conviction remedies for federal prisoners but does not provide for relief by the common-law writ of audita querela, bars its use as such a remedy. Third, as relief by audita querela is not specifically authorized by Congress, some source of authority for issuing the writ must be established. Although these issues have only recently begun to be addressed in the case law with regard to the writ of audita querela,[95] they have already been resolved with regard to the writ of error coram nobis, an analogous common-law writ. The treatment of coram nobis by the courts is thus important, as I will argue that audita querela should receive similar treatment.

The original purpose of the writ of error coram nobis was to correct errors of fact in the original proceeding that, had they been known, would have prevented rendition of the judgment.[96] It did not encompass all errors of fact, however; it was used only for errors that were so fundamental that they rendered the proceeding irregular and invalid.[97]

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90. WILKES, *supra* note 89, §§ 1-3, 1-4.

91. *Id.* § 1-5.

92. *Id.* § 1-7. Two other requirements must also be met: first, there must be "no procedural or other obstacles to relief," and, second, the claim must be "either proved or admitted." *Id.* As to the former, for purposes of this Article I shall assume that the individual does not face procedural bars to his or her application for relief. As to the latter, I discuss the circumstances in which audita querela should be granted in Part IV.

93. The original rules were adopted on December 20, 1937, and became effective on September 16, 1938. The rules were amended on December 27, 1946; those amendments became effective on March 19, 1948. *See infra* notes 108, 130 (providing text of both original and amended Rule 60).

94. 28 U.S.C. § 2255 (1988), *quoted in part in infra* note 143.

95. *See infra* notes 219-324 and accompanying text (discussing recent application of audita querela as post-conviction remedy in immigration cases).

96. BLACK'S LAW DICTIONARY 337 (6th ed. 1990). The full title of the writ is *quae coram nobis resident*, Latin for "let the record remain before us." Blake v. Florida, 272 F. Supp. 557, 558 (S.D. Fla. 1967).

97. *See* United States v. Addonizio, 442 U.S. 178, 186 (1979) (stating that "coram nobis jurisdiction has never encompassed all errors of fact; instead, it was of limited scope, existing 'in those cases where the errors were of the most fundamental character, that is, such as rendered the proceeding itself irregular and invalid' ") (quoting United States v. Mayer, 235 U.S. 55, 69

In *United States v. Morgan*,[98] the United States Supreme Court sanctioned the use of coram nobis as a post-conviction remedy.[99] Following the rationale used by the Court in *Morgan*, the writ of audita querela should also exist as a criminal post-conviction remedy.

A. *The Establishment of Coram Nobis as a Criminal Post-Conviction Remedy*

Until 1954, the Supreme Court had not decided whether the coram nobis remedy had survived Rule 60(b) and was still a valid remedy to challenge criminal convictions.[100] Although the Court had intimated that such a remedy did not exist,[101] several federal courts had granted the remedy in various situations.[102] In *United States v. Morgan*, however, the Supreme Court directly addressed the issue of whether coram nobis continued to exist as a criminal post-conviction remedy.

In *Morgan*, the respondent had pleaded guilty on a federal charge[103]

(1914)).

98. 346 U.S. 502 (1954).

99. *Id.* at 511.

100. WILKES, *supra* note 89, § 3-3.

101. *See* United States v. Smith, 331 U.S. 469, 475-76 n.4 (1947) (finding it "difficult to conceive of a situation in a federal criminal case today where [coram nobis] would be necessary or appropriate"). In *Smith*, the defendant had been convicted of tax evasion and sentenced to three years imprisonment and fines. *Id.* at 470. The day after the Third Circuit affirmed the conviction, Judge Smith of the district court entered an order vacating the judgment. *Id.* at 470-71. The question presented to the Supreme Court was whether Judge Smith had the power to enter such an order under the Federal Rules of Criminal Procedure. *Id.* at 471. In its discussion of post-conviction relief, the Supreme Court concluded that habeas corpus relief was available "for jurisdictional and constitutional errors at the trial," and that Rule 33 was available for newly discovered evidence after trial. *Id.* at 475. Thus, the Court could not "conceive" of a situation in which coram nobis relief might be used. *Id.* at 475-76 n.4.

102. *See* Allen v. United States, 162 F.2d 193, 194 (6th Cir. 1947) (deciding that coram nobis was proper remedy where petitioner claimed relief on basis of insanity at time of plea, since if that fact had been known at time of judgment it might have led to different result); Roberts v. United States, 158 F.2d 150, 150-51 (4th Cir. 1946) (granting coram nobis relief to determine whether petitioner had intelligently entered plea of guilty and competently waived counsel where record did not show whether petitioner had been informed of right and there was evidence of his mental disability); Garrison v. United States, 154 F.2d 106, 106-07 (5th Cir. 1946) (granting coram nobis relief for violation of petitioner's due process rights where petitioner claimed that United States officers had forced material witnesses to commit perjury); *see also* United States v. Monjar, 64 F. Supp. 746, 746-47 (D. Del. 1946) (ruling that coram nobis still existed as valid remedy despite government's insistence to contrary). *But see* United States v. Kerschman, 201 F.2d 682, 684 (7th Cir. 1953) (considering motion on its merits since it "might be treated as a modern substitute for the ancient writ of error coram nobis," because such writs had been abolished by Rule 60(b)).

It is interesting to note the timing of these decisions, as *Kerschman* appears to be the only case that dealt with the effect of the 1948 amendments to the Federal Rules of Civil Procedure, which had abolished the use of coram nobis as a civil remedy. *See* Brendan W. Randall, Comment, United States v. Cooper: *The Writ of Error* Coram Nobis *and the* Morgan *Footnote Paradox*, 74 MINN. L. REV. 1063, 1067 & n.26 (1990) (noting that *Kerschman* was only decision to deal with 1948 amendments and that it had overruled previous Seventh Circuit decision that had held that coram nobis was still valid criminal post-conviction remedy).

103. Morgan was convicted on eight counts of theft of letters from the United States mail. United States v. Morgan, 202 F.2d 67, 67 (2d Cir. 1953), *aff'd*, 346 U.S. 502 (1954).

in 1939 and served a four-year sentence.[104] Subsequently, when convicted on a state charge in 1950, he was given an enhanced sentence, due to the previous federal conviction.[105] Morgan sought to use a writ of error coram nobis to invalidate the federal conviction on the ground that his constitutional right to counsel had been violated.[106]

1. *The Effect of Rule 60(b) of the Federal Rules of Civil Procedure on the Use of Coram Nobis as a Criminal Remedy*

The first issue addressed by the Supreme Court was the effect of Rule 60(b) of the Federal Rules of Civil Procedure, which abolished the writ of coram nobis as a civil remedy, on the use of the writ of coram nobis as a criminal remedy.[107] In order to understand the effect of the rule, it is necessary to provide some background information on the process by which it was enacted.

Rule 60,[108] which was intended to regulate the procedures by which a party may receive post-judgment relief,[109] was designed to balance the competing values of finality of judgment, on the one hand, and fairness and justice, on the other hand.[110] Subsection (a) dealt with clerical

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104. 346 U.S. at 503.

105. *Id.* at 503-04.

106. *Id.* at 504. Morgan filed an application for a writ of coram nobis and gave notice of a motion for the writ in the federal court in which he had been originally sentenced. *Id.*

107. It may be interesting to note that the Court dealt with the issue in a footnote, suggesting, perhaps, that Rule 60(b) was not a significant obstacle to issuance of the writ in the criminal context.

108. Original Rule 60 read as follows:

> (a) Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.
>
> (b) On motion the court, upon such terms as are just, may relieve a party or his legal representative from a judgment, order or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding, or (2) to set aside within one year, as provided in Section 57 of the Judicial Code, U.S.C. Title 28, § 118, a judgment obtained against a defendant not actually personally notified.

FED. R. CIV. P. 60.

109. *See* FED. R. CIV. P. 60(b) advisory committee notes (stating that Rule 60(b) describes "the practice by a motion to obtain relief from judgments"); Bankers Mortgage Co. v. United States, 423 F.2d 73, 77 (5th Cir.) (stating that "purpose of Rule 60(b) is to define the circumstances under which a party may obtain relief from judgment"), *cert. denied*, 399 U.S. 927 (1970); WRIGHT & MILLER, *supra* note 5, § 2851 (stating that "Rule 60 regulates the procedures by which a party may obtain relief from a final judgment").

110. *See* Bankers Mortgage Co. v. United States, 423 F.2d 73, 77 (5th Cir.) ("The provisions of [Rule 60] must be carefully interpreted to preserve the delicate balance between the sanctity of final judgments, expressed in the doctrine of res judicata, and the incessant command of the court's conscience that justice be done in light of all the facts.") (emphasis removed), *cert. denied*, 399 U.S. 927 (1970); *see also* WRIGHT & MILLER, *supra* note 5, § 2851 (describing rule as attempt to strike balance between these considerations).

mistakes made by the court.[111] Since the matter had been adequately handled by Equity Rule 72 as interpreted,[112] the substance of the equity rule dealing with clerical mistakes was adopted for this section.[113] Subsection (b) dealt with the grounds for relief, such as mistake, inadvertence, surprise, or excusable neglect.[114] Subsection (b) also contained a clause that stated: "This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding."[115] This so-called "savings" clause was pivotal, as it left open the question of whether the old common-law writs, including coram nobis and audita querela, were still available as post-judgment civil remedies.[116]

The wording of the rule itself did not explicitly mention the common-law writs when delineating the power of the courts to grant post-judgment relief.[117] The advisory committee notes, however, contained references to provide guidance for interpreting the clause.[118] The notes referred the reader to bills of review, independent actions, and writs of error coram nobis in describing available remedies.[119] Based on this reasoning, courts had interpreted the savings clause "as embracing not only independent actions in equity but also the old ancillary proceedings: no new powers were created, no old ones enlarged, but all former powers were retained."[120]

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111. FED. R. CIV. P. 60(a). *See supra* note 108 (providing text of original Rule 60(a)).

112. *See* James W. Moore & Elizabeth B.A. Rogers, *Federal Relief from Civil Judgments*, 55 YALE L.J. 623, 630-31 (1946) (stating that drafters adopted substance of Equity Rule 72 because, as interpreted, it adequately dealt with situations in which there had been clerical mistakes). For examples of cases in which original Rule 60(a) was used to provide relief, see Rigopoulos v. Kervan, 53 F. Supp. 829, 829-30 (S.D.N.Y. 1943) (finding oversight or omission and granting Rule 60(a) motion where court failed to include interest on judgment rendered for plaintiffs); *In re* Levis, 46 F. Supp. 527, 529-30 (D. Md. 1942) (deciding that Rule 60(a) and equity rules were sufficient to correct misstatement of petitioner's birth date in naturalization records where mistake had been made by petitioner who had exhibited no fraud, misrepresentation, or improper motive).

113. *See supra* note 108 (providing text of Rule 60(a)).

114. FED. R. CIV. P. 60(b). *See supra* note 108 (providing text of original Rule 60(b)).

115. FED. R. CIV. P. 60(b).

116. *See* Note, *History and Interpretation of Federal Rule 60(b) of the Federal Rules of Civil Procedure*, 25 TEMP. L.Q. 77, 81 (1951) (discussing debate over whether grounds stated in rule for granting relief were all-inclusive or if rule left common-law grounds available for granting relief).

117. *See supra* note 108 (providing text of Rule 60(b)).

118. *See* FED. R. CIV. P. 60(b) advisory committee notes ("For the independent action to relieve against mistake, etc. see Dobie, Federal Procedure, pages 760-65, compare 639; and Simkins, Federal Practice, ch. CXXI, pp. 820-30, and ch. CXXII, pp. 831-34, and compare § 214.").

119. *See* Moore & Rogers, *supra* note 112, at 633 (discussing references to common-law remedies in advisory committee notes).

120. *Id.* at 633. *See* Wallace v. United States, 142 F.2d 240, 244 (2d Cir. 1944) (finding that, if motion for relief is made more than six months after judgment, only relief available is by ancillary writ or bill or independent suit to set aside order for "extrinsic" fraud); Fraser v. Doing, 130 F.2d 617, 620 (D.C. Cir. 1942) (gleaning intent of rulemakers to preserve remedy formerly provided by bills of review, despite not being mentioned in Rule 60(b), from language stating that " '[t]his rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding' ") (quoting FED. R. CIV. P. 60(b)); Preveden v. Hahn, 36 F.

Using this rationale, the United States Court of Appeals for the Tenth Circuit, in *Oliver v. City of Shattuck*,[121] held that the writ of audita querela continued to exist under original Rule 60. In *Oliver*, the trial court had held that it did not have jurisdiction to consider appellants' Rule 60(b) motion for relief from judgment, since they had failed to meet the six-month time restriction in the rule.[122] The circuit court agreed that relief based on the grounds stated in the rule had to be made within the time period.[123] It also found, however, that Rule 60(b) contained

> a "saving provision," the manifest purpose of which is to preserve intact and unimpaired the inherent power of the courts to entertain remedial actions for relief against judgments traditionally recognized at common law, such as writs of coram nobis, actions in the nature of bills of review and actions for a writ of audita querela.[124]

Since "the judicial process was not rendered less flexible by the advent of the new rule,"[125] the court allowed relief in this situation.[126] As a result of *Oliver* and other Rule 60(b) cases, audita querela and coram nobis clearly still existed as civil remedies. There was thus no barrier to their use as criminal post-conviction remedies.

The advisory committee reacted to this development by amending Rule 60 in 1946.[127] The committee had intended for the original rules, including Rule 60, to "cover the field" with respect to relief from judgments.[128] The committee therefore sought to eliminate the common-law ancillary remedies still being used, mostly because the precise use of

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Supp. 952, 953 (S.D.N.Y. 1941) (stating that plaintiff could not obtain relief by motion under Rule 60(b) because more than six months had expired between time of judgment and application for relief; also stating, however, that relief might still be available since rule did not abolish prior forms of relief such as "bill of review in equity and bill of error 'coram vobis' or 'coram nobis' at law"); *see also* Note, *supra* note 116, at 81 (concluding that courts continued to leave open ancillary remedies after Rule 60(b) was promulgated).

121. 157 F.2d 150 (10th Cir. 1946).

122. *Id.* at 152.

123. *Id.*

124. *Id. But see* Jones v. Watts, 142 F.2d 575, 577 (5th Cir. 1944) (stating that rules "favor the use of motions in substitution of the old remedial writs").

125. *Oliver*, 157 F.2d at 152.

126. *Id.* at 154.

127. *See* FED. R. CIV. P. 60(b) advisory committee notes (noting that bills of review, coram nobis, and audita querela were still being used to provide relief despite fact that those rules did not mention them and did not prescribe their practice, and stating that purpose of reconstructing rule was to clarify situation).

128. *Id.* (stating that provision in rules "describing the practice by a motion to obtain relief from judgments . . . coupled with the reservation in Rule 60(b) of the right to entertain a new action to relieve a party from a judgment, were generally supposed to cover the field"); *see also* WRIGHT & MILLER, *supra* note 5, § 2851 (noting intent of committee to define complete scope of rules for post-judgment relief); Note, *supra* note 116, at 81 (stating that purpose of rule was "to comprehend all other methods of giving relief from judgments or orders").

those remedies was obscure at common law.[129] As a result, the committee amended Rule 60(b) so that the rules completely defined the remedies available to obtain relief from judgments.[130] Writs of coram nobis, coram vobis, audita querela, bills of review, and bills in the nature of a bill of review were expressly abolished and the forms of relief under the rule were greatly expanded, with the goal of encompassing the relief that was previously available by the common-law remedies.[131] The direct effect of amended Rule 60(b) was to eliminate the use of coram nobis and audita querela as post-judgment remedies in civil cases; it was unclear, however, whether the rule altered their use as criminal remedies.

In its analysis of the effect of Rule 60 on coram nobis in the criminal context, the Supreme Court in *Morgan* first noted that a motion in the nature of a writ of error coram nobis was simply another "step in a criminal case."[132] It then acknowledged that coram nobis was issued

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129. *See* FED. R. CIV. P. 60(b) advisory committee notes (asserting that exact use of these remedies was "shrouded in ancient lore and mystery"); *see also* Klapprott v. United States, 335 U.S. 601, 614 (1949) (stating that one argument against audita querela was that "few courts ever have agreed as to what circumstances would justify relief under" old common-law remedies); Note, *supra* note 116, at 82 (contending that continuing to allow courts to grant relief under "shrouded ancient writs . . . would result either in great injustice or a statute rendered meaningless by a host of court-made exceptions").

130. *See* FED. R. CIV. P. 60(b) advisory committee notes (finding it "obvious that the rules should be complete in this respect and define the practice with respect to any existing rights or remedies to obtain relief from final judgments"). Rule 60(a), in contrast, was left largely intact. Amended Rule 60 reads, in pertinent part:

> (a) Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.
>
> (b) On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. . . . *Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished*, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

FED. R. CIV. P. 60 (emphasis added).

131. *See* FED. R. CIV. P. 60(b) advisory committee notes (stating that committee had attempted to retain forms of relief available in federal courts prior to adoption of rules); *see also* Note, *supra* note 116, at 83 (concluding that new Rule 60(b) "is a carefully drafted, smoothly operating Rule of Civil Procedure").

132. United States v. Morgan, 346 U.S. 502, 505 n.4 (1954). This phrase has played an important role in the current debate over whether the time limits in coram nobis proceedings should be governed by the civil rules or the criminal rules. *See infra* note 171 and accompanying text

out of chancery at common law, but accepted the fact that procedure by motion had become the current American practice.[133] The Court opined in a footnote "that Rule 60(b) . . . expressly abolishing the writ of error coram nobis" in civil cases did not apply to criminal cases.[134] It then found that the "motion is of the same general character as one under 28 U.S.C. § 2255,"[135] citing directly to the Reviser's notes for section 2255 for this proposition.[136] Presumably the reference is to the statement that "[t]his section restates, clarifies and simplifies the procedure in the nature of the ancient writ of error coram nobis."[137] Thus, the Court eliminated a significant barrier to the use of coram nobis as a criminal post-conviction remedy.

2. *The All Writs Act as a Source of Authority for Granting the Writ*

The second issue addressed by the Supreme Court was the source of authority for granting coram nobis relief. The Court believed that, since motions in the nature of coram nobis were not authorized by any congressional statute,[138] the power to grant such relief would have to come from the All Writs section of the Judicial Code, which provided: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[139] The Court then discussed the role that coram nobis had played in American jurisprudence.[140] In all of the cases employing coram nobis, the Court found only a few in which "the power to consider a motion for coram

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(describing split among circuits concerning which rules apply).

The *Morgan* Court also noted that it "treat[ed] the record as adequately presenting a motion in the nature of a writ of error coram nobis," since the respondent had made the requested effort to set aside the federal conviction and sentence. 346 U.S. at 505.

133. *Id.* at 506 n.4.

134. *Id.*

135. *Id.*

136. *Id.*

137. Judicial Code and Judiciary, ch. 646, 62 Stat. 967 (1948) (codified as amended at 28 U.S.C. § 2255 (1988)) reviser's notes.

The Supreme Court also referenced United States v. Kerschman, 201 F.2d 682, 684 (7th Cir. 1953). In *Kerschman*, the court discussed the case of Roberts v. United States, 158 F.2d 150 (4th Cir. 1946), in which a motion was considered as a petition for coram nobis. *Kerschman*, 201 F.2d at 684. But this occurred two years before the 1948 enactment of § 2255. *Id.* Presumably, the Supreme Court cited this case because it obliquely suggested that § 2255 was similar to coram nobis. This connection, however, seems tenuous.

138. United States v. Morgan, 346 U.S. 502, 506 (1954).

139. All Writs Act, ch. 646, 62 Stat. 944 (1948) (codified as amended at 28 U.S.C. § 1651(a) (1988)).

140. *See Morgan*, 346 U.S. at 507-10 (canvassing history of coram nobis and its extensive use as criminal post-conviction remedy). The Court noted that the writ's purpose was to correct errors of fact that affected both the validity and the regularity of the judgment, that it was used in both civil and criminal cases, and that it "had a continuous although limited use also in our states." *Id.* at 507. The Court added that relief "should be allowed through this extraordinary remedy only under circumstances compelling such action to achieve justice." *Id.* at 511.

nobis relief ha[d] been denied,"[141] indicating that the power to grant the writ clearly stemmed from the All Writs Act.[142]

3. *The Effect of 28 U.S.C. § 2255 on the Use of Coram Nobis as a Criminal Remedy*

The third issue addressed by the Court was whether 28 U.S.C. § 2255[143] "should be construed to cover the entire field of remedies in the nature of coram nobis in federal courts."[144] The government argued that section 2255 had codified the writ of coram nobis, restricting it to situations in which the convicted individual seeking relief was still in custody.[145] The Court rejected this argument,[146] relying on the Supreme Court's analysis of the legislative history of section 2255 in *United States v. Hayman*.[147]

In *Hayman*, the defendant initiated a section 2255 proceeding seeking to have his sentence vacated and a new trial set because he allegedly had not received the effective assistance of counsel.[148] The district court held a hearing on the motion without giving him notice and without his presence.[149] The motion was denied.[150] Both on direct appeal and on rehearing, the court of appeals "treated Section 2255 as a nul-

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141. *Id.* at 510.

142. *See* United States v. Stoneman, 870 F.2d 102, 105 (3d Cir. 1989) (citing *Morgan* for proposition that coram nobis was valid remedy for federal courts under All Writs Act); WILKES, *supra* note 89, § 3-3 (stating that Supreme Court in *Morgan* construed All Writs Act "to authorize a federal coram nobis remedy for persons convicted in a federal court"); M. Diane Duszak, Note, *Post*-McNally *Review of Invalid Convictions Through the Writ of* Coram Nobis, 58 FORDHAM L. REV. 979, 983 (1990) (describing how Court in *Morgan* found power to issue writ of coram nobis from All Writs Act).

143. Judicial Code and Judiciary, ch. 646, 62 Stat. 967 (1948) (codified as amended at 28 U.S.C. § 2255 (1988)). The section provides, in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Id.

144. United States v. Morgan, 346 U.S. 502, 510 (1954). The Historical and Revision Notes to § 2255 state that "[t]his section restates, clarifies and simplifies the procedure in the nature of the ancient writ of error coram nobis." 28 U.S.C. § 2255 (1988) historical and revision notes. *See also supra* note 143 (providing relevant text of § 2255). It is important to note that § 2255 relief applies only to prisoners who are still in custody, although the habeas corpus custody requirement for both state and federal prisoners has been expanded to include cases in which actual physical custody is lacking. *See generally* Ira P. Robbins, Habeas Corpus Checklists ch. 9A (forthcoming 1993).

145. *See Morgan*, 346 U.S. at 510.

146. *See id.* (deciding that there was "no compelling reason" to conclude that § 2255 precluded use of coram nobis as criminal post-conviction remedy).

147. 342 U.S. 205 (1952).

148. *Id.* at 208. He claimed that his attorney had been representing the principal witness against him in a related case and that he was unaware of the dual representation. *Id.*

149. *Id.*

150. *Id.* at 209.

lity," finding that it was either inadequate or, alternatively, was an "unconstitutional 'suspension' of the writ of habeas corpus as to respondent."[151] The Supreme Court, after a lengthy discussion of section 2255, remanded the case to the district court to hear the motion under section 2255, this time *with* notice to the defendant.[152]

The Court commenced its analysis of section 2255 by examining the various problems involved with habeas corpus as a post-conviction remedy in the years preceding the adoption of section 2255.[153] To address those problems, the Judicial Conference of the United States had formed a committee that recommended two bills to Congress for streamlining the use of habeas corpus.[154] Meanwhile, a bill to revise the entire Judicial Code was drafted. This bill included section 2255, which was modeled after one of the bills that had been proposed by the Judicial Conference.[155] The Court in *Hayman* thus concluded that section 2255 "was passed at the insistence of the Judicial Conference to meet practical difficulties that had arisen in administering the habeas corpus jurisdiction of the federal courts."[156] Furthermore, it discovered in the legislative history of section 2255 no "purpose to impinge upon prisoners' rights of collateral attack upon their convictions."[157] The Supreme Court in *Morgan* relied on this language to determine that section 2255 did not bar the district court from granting motions in the nature of coram nobis.[158] On this basis, the *Morgan* Court legitimized coram nobis as a viable post-conviction remedy in criminal cases, although it ambiguously cautioned that relief "should be allowed through this extraordinary remedy only under circumstances compelling such action to achieve justice."[159]

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151. *Id.; see* U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of Rebellion or Invasion the public Safety may require it."). Thus, the court of appeals refused to affirm or reverse the district court decision. *Hayman*, 342 U.S. at 210.

152. *Hayman*, 342 U.S. at 223-24.

153. *Id.* at 212. The Court highlighted three such problems. First, the sheer volume of habeas corpus applications caused difficulties. *Id.* Second, many of the applications lacked merit, which was compounded by the fact that at that time the action had to be brought in a court in the district of confinement, a court that did not have the record of the sentencing court. *Id.* at 212-13. Third, along the same lines, there were distance problems experienced by the districts that contained major federal prisons and therefore received a large volume of applications. *Id.* at 213-14.

154. *Id.* at 214-15. The "procedural bill" was intended to prevent abuse of the writ of habeas corpus, while the "jurisdictional bill" contained a provision to allow the challenge to be brought in the sentencing court. *Id.* at 215.

155. *See id.* at 218 (stating that § 2255 was modeled after section of "jurisdictional bill" allowing applications to go to sentencing court).

156. *Id.* at 219.

157. *Id.*

158. *See Morgan*, 346 U.S. at 511 (citing *Hayman*, 342 U.S. at 219). The *Morgan* Court also concluded that Rule 35 of the Federal Rules of Criminal Procedure, allowing courts to correct illegal sentences at any time, was inapplicable since "[s]entences subject to correction under that rule are those that the judgment of conviction did not authorize." *Id.* at 505-06.

159. 346 U.S. at 511.

B. *The Role of Coram Nobis as a Criminal Post-Conviction Remedy*

In order to compare coram nobis and audita querela comprehensively, it is essential to explore the judicial treatment of coram nobis since *Morgan* was decided.[160] The writ is generally available to individuals who are ineligible for section 2255 relief because they have completed their sentences and are no longer in custody.[161] It is used to correct errors of fact so fundamental that they render the original proceeding invalid.[162] The remedy results in either vacating the conviction or granting a new trial.[163]

Courts have differed concerning the scope of the harm to the petitioner that is required for coram nobis relief. One line of cases, illustrated by the recent decision of United States Court of Appeals for the Seventh Circuit in *United States v. Craig*,[164] takes a restrictive view of the writ. The court in *Craig* stated that the writ could be issued only "where there is a concrete threat that an erroneous conviction's lingering disabilities will cause serious harm to the petitioner."[165] Other cir-

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160. *See generally* Duszak, *supra* note 142, at 981 (tracing history of coram nobis and describing requirements for issuing writ).

161. *See supra* note 143 (providing relevant text of § 2255, which begins with words "[a] prisoner in custody"); *see also* United States v. Bruno, 903 F.2d 393, 395 (5th Cir. 1990) (stating that petitioner's only avenue for relief for criminal conspiracy count was coram nobis since his sentence had already been served); United States v. Stoneman, 870 F.2d 102, 105-06 (3d Cir. 1989) (same); United States v. Balistrieri, 606 F.2d 216, 220 (7th Cir. 1979) (stating that *Morgan* established that coram nobis was similar to § 2255 remedies); Commonwealth v. Thomas, 513 A.2d 473, 474 (Pa. Super. 1986) (finding that coram nobis is granted only where there is no remedy at law); Duszak, *supra* note 142, at 979 (stating that petitioner must assert unavailability of other remedies in order to be granted coram nobis relief). *Cf.* United States v. Doe, 867 F.2d 986, 988 (7th Cir. 1989) (finding coram nobis available where error would have provided § 2255 habeas corpus relief).

162. *See, e.g.*, United States v. Mayer, 235 U.S. 55, 69 (1914) (stating that coram nobis remedy could vacate judgments "where the errors were of the most fundamental character, that is, such as rendered the proceeding itself irregular and invalid"); *Bruno*, 903 F.2d at 396; *Stoneman*, 870 F.2d at 106; Hirabayashi v. United States, 828 F.2d 591, 604 (9th Cir. 1987); United States v. Haga, 740 F. Supp. 1493, 1496 (D. Colo. 1990) ("A writ of coram nobis is considered an 'extraordinary remedy' which is appropriate to correct only fundamental errors and to prevent injustice."), *aff'd*, 931 F.2d 642 (10th Cir. 1991); United States v. Hamid, 531 A.2d 628, 634 (D.C. 1991).

163. *See* Duszak, *supra* note 142, at 979 (discussing requirements for relief by coram nobis).

164. 907 F.2d 653 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 2013 (1991), *criticized in* Jennifer Mee, Comment, *Petitioners for Federal Writ of Error Coram Nobis Must Show "Lingering Civil Disabilities" from Erroneous Conviction*, 70 WASH. U. L.Q. 665 (1992).

165. *Craig*, 907 F.2d at 658 (asserting that three elements were necessary to justify coram nobis relief: disability must be causing present harm; erroneous conviction must be causing harm; and harm must be more than incidental); *see also* United States v. Keane, 852 F.2d 199, 202-03 (7th Cir. 1988) (stating that need to break rules of finality of judgment is not as great when petitioner is no longer in custody, and therefore that coram nobis remedy is used only for "compelling events").

In *Craig*, Illinois General Assembly members Craig, North, and Walker, and trade-association attorney Pappas had been convicted under the federal mail-fraud statute in a scheme whereby the trade association would pay members of the Assembly to pass legislation. *See Craig*, 907 F.2d at 654-55. The petitioners were convicted according to an "intangible rights theory — that the petitioners had devised a scheme to defraud the citizens of the state of Illinois of their right to the petitioners' loyal, faithful, and honest service as public officers, public employees, and members of the Illinois General Assembly." *Id.* at 655. When the Supreme Court overturned that theory of

cuits, however, have taken a more relaxed view of the level of harm necessary, concluding that all criminal convictions have adverse effects on those convicted.[166]

As a remedy of limited scope, other restrictions have been imposed on the writ of coram nobis. The Supreme Court in *Morgan* held that a motion in the nature of coram nobis was a step in a criminal proceeding;[167] therefore, relief can only be granted by the court that rendered the judgment.[168] Moreover, coram nobis is not available to attack a

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prosecution in McNally v. United States, 483 U.S. 350 (1987), the petitioners sought writs of coram nobis to vacate their convictions. *Craig*, 907 F.2d at 655. The Seventh Circuit found that none of the petitioners had satisfied the civil-disabilities element necessary for issuance of coram nobis relief. *Id.* at 659. The court rejected the following disabilities claimed by the petitioners as bases for granting the writ: the effect on pension benefits for the legislators; the right to vote; the possible future criminal-sentence enhancement; the removal from the legislature; and the possibility of impeachment as a witness. *Id.* at 660. The court regarded Pappas' argument that the conviction prevented his return to the practice of law to be a "compelling argument," but found that "Pappas has not shown either that his conviction is a direct cause of his disbarment or that he has a present desire to apply for reinstatement to the bar." *Id.* at 659.

A similar result was reached in United States v. Gottlieb, 738 F. Supp. 1174 (N.D. Ill. 1990), in which defendants Gottlieb and Segal sought writs of coram nobis to vacate their mail-fraud convictions as a result of *McNally*. *See id.* at 1175. The court denied relief to both defendants. *Id.* Relief was denied to Gottlieb because he had died, and therefore did not continue to suffer any civil disabilities due to the conviction. *Id.* at 1178. As to Segal, the court found that the following claimed disabilities were not sufficient to justify coram nobis relief: "the possibility of enhanced penalties for future convictions, the potential for impeachment during testimony at trial, and [Segal's] inability to obtain an Illinois currency exchange license and a California lottery retailer license." *Id.* at 1178-80.

The Seventh Circuit has continued its trend of restricting the use of coram nobis in this type of situation. *See* Howard v. United States, 962 F.2d 651 (7th Cir. 1992). In *Howard*, the petitioner was indicted on nineteen counts of mail fraud and tax offenses. *Id.* at 652. At that time, he voluntarily relinquished his law license, rather than face a disciplinary hearing. *Id.* He pleaded guilty to a mail-fraud count and two of the tax charges. *Id.* His mail-fraud conviction was overturned pursuant to a § 2255 motion; he brought a writ of coram nobis to have the two tax convictions vacated. *Id.* at 652-53. Although he had been released from prison, he claimed that he continued to suffer several types of civil disabilities resulting from the conviction: loss of his law license; inability to possess a firearm; and his possible denial of entry into the Cayman Islands. *Id.* at 653. The court found that these disabilities did not satisfy the requirements for coram nobis, for several reasons. First, he voluntarily surrendered his law license. *Id.* at 654. Second, he failed to show that either his inability to practice law or his failure to purchase a firearm was causing him any harm. *Id.* at 655. Third, even if he was prevented from travelling to the Cayman Islands under the applicable statute, which the court doubted, the court found that this was not the type of civil disability that was to be protected by coram nobis. *Id.* The petition for coram nobis relief was therefore denied. *Id.*

166. *See, e.g.*, United States v. Walgren, 885 F.2d 1417, 1421-22 (9th Cir. 1989) (employing liberal presumption that all criminal convictions carry collateral consequences to find that effect of felony conviction on sentence for any future convictions, as well as possibility that petitioner's testimony at any future trial may be impeached due to conviction, qualified as sufficient adverse consequences for coram nobis relief); United States v. Mandel, 862 F.2d 1067, 1075 n.12 (4th Cir. 1988) (noting that felony convictions affect petitioner's reputation and economic opportunities) (citing Parker v. Ellis, 362 U.S. 574, 593-94 (1960)); Holloway v. United States, 393 F.2d 731, 732 (9th Cir. 1968) (finding that coram nobis can be used "even where removal of prior conviction will have little present effect on the petitioner").

167. *Morgan*, 346 U.S. at 505 n.4.

168. *See, e.g., Stoneman*, 870 F.2d at 106 (stating that coram nobis proceeding "must go to the jurisdiction of the trial court"); Booker v. Arkansas, 380 F.2d 240, 244 (8th Cir. 1967); Duszak, *supra* note 142, at 981 (stating that "the writ was brought before the court that had rendered the original judgment"). This requirement also applies to audita querela, *see supra* note 38 and accompanying text, as well as to relief sought pursuant to § 2255. *See supra* note 143.

state conviction in federal court.[169] Further, the petitioner has the burden of proving that the earlier proceedings were incorrect.[170] Whether the civil or criminal time limits for appeal apply to the writ is an issue left unresolved by the courts.[171]

Despite these restrictions, coram nobis has been used successfully in a variety of situations,[172] encompassing both errors of fact affecting legal proceedings and legal errors of constitutional dimension.[173] The following list gives a sampling of some of the errors for which coram nobis has provided relief: violation of the Sixth Amendment right to provide counsel;[174] incompetence or inadequacy of counsel;[175] insanity at time of trial;[176] and a subsequent Supreme Court decision holding the stat-

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169. *See, e.g.*, Sinclair v. Louisiana, 679 F.2d 513, 514 (5th Cir. 1982) ("It is well settled that the writ of error coram nobis is not available in federal court to attack state criminal judgments."); Theriault v. Mississippi, 390 F.2d 657, 657 (5th Cir. 1968) (concluding that coram nobis is not available to attack state criminal judgment in federal court because it is used "to attack a judgment" of original court "for error of fact"); Rivenburgh v. Utah, 299 F.2d 842, 843 (10th Cir. 1962) (stating that coram nobis "cannot be used as a . . . collateral writ of error between state and federal jurisdictions").

170. *See* United States v. Stoneman, 870 F.2d 102, 106 (3d Cir. 1989) (noting presumption that trial-court proceedings are correct).

171. The Supreme Court in *Morgan* left this issue unclear in its footnote discussing the nature of coram nobis. *See generally* Randall, *supra* note 102, at 1071-87 (arguing that correct interpretation of footnote is that criminal rules for time of appeals should be applied to coram nobis proceedings). The language used by the Supreme Court is confusing. On the one hand, the Court stated that a motion in the nature of coram nobis "is a step in the criminal case and not . . . the beginning of a separate civil proceeding," *Morgan*, 346 U.S. at 505 n.4, suggesting that criminal rules should apply. *See* Randall, *supra* note 102, at 1071. On the other hand, the Court compared coram nobis to a § 2255 proceeding, which at the time was considered a civil proceeding. *See id.*

The circuits have remained split on the issue. *Compare* Yasui v. United States, 772 F.2d 1496, 1499 (9th Cir. 1985) (using *Morgan* reference to coram nobis as step in criminal proceeding to find that criminal rules apply) *and* United States v. Mills, 430 F.2d 526, 528 (8th Cir. 1970) (same), *cert. denied*, 400 U.S. 1023 (1971) *with* United States v. Craig, 907 F.2d 653, 656-57 (7th Cir. 1990) (applying civil time limits because shorter time limits in criminal appeals are intended to further public interest in finality of proceedings, a concern not present when petitioner is no longer in custody; also stating that limits should be same as other § 2255 remedies), *cert. denied*, 111 S. Ct. 2013 (1991); United States v. Cooper, 876 F.2d 1192, 1194 (5th Cir. 1989) (holding that civil rules should apply, since reference in *Morgan* to coram nobis as step in criminal proceeding meant only to distinguish coram nobis from habeas corpus; further, coram nobis should be given same time limits as other § 2255 remedies); *and* United States v. Keogh, 391 F.2d 138, 140 (2d Cir. 1968) (applying civil time limits since *Morgan* reference did not mean that criminal rules apply, coram nobis is similar to § 2255 remedies, and policy reasons for short time limits on appeals for criminal cases not present in case of coram nobis).

172. *See* Romualdo P. Eclavea, Annotation, *Availability, Under 28 USCS § 1651, of Writ of Error Coram Nobis to Vacate Federal Conviction Where Sentence Has Been Served*, 38 A.L.R. Fed. 617 (1978 & Supp. 1991) (summarizing various uses of coram nobis to provide relief from criminal convictions).

173. *See* Cardall v. United States, 599 F. Supp. 912, 915 (D. Utah 1984) (describing coram nobis relief as "narrow," but then stating that "its present scope encompasses not only errors of fact that effect [sic] legal proceedings, but also legal errors of a constitutional or fundamental proportion").

174. *See* United States v. Morgan, 346 U.S. 502, 512 (1954) (allowing coram nobis proceeding to determine whether right to counsel had been waived improperly).

175. *See* United States v. Garguilo, 324 F.2d 795, 796 (2d Cir. 1963) (stating that coram nobis relief is available if inadequacy of counsel is so bad that trial is "a farce and mockery of justice") (citation omitted); *Cardall*, 599 F. Supp. at 915, 916 (finding that coram nobis is proper method of showing ineffective assistance of counsel, but denying relief on facts).

176. *See* United States v. Valentino, 201 F. Supp. 219, 221 (E.D.N.Y. 1962) (using coram

ute under which the petitioner was convicted unconstitutional.[177] *Morgan* and its progeny have thus established coram nobis as an important and functional post-conviction remedy in criminal cases.

C. *Audita Querela, Like Coram Nobis, Is a Possible Federal Criminal Post-Conviction Remedy*

Audita querela and coram nobis are so similar that some authorities have suggested that they should not be differentiated at all.[178] Some of the Supreme Court's language in *Morgan* also supports this conclusion. The Court stated that coram nobis should be allowed "only under circumstances compelling such action to *achieve justice*."[179] This suggests that coram nobis is equitable in nature, a characteristic of audita querela that has been emphasized by many of the state courts that have discussed the common-law civil uses of the writ.[180] An examination of the Supreme Court's holding in *Morgan* as to coram nobis, as well as a comparison of the two writs, should lead one to conclude that audita querela, like coram nobis, remains a viable post-conviction remedy.

As with coram nobis, audita querela was explicitly abolished by Rule 60(b) of the Federal Rules of Civil Procedure,[181] and was not explicitly mentioned as a section 2255 remedy.[182] Neither of these factors, however, was dispositive for the survival of coram nobis in the *Morgan* analysis,[183] nor should they be dispositive for audita querela. While neither writ was mentioned in section 2255, the argument is actually stronger that section 2255 bars the use of coram nobis than that it bars the use of audita querela. The Historical and Revision Notes to section 2255, for example, state that "[t]his section restates, clarifies and simplifies the procedure in the nature of the ancient writ of error coram

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nobis to vacate judgment against petitioner on ground of insanity).

177. *See* DeCecco v. United States, 485 F.2d 372, 373 (1st Cir. 1973) (pointing out that there was no dispute that coram nobis was proper remedy for vacating conviction under federal tax-wagering statutes after Supreme Court "held that the Fifth Amendment privilege against self-incrimination provided a complete defense against criminal prosecution under the wagering tax statutes").

178. *See* Robertson v. Commonwealth, 132 S.W.2d 69, 71 (Ky. 1939) ("We see but little distinction between the writ of coram nobis and audita querela."), *overruled on other grounds*, Smith v. Buchanan, 163 S.W.2d 5 (Ky. Ct. App. 1942). The Kentucky Court of Appeals later wrote that the technical difference between coram nobis and audita querela "is that coram nobis attacks the judgment itself, whereas audita querela may be directed against the enforcement, or further enforcement, of a judgment which when rendered was just and unimpeachable." Balsley v. Commonwealth, 428 S.W.2d 614, 616 (Ky. Ct. App. 1967). *See also* FREEMAN, *supra* note 37, § 257 (stating that audita querela is sometimes sanctioned where coram nobis "seems peculiarly appropriate").

179. United States v. Morgan, 346 U.S. 502, 511 (1954) (emphasis added).

180. *See supra* notes 78-81 and accompanying text (describing equitable nature of audita querela).

181. *See supra* note 130 (providing text of modified Rule 60(b)).

182. *See supra* note 143 (providing relevant text of § 2255).

183. *See Morgan*, 346 U.S. at 511 (holding that district court had power to grant motion in nature of coram nobis).

nobis,"[184] but makes no mention whatsoever of audita querela. Since the Court found that section 2255 did not cover the field with respect to remedies in the nature of coram nobis,[185] neither should it bar the existence of audita querela.

The All Writs Act, relied on by the Court in *Morgan* to authorize relief by coram nobis,[186] grants the authority to issue all writs "necessary or appropriate."[187] This language must include audita querela if it includes coram nobis. The Supreme Court emphasized three characteristics in authorizing use of the writ of error coram nobis: it stressed the availability of coram nobis at common law;[188] it noted the writ's "continuous although limited state use";[189] and it found that the writ "was used in both civil and criminal cases."[190] Audita querela shares each of these characteristics. Audita querela had extensive state use as a civil remedy, and it undeniably had continuous state use at common law.[191] The only potential problem, however, is the third characteristic stressed by the *Morgan* Court: whether audita querela was used as a criminal as well as a civil remedy. Although its use as a criminal remedy was not widespread, it was authorized at common law.

State courts have also used, or indicated uses of, the writ of audita querela to provide post-conviction relief in the criminal context. *Robertson v. Commonwealth*,[192] for example, decided in 1939, greatly defined the way in which audita querela was used in Kentucky. In *Robertson*, the petitioner had applied for a writ of coram nobis and/or audita querela when, after a conviction for armed robbery and a failed appeal, two others exonerated the petitioner from any connection with the crime during their subsequent confessions.[193] Although the court denied the writs,[194] the decision is important for its description of the writs and for outlining potential uses of audita querela.

The court began its analysis by defining coram nobis and audita querela.[195] Despite the different definitions, the court, on the basis of

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184. 28 U.S.C. § 2255 (1988) historical and revision notes.
185. 346 U.S. at 510.
186. *Id.* at 506.
187. *See* text accompanying *supra* note 139 (providing text of All Writs Act).
188. *Morgan*, 346 U.S. at 507.
189. *Id.*
190. *Id.*
191. *See supra* notes 36-88 and accompanying text (mentioning various state uses of audita querela).
192. 132 S.W.2d 69 (Ky. Ct. App. 1939).
193. *See id.* at 70. The petitioner sought relief based on two theories — newly discovered evidence about one of the individuals who had confessed, and perjured testimony by the other. *Id.*
194. *See id.* (deciding that both writs were unavailable on these facts).
195. *Id.* The court defined coram nobis as a "direct proceeding for setting aside a judgment" due to "mistake or lack of knowledge of facts inhering in the judgment itself." *Id.* It defined audita querela as a writ that "lay in behalf of a defendant in a judgment to be relieved from oppression of the plaintiff where matter of defense arose after the judgment, or was not available at the time of trial." *Id.*

Sanders v. State,[196] an 1882 Indiana case, concluded that there was little distinction between the two writs.[197] In *Sanders*, the court granted a writ of coram nobis in circumstances that the court in *Robertson* argued actually called for a writ of audita querela.[198] The defendant in *Sanders* was on trial for the murder of his wife.[199] Under duress from counsel and clerks of the court, the defendant pleaded guilty without presenting a defense.[200] The *Robertson* court concluded that the writ of coram nobis was granted not due to a mistake of fact, but instead "to relieve Sanders from duress and oppression, and to allow him to present a defense which was not available to him at the time of trial."[201] Since the *Sanders* court did not properly distinguish between the remedies, the court did not see the need to do so in *Robertson*.[202]

The writ of audita querela was also discussed in *Balsley v. Commonwealth*,[203] in which the petitioner was on parole from a life sentence imposed on him for armed robbery by the Commonwealth of Kentucky.[204] During Balsley's parole, his parole officer issued a warrant, arrested, and detained him in connection with a federal bank robbery.[205] He was released from the state prison to be tried in federal court for armed robbery,[206] and was later convicted and sentenced to ten years in prison.[207] Balsley applied for a writ of error coram nobis on "the ground that his transfer of custody to the federal authorities effected a forfeiture of [Kentucky's] right to enforce completion of the sentence under which it was holding him at the time of the transfer."[208] While not specifying the precise basis for relief, the court granted relief on two general principles: first, that the remedies of coram nobis and

196. 85 Ind. 318 (1882).

197. *Robertson*, 132 S.W.2d at 71.

198. *Id.*

199. 85 Ind. at 320.

200. *See id.* The actions of counsel and the court were caused by an angry mob that had surrounded the courthouse, threatening to lynch the defendant. *Id.*

201. 132 S.W.2d at 71. This position is consistent with the previous discussion of when audita querela could be used for matters arising prior to judgment. *See supra* notes 54-63 and accompanying text (discussing use of audita querela in this situation). Through no fault of his own, the defendant had lost his defense and therefore had not had his day in court. Thus, audita querela relief was necessary to alleviate the oppression of the defendant.

202. 132 S.W.2d at 71. The court's discussion of *Sanders* is important not only for its comparison and apparent acceptance of coram nobis and audita querela as post-conviction remedies, but also for describing potential uses of the writ of audita querela. Presumably, the factual scenario of *Sanders* is one in which audita querela should have been granted. Furthermore, the court asserted that relief was granted in *Sanders* to relieve the defendant from "duress and oppression," and to allow him to present a defense not available at trial. This description of the writ illustrates an equitable view of the remedy in the criminal context.

203. 428 S.W.2d 614 (Ky. Ct. App. 1968).

204. *See id.* at 615.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

audita querela were preserved by Kentucky statute,[209] and, second, like the court in *Robertson*, that there was little to distinguish the writs of coram nobis and audita querela.[210]

The 1935 Florida case, *Keith v. State*,[211] suggests another early use of audita querela. In *Keith*, three defendants had been charged with kidnapping; two of the defendants, Millard Keith and Bonard Retherford, were tried separately from the third defendant, Dewey Keith.[212] The court affirmed the judgment against Dewey Keith,[213] with one reservation: if the other two were acquitted in the new trial that they had been awarded, the court believed that Dewey Keith might have recourse in the form of audita querela, "in view of such change in the circumstances affecting the amenability to punishment of the other alleged participants in the offense charged against the joint defendants."[214] The court defined audita querela as

> a common law writ issuing from and returnable to the court wherein the judgment complained of was rendered or where the record is, and is issuable wherever matters of avoidance arise subsequent to the rendition of a judgment the enforcement of which the complainant in audita querela apprehends or wishes to have restrained on legal grounds.[215]

The holding in *Keith* is similar to the 1844 Vermont civil case of *Titlemore v. Wainwright*,[216] in which a judgment was rendered against two parties, with the court stating that "[i]t is either a valid judgment against both, or neither; and any proceedings had with a view to affect or vacate that judgment, or to prevent an execution issuing thereon according to the terms of the judgment, should be had at the instance of

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209. *See id.* at 616 (citing Criminal Rule 60.02(5) comment 8 for proposition that coram nobis and audita querela were still preserved in Kentucky); *see also* Gross v. Commonwealth, 648 S.W.2d 853, 856 (Ky. 1983) (stating that remedy of coram nobis was preserved, but limited, by Kentucky statute).

210. *See Balsley*, 428 S.W.2d at 616 (stating that technical distinction between audita querela and coram nobis "is that coram nobis attacks the judgment itself, whereas audita querela may be directed against the enforcement, or further enforcement, of a judgment which when rendered was just and unimpeachable").

211. 163 So. 884 (Fla. 1935).

212. *See id.* at 884.

213. *Id.* at 885.

214. *Id.* Keith was one of three defendants convicted of unlawful kidnapping. *See id.* at 884. The other two defendants were convicted of "felonious kidnaping with intent to hold for ransom," and were sentenced to death. *Id.* The judgment and sentence were reversed "because of the erroneous refusal of the trial judge to properly charge the trial jury as to the necessity of affirmatively proving the element of 'intent to hold for ransom' when that is put in issue for the prosecution for [this] capital crime." *Id.* Keith, however, had received a life sentence only because of a jury recommendation for mercy. *Id.* Thus, the judgment against Keith was affirmed, with the possibility of audita querela relief should the other defendants be acquitted at their new trial. *Id.* at 885.

215. *Id.* at 885.

216. 16 Vt. 173 (1844).

both."[217] In this manner, the court in *Keith* applied a civil common-law use of audita querela to a factual scenario in the criminal context.

Although audita querela has not enjoyed widespread use in the state courts as a criminal post-conviction remedy, it has been accepted as such in various situations. Therefore, like coram nobis, audita querela survives the *Morgan* analysis and exists as a valid form of post-conviction relief.[218]

IV. CURRENT USES OF AUDITA QUERELA: THE IMMIGRATION CASES

While the argument that audita querela is authorized as a post-conviction remedy may be convincing, in order for the writ to be utilized effectively in modern practice the circumstances that justify its issuance need to be identified. In recent immigration cases, the writ of audita querela has been used successfully to vacate prior convictions in order to take advantage of immigration amnesty provisions.[219] And, although they have not yet been successful, petitioners have attempted to use the writ to vacate convictions — particularly for drug offenses —

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217. *See id.* at 174-75.

218. By the same rationale, audita querela also exists as a remedy in states whose courts have adopted rules of civil and criminal procedure, as well as in states whose legislatures have enacted a statute that allows issuance of writs that are similar to their federal counterparts. A Florida appellate court accepted this line of reasoning concerning coram nobis in Weir v. State, 319 So. 2d 80 (Fla. Dist. Ct. App. 1975).

In *Weir*, the petitioner sought to vacate his 30-year-old grand-larceny conviction, for which he had served more than three years in prison, on the ground that he had been unconstitutionally denied the assistance of counsel. *See id.* at 80. The court commenced its coram nobis analysis by noting that the normal vehicle for post-conviction relief was Florida Criminal Procedure Rule 3.850. As with 28 U.S.C. § 2255 remedies, the rule began with the words "a person in custody." FLA. R. 3.850, 31 FLA. STAT. ANN. (West Supp. 1990). Furthermore, coram nobis had been abolished by Florida's rules of civil procedure. *See* FLA. R. CIV. P. 1.540 (stating that "[w]rits of coram nobis, coram vobis, audita querela and bills of review and bills in the nature of a bill of review are abolished"). Since the petitioner was not in custody for purposes of the rule, and since coram nobis had been abolished as a civil remedy, the court questioned whether it had the means to grant relief. 319 So. 2d at 81.

However, the court analogized the situation to the federal system, in which courts had used the All Writs Act to grant the remedy of coram nobis under the same conditions. *See id.* Since similar all-writs authority was granted by the Florida Constitution, the court concluded that it had the same power as the federal courts. *Id.* at 81. The court also noted that the same result was suggested in Grant v. Florida, 166 So. 2d 503, 504 n.1 (Fla. Dist. Ct. App. 1964), but had not been decided since the petitioner was in custody. *Id.* at 81. Thus, the court found that the petitioner's "motion should be treated as an application for a writ of coram nobis." *Id.* Once again, the manifest similarity between audita querela and coram nobis requires that the same rationale apply to audita querela. Therefore, audita querela should be a valid remedy for defendants in states that have adopted procedural rules and all-writs statutes similar to the federal ones relied on by *Morgan* and its progeny.

219. *See, e.g.*, United States v. Louder, CR No. 82-1084 WWE (D. Conn. May 1, 1989) (granting motion to vacate conviction pursuant to audita querela); United States v. Ghebreziabher, 701 F. Supp. 115, 117 (E.D. La. 1988) (using audita querela to vacate one of three misdemeanor counts of food-stamp trafficking); United States v. Salgado, 692 F. Supp. 1265, 1266 (E.D. Wash. 1988) (granting writ of audita querela to vacate conviction for failure to pay transfer tax on small quantity of marijuana), *discussed infra* notes 240-49, 261-70 and accompanying text.

that have other immigration consequences.[220] Once again, the equitable nature of the writ is critical, as some courts emphasize the circumstances that have arisen since the conviction while others underscore whether it is simply equitable to vacate the conviction.[221] An analysis of the reasoning used by courts that have considered audita querela in the immigration context indicates that the writ can be used effectively as a modern post-conviction remedy in certain situations.

A. *Factual Situations*

A criminal conviction can affect an alien's[222] immigration status in many ways.[223] Criminal conduct may prevent an alien from entering the United States, for example, or require an alien currently residing in the United States to leave the country.[224] By having a conviction vacated, an alien may be able to avoid these harsh immigration consequences of prior criminal activity.[225]

In several instances, individuals have attempted, albeit unsuccessfully, to use the writ of audita querela to vacate criminal convictions involving drug offenses. In *United States v. Ayala*,[226] for example, Ayala had pleaded guilty to conspiracy to distribute 500 grams of cocaine.[227] The INS sought to deport him under a provision requiring deportation for convictions for drug-related activities.[228] Ayala sought a writ of audita querela to vacate his conviction and avoid deportation.[229]

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220. *See infra* notes 226-32, 240-49, 259-306 and accompanying text (summarizing cases in which individuals have argued that their convictions should be vacated by writ of audita querela to avoid immigration consequences of conviction).

221. *Compare Salgado*, 692 F. Supp. at 1270 (finding that, subsequent to petitioner's conviction, Immigration Reform and Control Act of 1986 created right that could not be enjoyed without audita querela relief) *with Ghebreziabher*, 701 F. Supp. at 117 (granting relief by audita querela in "interests of justice").

222. An alien is defined in the Immigration and Nationality Act (INA) as "any person not a citizen or national of the United States." INA § 101(a)(3), 8 U.S.C. § 1101(a)(3) (1988).

223. *See generally* DAN KESSELBRENNER & LORY D. ROSENBERG, IMMIGRATION LAW AND CRIMES § 12.1 (1990) (examining interrelationship between criminal and immigration law).

224. *See* INA § 212(a)(2), 8 U.S.C. § 1182(a)(2) (1988). *See generally* KESSELBRENNER & ROSENBERG, *supra* note 223, § 1.3 (discussing immigration effects of crime-related activity by aliens). An alien not entitled to enter the United States is deemed "inadmissible," while an alien required to leave is deemed "deportable." *Id.*

225. *See* KESSELBRENNER & ROSENBERG, *supra* note 223, § 4.2 ("When a court, acting within its jurisdiction, vacates an original judgment of conviction, that conviction may no longer constitute the basis for deportation or exclusion."). *See generally* Abriel, *supra* note 89.

226. 894 F.2d 425 (D.C. Cir. 1990).

227. *See id.* at 426.

228. *Id.* at 427. The relevant provision required deportation for an alien "who . . . at any time has been convicted of . . . a violation of, or a conspiracy to violate, any law or regulation of a State, the United States, or a foreign country relating to a controlled substance." INA § 241(a)(11), 8 U.S.C. § 1251(a)(11) (1988).

229. *See* 894 F.2d at 427 (explaining Ayala's contention that audita querela should be used to grant writ because "the prospect of deportation made the continuing effect of the conviction unfair"). The court denied the writ, however, as Ayala was not claiming that there was a legal objection to the conviction, which the court found was a necessary prerequisite for obtaining audita querela relief. *Id.* at 429-30. At oral argument, Ayala also argued that the government had

In *United States v. Holder*,[230] Holder had pleaded guilty to importing 5.45 pounds of marijuana into the United States.[231] This conviction prevented him from obtaining permanent-resident status.[232] Thus far, audita querela relief has been denied where individuals have simply sought to have their criminal convictions vacated to avoid the immigration consequences of their actions.

Audita querela relief has been granted, however, in a second category of cases. In these cases, petitioners have sought to vacate their convictions to take advantage of specific amnesty provisions of the Immigration Reform and Control Act of 1986[233] (IRCA). In order to understand the argument, a brief review of the relevant provisions of the IRCA is imperative.

The purpose of the IRCA was to introduce an "amnesty" program whereby temporary and permanent residence would be extended to qualified aliens.[234] An alien's status is adjusted "to that of an alien lawfully admitted for temporary residence" if certain requirements are satisfied.[235] One of these requirements is that the alien must not have "been convicted of any felony or of three or more misdemeanors committed in the United States" — the so-called "one felony/three misdemeanor" rule.[236] Once provided "lawful temporary-resident status," the

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promised that he would not be deported if he pleaded guilty and testified against other defendants. *Id.* at 429. Ayala claimed that this violated his due process rights and that the deportation constituted a second punishment in violation of the double jeopardy clause. *Id.* at 429-30. The court remanded the case to allow Ayala to pursue these claims in a § 2255 proceeding, which it thought was the appropriate remedy for such claims. *Id.* at 430.

230. 936 F.2d 1 (1st Cir. 1991).

231. *See id.* at 1.

232. *Id.* at 2. The relevant provision states that "the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States: . . . (23) Any alien who . . . (A) has been convicted of a violation of, or a conspiracy to violate, any law or regulation of a State, the United States, or a foreign country relating to a controlled substance." INA § 212(a)(23)(A), 8 U.S.C. § 1182(a)(23)(A) (1988). The court denied relief, finding that audita querela required that there be a legal defect in the underlying conviction. 936 F.2d at 5.

There are two other reported cases in which individuals sought to use the writ of audita querela in this way but in which the courts did not find the immigration provision triggered by the conviction. In United States v. Reyes, 945 F.2d 862 (5th Cir. 1991), the petitioner, in order to avoid deportation, sought a writ of audita querela to vacate his conviction for conspiring to possess cocaine hydrochloride with intent to distribute. *See id.* at 863. Like the First Circuit in *Holder*, the Fifth Circuit concluded that audita querela relief could be issued only where there was a legal objection to the conviction. In United States v. Johnson, 962 F.2d 579 (7th Cir. 1992), the petitioner had been convicted of two counts involving conspiracy and distribution of opium. *See id.* at 580. He sought a writ of audita querela to avoid the deportation consequences of his conviction. *Id.* The writ was denied because there was no legal defect in the conviction and because the court believed that the writ could not be issued on purely equitable grounds. *Id.* at 581-83.

233. INA § 245A, 8 U.S.C. § 1255a (1988).

234. *See* KESSELBRENNER & ROSENBERG, *supra* note 223, § 12.

235. INA § 245A, 8 U.S.C. § 1255a (1988).

236. 8 U.S.C. § 1255a(a)(4)(B) (1988). The alien must meet several other requirements. Generally, the alien must establish entry into the country before January 1, 1982 and that he or she has resided in an unlawful status since that arrival. *Id.* § 1255a(a)(2)(A). The alien must also establish physical presence in the United States since November 6, 1986. *Id.* § 1255a(a)(3)(A). Finally, "the alien must establish that he . . . is admissible to the United States as an immigrant, except as otherwise provided under subsection (d)(2)." *Id.* § 1255a(a)(4)(A). Subsection

alien's status is adjusted "to that of an alien lawfully admitted for permanent residence" if certain requirements are met.[237] Once again, the "one felony/three misdemeanor" rule will bar an alien from attaining this status.[238] Thus, aliens seeking to qualify for amnesty under these provisions have a strong interest in vacating prior felony or misdemeanor convictions.

The petitioners in such cases are attempting to use the writ of audita querela for this purpose.[239] The case of *United States v. Salgado*[240] provides a typical factual scenario in which the writ has been sought to take advantage of the IRCA amnesty provisions. After working several

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a(d)(2)(A) details provisions in the INA, unrelated to criminal activity, that cannot be used as grounds for exclusion. *Id.* § 1255a(d)(2)(A). Subsection a(d)(2)(B)(i) provides that the Attorney General may waive any of the provisions under 8 U.S.C. § 1182(a) — which specifies the classes that are ineligible for admission into the United States — "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest," except for those situations provided in subsection (d)(2)(B)(ii). *Id.* § 1255a(d)(2)(B)(i). Pursuant to subsection a(d)(2)(B)(ii), sections 1182(a)(9) and (10) may not be waived. *Id.* § 1255a(d)(2)(B)(ii). These provisions cover crimes of moral turpitude and aliens convicted of two or more offenses. *Id.* § 1182(a)(9), (10). Apparently, the INS interprets this to mean "that in the absence of any express provision in the IRCA, no form of amelioration anywhere under the INA or in established judicial precedent is available to overcome § 1182(a)(9) or (10) inadmissibility, with the exception of an expungment [sic], pardon, or dismissal." KESSELBRENNER & ROSENBERG, *supra* note 223, § 12.3(a). These authors question this interpretation; they also argue that nothing in the IRCA should diminish the applicability of expungement and vacations of conviction to these crimes. *Id.* §§ 12.3(b)-(c).

237. INA § 245A(b), 8 U.S.C. § 1255a(b) (1988). The INA defines "lawfully admitted for permanent residence" as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." INA § 101(a)(20), 8 U.S.C. § 1101(a)(20) (1988).

238. INA § 245A(b)(1)(C)(ii), 8 U.S.C. § 1255a(b)(1)(C)(ii) (1988). The alien must meet other timing and residency requirements. *See* INA § 245A(b), 8 U.S.C. § 1255a(b) (1988) (*providing requirements for alien to have status adjusted to that of alien lawfully admitted for permanent residence*). Once again, the alien "must establish that he . . . is admissible to the United States as an immigrant, except as otherwise provided under subsection (d)(2)." INA § 245A(b)(1)(C)(i), 8 U.S.C. § 1255a(b)(1)(C)(i) (1988); *see also supra* note 236 (reviewing mechanics of subsection (d)(2)).

The "one felony/three misdemeanor" rule has one other application in the IRCA. An alien who has temporary-resident status will have that status terminated if convicted of a felony or three or more misdemeanors. INA § 245A(b)(2)(B), 8 U.S.C. § 1255a(b)(2)(B) (1988).

239. *See, e.g.*, United States v. Javanmard, 767 F. Supp. 1109, 1110 (D. Kan. 1991) (setting forth petitioner's challenge to 1983 guilty plea to making false statement to Department of Education, which statement made him ineligible for amnesty under IRCA); United States v. Haro, CR No. 85-00612 WJR (C.D. Cal. May 30, 1990) (memorandum decision and order) (describing argument that petitioner could not qualify for IRCA amnesty provisions because of felony conviction for "aiding and abetting the unlawful procurement of evidence of United States citizenship," which occurred prior to enactment of IRCA); United States v. Gizar, CR No. 80-0559-T (S.D. Cal. Apr. 4, 1990) (decision and order) (discussing Gizar's argument that 1980 felony conviction for conspiracy to possess controlled substance with intent to distribute prohibited him from qualifying for amnesty under IRCA); United States v. Acholunu, 717 F. Supp. 709, 709 (D. Nev. 1989) (describing petitioner's claim that 1980 mail-fraud conviction should be vacated in order to qualify for amnesty under IRCA); Memorandum in Support of Motion to Vacate Title 20, U.S.C. of Sec. 1087-4(a) Count, United States v. Louder, CR No. B2-1084 WWE (D. Conn. Mar. 1, 1989) [hereinafter Louder Memorandum] (presenting Louder's argument that 1983 conviction for false statements on student-loan application should be vacated, to allow him to take advantage of IRCA amnesty provisions); United States v. Salgado, 692 F. Supp. 1265, 1266, 1270 (E.D. Wash. 1988) (discussing Salgado's argument that 1964 felony should be vacated to qualify for IRCA amnesty provisions).

240. 692 F. Supp. 1265 (E.D. Wash. 1988).

years as a seasonal agricultural worker and marrying a United States citizen, Salgado was granted status as a permanent-resident alien in 1948.[241] In 1964, he pleaded guilty to a tax-evasion charge involving the transfer of marijuana, and was deported after serving his two-year sentence.[242] Advised by prison officials that he could not reenter the country for two years, Salgado returned in 1969 using his green card, which had never been confiscated.[243] Over the next fifteen years Salgado worked as a rancher in California, occasionally taking vacations in Mexico and never having his right to reenter or his green card questioned.[244] During a routine eligibility check of his application for social security benefits in 1984, however, it was determined that he was in the country unlawfully, and deportation proceedings were brought against him.[245] Salgado sought to have his conviction vacated, in order to qualify for the IRCA amnesty.[246]

The federal district court granted the writ of audita querela and vacated the judgment of conviction.[247] The court stressed two factors in reaching this result. First, it found that the equities strongly favored granting relief.[248] Second, it found that the IRCA, through its amnesty provision, had created a new right since Salgado's conviction, thereby meeting the technical definition of audita querela.[249]

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241. *See id.* at 1266.
242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.* at 1270. Salgado's conviction rendered him ineligible for amnesty under the "one felony/three misdemeanor" rule. *Id.*
247. *Id.* at 1271.
248. Among other things, the court wrote: "It is virtually a foregone conclusion that once the amnesty window closes in May of this year and the INS turns its efforts to the enforcement provisions of the IRCA, the courts are going to be inundated with hardluck tales such as presented here." *Id.* at 1267. Further,

> the Court is left with the unmistakable impression that under the totality of the circumstances, it would be a gross injustice to allow this man, who has by all accounts been a model resident for forty-five years save for a single period of unlawful conduct, to effectively serve a life sentence, and for his family to be deprived of benefits from a fund he has paid into throughout his working life.

Id. at 1268. Rejecting the contrary position, the court concluded:

> There may be those with a more callous view of life who might conclude that Mr. Salgado has nothing to complain about. It is undisputed that he committed the crime charged, and paid the reasonably foreseeable penalty of deportation. Some might say that his continuing enjoyment of life in the United States between 1969 and the present was a serendipitous happenstance which accrued to his benefit and which created no cognizable expectation of entitlement to remain indefinitely. The Court cannot subscribe to such a hardened approach. Much to his credit, neither can the United States Attorney. When, in the confines of this adversarial system, all counsel and the Court can unanimously agree on the equities, and on the right result, it is a fairly safe wager that justice would be served by reaching that result.

Id. at 1271.
249. *Id.* at 1270. A variation of this scenario has been considered by the courts. In *Salgado*, the conviction sought to be vacated occurred prior to the enactment of the IRCA in 1986. *See id.*

B. *Judicial Analyses*

Although formulated in various terms, courts generally employ a three-pronged analysis in determining whether the writ of audita querela should be granted. First, the courts analyze whether the writ still exists as a criminal post-conviction remedy despite its having been abolished in the civil context. Second, the courts examine the requirements that are necessary for issuing the writ. Third, the courts determine whether the writ should be granted on the facts of the particular case.

1. *Existence of the Writ as a Criminal Post-Conviction Remedy*

An important reason that the Supreme Court in *United States v. Morgan* granted coram nobis relief was that section 2255 remedies were not available to the petitioner.[250] Section 2255 provides relief for persons in custody;[251] since Morgan was no longer in custody, he was not eligible for relief under that provision. Courts have thus interpreted *Morgan* as allowing coram nobis relief because it was necessary to complete the full panoply of criminal post-conviction remedies.[252] In *United States v. Ayala*, for example, the United States Court of Appeals for the District of Columbia Circuit wrote that "[t]he teaching of *Morgan* is that federal courts may properly fill the interstices of the federal postconviction remedial framework through remedies available at common law."[253]

This argument holds true for audita querela as well as for coram nobis. In *United States v. Kimberlin*,[254] for example, the Seventh Circuit concluded that the abolishment of audita querela in Rule 60(b) did not itself make the writ unavailable in criminal cases.[255] The court as-

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at 1266 (noting that Salgado's conviction occurred in 1964). In other cases, however, the conviction occurred after enactment of the IRCA. *See, e.g.*, United States v. Garcia-Hernandez, 755 F. Supp. 232, 232 (C.D. Ill. 1991) (describing situation in which petitioner sought writ of audita querela to vacate 1990 conviction for transporting illegal alien); United States v. Grajeda-Perez, 727 F. Supp. 1374, 1374 (E.D. Wash. 1989) (evaluating petitioner's application for writ of audita querela to vacate 1988 firearms conviction). *Cf.* United States v. Ghebreziabher, 701 F. Supp. 115, 116-17 (E.D. La. 1988) (granting audita querela relief for equitable reasons, despite fact that Ghebreziabher had been convicted of three counts of food-stamp trafficking in 1987).

250. *See* 346 U.S. at 504 (noting district court's refusal to grant relief since respondent was no longer in custody).

251. *See supra* note 143 (providing relevant text of § 2255).

252. *See* United States v. Kimberlin, 675 F.2d 866, 869 (7th Cir. 1982) (finding that audita querela could be used under *Morgan* if found "necessary to plug a gap in the system of federal postconviction remedies"); *see also* United States v. Gottlieb, 738 F. Supp. 1174, 1177-78 (N.D. Ill. 1990) (finding coram nobis to be only method of collateral review when custody ends).

253. 894 F.2d at 428.

254. 675 F.2d 866 (7th Cir. 1982).

255. *See id.* at 869; *see also* United States v. Reyes, 945 F.2d 862, 865 (5th Cir. 1991) (stating that "it is likely that Rule 60(b) did not abolish the writ of audita querela to the extent it might otherwise have been available to attack a criminal conviction"); United States v. Johnson, 773 F. Supp. 114, 115 (N.D. Ill. 1991) (stating that, although writ had been abolished by Rule

sumed that, as with coram nobis, audita querela would be allowed if the "defendant could show that it was necessary to plug a gap in the system of federal postconviction remedies."[256] The court doubted, however, that such a gap existed because of the availability of section 2255 remedies for defendants in custody and coram nobis for defendants no longer in custody.[257] Despite these doubts, most courts that have addressed the issue have expressly or impliedly held that the writ is available to provide relief in certain circumstances.[258] Thus, it is relatively clear that the writ does survive Rule 60(b) as a post-conviction remedy in the criminal context, and that it can be granted if necessary to complete the spectrum of post-conviction relief. As the following analysis shows, audita querela is indeed necessary to complete that spectrum.

2. *Substantive Elements Required To Issue the Writ*

The issue that has divided the courts is how to specify the appropriate circumstances for granting the writ. Confusion over the substantive elements of the writ is not surprising, considering both the assorted uses of the writ in early United States common law[259] and the fact

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60(b), "it is not equally clear that it is wholly unavailable in federal criminal cases"), *aff'd*, 962 F.2d 579 (7th Cir. 1992).

256. 675 F.2d at 869.

257. *See id.* The *Kimberlin* court further noted that, even if such a gap existed, it would be unlikely that audita querela would be the plug to fill it, since the court "failed to discover any criminal case in which this writ has ever been asked for, let alone issued." *Id.; see also* United States v. Johnson, 962 F.2d 579, 583 (7th Cir. 1992) (questioning "the extent of the viability of audita querela given the availability of coram nobis and § 2255," and stating that "[t]he gap-filling allowed by *Morgan* does not . . . permit redefinition of the writ of audita querela"); United States v. Ayala, 894 F.2d 425, 429 (D.C. Cir. 1990) (expressing view that "the authority of federal courts to use [audita querela] as a 'gap-filler' under the All Writs Act is open to serious doubt").

258. *See, e.g.*, United States v. Johnson, 962 F.2d 579 (7th Cir. 1992) (declining to resolve question of whether audita querela could ever be used to provide relief); United States v. Reyes, 945 F.2d 862, 865 (5th Cir. 1991) (assuming *arguendo* "that in some set of circumstances audita querela might appropriately afford post-conviction relief to a criminal defendant"); United States v. Holder, 936 F.2d 1, 2 (1st Cir. 1991) (assuming *arguendo* that "the writ of audita querela may still be available in appropriate circumstances in criminal proceedings notwithstanding the language of Rule 60(b)"); United States v. Haro, CR No. 85-00612 WJR (C.D. Cal. May 30, 1990) (memorandum decision and order) (holding that audita querela is viable criminal post-conviction remedy); United States v. Acholunu, 717 F. Supp. 709, 710 (D. Nev. 1989) (concluding that "audita querela is available in federal courts in criminal cases"); United States v. Louder, CR No. 82-1084 WWE (D. Conn. May 1, 1989) (granting motion to vacate conviction pursuant to audita querela); United States v. Ghebreziabher, 701 F. Supp. 115, 117 (E.D. La. 1988) (granting writ of audita querela without first explicitly finding that it exists); United States v. Salgado, 692 F. Supp. 1265, 1269 (E.D. Wash. 1988) (relying on *Kimberlin* to conclude that audita querela exists as criminal remedy). *But see* United States v. Gizar, CR No. 80-0559-T (S.D. Cal. Apr. 4, 1990) (decision and order), at 2 (denying relief on merits "[e]ven if this Court had jurisdiction to set aside petitioner's conviction").

259. *See supra* notes 36-88 and accompanying text (highlighting different uses of writ as civil remedy at common law).

The *Reyes* case perhaps best illustrates the confusion attendant to this area of law. When denying audita querela relief to the petitioner, the district court stated that "[t]he only case in which the writ was granted was United States v. Salgado, 692 F. Supp. 1265 (E.D. Wash. 1988)." United States v. Reyes, CA No. 88-378, 1990 U.S. Dist. LEXIS 13853, at *2 (E.D. La. Oct. 12,

that, as the Seventh Circuit wrote in 1982 in *Kimberlin*, "[o]ur research has failed to discover any criminal case in which the writ has ever been asked for, let alone issued."[260] The starting point for such an analysis is the court's holding in *United States v. Salgado*, the first of the recent cases to apply the writ in the immigration context.[261] In *Salgado*, the court initially emphasized that the equities in the case favored granting relief.[262] Despite the strong equities involved, however, it concluded that it needed to find the proper authority to grant relief.[263] The court found that audita querela was the proper vehicle for relief in the given situation.[264]

The court began its analysis of audita querela by describing it as "an action brought by a judgment defendant to obtain relief against the consequences of the judgment on account of some matter of defense or discharge arising since its rendition and which could not be taken advantage of otherwise."[265] Applying that definition to the facts, the court noted that Salgado was seeking relief from the consequences of his conviction — in this case, the immigration consequences of that conviction.[266] The court then construed the defense-or-discharge clause in the definition of audita querela as applying to new rights created since the conviction.[267] The newly created rights, the court found, were the amnesty provisions in the IRCA of 1986.[268] Finally, the court found that Salgado would not be entitled to these new rights if he did not receive audita querela relief.[269] Thus, the court vacated the judgment by audita querela.[270]

1990), *aff'd*, 945 F.2d 862 (5th Cir. 1991). Not only is this assertion incorrect, but such relief had been granted two years earlier *by the same court*. *See* United States v. Ghebreziabher, 701 F. Supp. 115, 117 (E.D. La. 1988).

260. *Kimberlin*, 675 F.2d at 869.

261. *See supra* notes 240-49 and accompanying text (summarizing facts and proceedings in *Salgado*).

262. *See* 692 F. Supp. at 1266 ("It was the general consensus of all concerned that the equities militate strongly in favor of relieving defendant from prospective operation of the judgment."); *see also id.* at 1268 (stating that "under the totality of the circumstances, it would be a gross injustice to allow this man, who has by all accounts been a model resident for forty-five years save for a single period of unlawful conduct, to effectively serve a life sentence" for his conduct).

263. *See id.* at 1266 ("The question is whether, equities aside, the Court has authority to take any action.").

264. *Id.* at 1269.

265. *Id.* (quoting BLACK'S LAW DICTIONARY (5th ed. 1979)).

266. *Id.*

267. *Id.*

268. *Id.* at 1270.

269. *Id.* at 1269.

270. *Id.* at 1270. The same court, one year later, refused to grant the writ to a petitioner who sought to vacate the judgment itself, rather than to obtain relief from the consequences of the judgment. *See* United States v. Grajeda-Perez, 727 F. Supp. 1374, 1375 (E.D. Wash. 1989). It is interesting to note this result, since the facts are quite similar to *Salgado*. In *Grajeda-Perez*, the petitioner sought relief from a 1988 judgment of guilt for being an alien in possession of a firearm. *See id.* at 1374. The defendant sought relief in order to be eligible for amnesty under the IRCA. *Id.* Despite not granting the writ of audita querela, the court, broadly construing its powers under

The federal district court in *United States v. Ghebreziabher*[271] granted the writ of audita querela on different grounds. The petitioner sought to vacate one of his three misdemeanor convictions to be eligible for amnesty under the IRCA.[272] The court began its analysis by quoting the equitable "totality of the circumstances" language of *Salgado*.[273] Next, as in *Salgado*, the court defined audita querela as a common-law writ brought "to obtain relief against the consequences of the judgment on account of some matter of defense or discharge arising since its rendition and which could not be taken advantage of otherwise."[274] Based on these principles, the court granted relief in the "interests of justice."[275] The court made no mention, let alone performed an analysis, of whether the IRCA created a defense or discharge needed for a writ of audita querela to issue. Thus, the court completely ignored the first factor and focused exclusively on the equitable aspects of audita querela in deciding whether to grant the writ.[276]

The formulations of the writ made by *Salgado* and *Ghebreziabher* have been criticized. The court in *United States v. Ayala* denounced these decisions for providing audita querela relief on a purely equitable basis.[277] In discussing the availability of audita querela as a post-conviction remedy, the *Ayala* court stated that "[t]he only circumstance, if any, in which the writ could furnish a basis for vacating a criminal conviction would be if the defendant raised a legal objection not cognizable under the existing scheme of federal postconviction remedies."[278]

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the All Writs Act, granted a "writ for relief from judgment." *Id.* at 1375.

271. 701 F. Supp. 115 (E.D. La. 1988).

272. The petitioner was a native of Ethiopia who had been convicted of three misdemeanor counts of food-stamp trafficking. *See id.* at 116. As a result of the convictions, his application for amnesty under the IRCA was denied under the "one felony/three misdemeanor" rule. *Id.* The court granted a writ of audita querela to reduce the convictions from three to two, because such relief should be afforded to the petitioner in the "interests of justice." *Id.* at 117.

273. *Id.* (quoting *Salgado*, 692 F. Supp. at 1268); *see supra* note 248 (providing relevant language from *Salgado*).

274. 701 F. Supp. at 117 (quoting BLACK'S LAW DICTIONARY 120 (5th ed. 1979)).

275. *Id.*

276. In United States v. Louder, CR No. 82-1084 WWE (May 1, 1989), it is unclear which basis of the writ was used by the court, as the government had conceded that the circumstances of the case were "truly exceptional" and therefore did not oppose the petitioner's request for relief. In the motion to vacate conviction, however, Louder's counsel had argued that audita querela required that there be a "newly created right," in this case the amnesty provisions of the IRCA, and then argued the equities of the case. Motion to Vacate Conviction, United States v. Louder, CR No. 82-1084 WWE (Mar. 1, 1989). This analysis seems to be in accord with *Salgado*. *See supra* notes 261-70 and accompanying text (discussing rationale in *Salgado* for invoking writ of audita querela to vacate conviction).

277. *Ayala*, 894 F.2d at 429 ("The *Salgado* and *Ghebreziabher* courts appear mistaken, as a historical matter, in their conclusion that audita querela furnishes a purely 'equitable' basis for relief independent of any legal defect in the underlying judgment."). In *Ayala*, the petitioner had pleaded guilty to a charge of conspiracy to distribute cocaine, in exchange for a recommendation of dismissal of the substantive charge. *See id.* at 426. The petitioner sought a writ of audita querela to vacate the conviction that was being used in deportation proceedings against him. *Id.* at 426-27.

278. *Id.* at 426. The district courts that granted the writ had found such a gap in the remedy

The district courts that had granted the remedy had done so "to relieve the defendant of the *inequitable consequences* of the judgment,"[279] a use that the *Ayala* court did not believe existed at common law.[280] This pure-equity version of the writ was not part of the "historical definition of the writ."[281] While admitting that the facts of *Ayala* did not require the court to determine whether the writ of audita querela could ever provide such relief, the court opined that the writ had been superseded by coram nobis and section 2255 remedies on the facts of Ayala's case.[282]

The decision in *Ayala* is one of several cases holding that the defense-or-discharge element of audita querela requires that there be a *legal* objection to the original judgment.[283] This argument, however, is flawed in several respects. First, based on a reading of the early state cases, there *has* been support for the proposition that audita querela can be issued on equitable grounds.[284] Second, these cases badly misconstrue the holding of *Salgado*, as the *Salgado* court did not stray from the traditional version of the writ. After stressing the equities of the case, the court in *Salgado* maintained that it could not grant relief

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structure. *Id.* at 428 (citing United States v. Ghebreziabher, 701 F. Supp. 115, 116-17 (E.D. La. 1988); United States v. Salgado, 692 F. Supp. 1265, 1269 (E.D. Wash. 1988)).

279. *Ayala*, 894 F.2d at 428.

280. *Id.* at 429. The court stated that the nature of audita querela did not lie "in the *character* of the grounds for voiding the judgment, but rather in the *timing* of the occurrence of these grounds." *Id.*

281. *Id.*

282. *Id.* at 427, 429.

283. *See* United States v. Johnson, 962 F.2d 579, 582 (7th Cir. 1992) ("The defense or discharge must be a legal defect in the conviction or in the sentence which taints the conviction. Equities or gross injustice, in themselves, will not satisfy the legal objection requirement and will not provide a basis for relief."); United States v. Reyes, 945 F.2d 862, 866 (5th Cir. 1991) (agreeing with court in *Ayala* that audita querela was traditionally "available only to remedy a legal defect or defense to the underlying judgment"); United States v. Holder, 936 F.2d 1, 3 (1st Cir. 1991) (equating "matter of defense or discharge" with "a legal defect in the conviction, arising since the conviction"); United States v. Garcia-Hernandez, 755 F. Supp. 232, 235 (C.D. Ill. 1991) (" 'The only circumstance, if any, in which the writ [of audita querela] could furnish a basis for vacating a criminal conviction would be if the defendant raised a *legal objection* not cognizable under the existing scheme of postconviction remedies.' " (quoting *Ayala*, 894 F.2d at 426)). The primary rationale for these decisions is separation-of-powers concerns. *See Johnson*, 962 F.2d at 582 ("Creation of a new equitable remedy in the federal post-conviction relief scheme raises serious constitutional concerns."); *Reyes*, 945 F.2d at 867 (concluding that granting equitable version of audita querela "presents serious separation-of-powers concerns"); *Holder*, 936 F.2d at 5 (finding that "legal objection" requirement "respects the proper interest of the legislative branch in defining the beneficiaries of its laws and of the executive branch in maintaining the integrity of convictions lawfully obtained"); *Garcia-Hernandez*, 755 F. Supp. at 235 (citing fact that relief sought by petitioner was to negate consequences of conviction that had been legislated by Congress). This argument, however, seems misplaced. The writ of coram nobis does not have legislative approval, nor does it necessarily respect the interest of the executive branch in maintaining convictions, yet that writ has been granted in a wide variety of situations. *See supra* notes 172-77 and accompanying text (providing examples of modern issues for which coram nobis has been used to provide post-conviction relief).

284. *See supra* notes 64-73 and accompanying text (discussing equitable uses of audita querela at common law).

unless it had the authority to do so.[285] The court embarked on an analysis of the elements necessary to grant relief, and held that the IRCA had created a right that could not be taken advantage of without audita querela relief.[286] Finally, and most importantly, the requirement by these courts that there be a legal objection to the original judgment is incorrect as a historical matter. At common law, it was not necessary for a defendant seeking audita querela relief to show that he or she had a legal objection to the judgment; in fact, when granted in circumstances in which the matter had arisen after judgment, it was presumed that the judgment was sound at the time it was granted.[287] Requiring that there be a legal objection to the conviction deviates from the common-law use of the writ and actually seems more akin to situations in which coram nobis relief would be granted.

Other courts have criticized *Salgado* on the ground that the amnesty provisions of the IRCA do not satisfy the defense-or-discharge element of the writ. In *United States v. Acholunu*,[288] for example, after the court found that the writ of audita querela existed,[289] the court addressed the issue of whether the writ should be granted on the ground that the IRCA constituted a discharge or defense that justified overturning the petitioner's sentence.[290] Since the IRCA specifically excluded those aliens who had been convicted of a felony, the court thought that it would be a non sequitur to say that the IRCA constituted a discharge of the conviction.[291] Similarly, the IRCA was not a defense to the charge because it was unrelated to the substantive law or facts that led to the conviction, and thus the amnesty effects of the conviction would not have caused the court in the original proceedings to dismiss the indictment.[292]

The court's analysis in *Acholunu*, however, ignores the rationale for granting audita querela relief at common law, as well as the flexibility

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285. *See* 692 F. Supp. at 1266.

286. *See id.* at 1269 (deciding that scenario presented in case was sufficient basis to grant writ, since petitioner sought relief from "the consequences of the judgment" and "refusal to grant such relief would strip him of access to newly created rights which he would otherwise clearly be entitled to by operation of law").

287. *See supra* notes 48-53 and accompanying text (discussing grounds for granting writ at common law).

288. 717 F. Supp. 709 (D. Nev. 1989).

289. *See id.* at 710. The petitioner sought a writ of audita querela to overturn his conviction for mail fraud, which conviction had made him ineligible for amnesty under the "one felony/three misdemeanor" rule of the IRCA. *Id.* at 709.

290. *Id.* at 710.

291. *Id.*

292. *Id.* Other courts have reached the same conclusion on the issue. *See* United States v. Javanmard, 767 F. Supp. 1109, 1111 (D. Kan. 1991) (finding "persuasive the cases holding that the availability of amnesty under IRCA is not the kind of 'defense or discharge' for which this common law writ was historically available"); United States v. Holder, 741 F. Supp. 27, 29 (D.P.R. 1990) (concluding that fact that conviction barred petitioner from being granted amnesty was not defense to or discharge from conviction), *aff'd*, 936 F.2d 1 (1st Cir. 1991).

in granting the writ. In the judgment-debtor scenario, if the debtor had paid the judgment and the creditor nevertheless sought to execute the judgment, audita querela relief could be granted for two reasons: the debtor had satisfied the judgment and the debtor had not truly had his or her day in court.[293] In either situation, relief would be granted to prevent oppression of the defendant.[294] Applying these principles, the IRCA can be seen to constitute a defense or discharge within the common-law formulation of the writ.

In *Acholunu*, for instance, the court correctly noted that the effect of the amnesty on the conviction would not have resulted in dismissal of the indictment; on this basis, the court held that the IRCA did not constitute grounds for a discharge of the conviction.[295] The court acknowledged, however, that, had the defendant realized the consequences of his plea, it would have played a prominent role in developing his case.[296] As the court recognized in a footnote, for example, the defendant "might have insisted on a jury trial."[297] By dealing with the issue in such a cursory manner, the court overlooked a powerful argument in favor of audita querela relief: that the effect of the IRCA enactment, which had occurred subsequent to the conviction, might have changed the outcome of the trial. Thus, in this case, the defendant had satisfied the judgment by serving his sentence, he had not genuinely had his day in court since the repercussions of conviction had changed significantly, and he had been seeking relief to avoid being deported. This is precisely the type of situation in which audita querela relief might be granted.

Perhaps the formulation of the writ most true to its historical origins was given in 1990 in *United States v. Haro*.[298] After accepting audita querela as a legitimate method of obtaining post-conviction relief, the court defined audita querela as a writ "used to vacate a judgment upon a showing that events occurring after the entry of judgment cause the continued existence of the judgment to be contrary to the interests of justice."[299] It then noted that a defense or discharge was required to issue the writ at common law, but that "the basic principle seems to

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293. *See supra* notes 48-63 and accompanying text (discussing uses of audita querela in judgment-debtor scenario).

294. *Id.*

295. *Acholunu*, 717 F. Supp. at 710. Among other things, the court wrote: "Certainly, it would be a non-sequitur to say that IRCA constitutes a discharge of defendant's conviction since 8 U.S.C. § 1255a(a)(4)(B) specifically provides that a felony conviction disqualifies an alien from the amnesty program." *Id.*

296. *See id.* at 710 n.2.

297. *Id.*

298. CR No. 85-00612 WJR (C.D. Cal. May 30, 1990) (memorandum decision and order).

299. *Id.* at 3. The petitioner sought "to vacate her felony conviction for aiding and abetting the unlawful procurement of evidence of United States citizenship," which had caused the denial of her application for legalization under the IRCA. *Id.* at 1.

have been that there had been a *satisfaction* of the judgment."[300] In the criminal context, the court found this satisfaction to be the serving of the sentence; after the sentence is served, the defendant can be said to have been discharged.[301] Thus, the court in *Haro* decided that the first step in granting audita querela relief is that the petitioner must have served his or her sentence.[302]

The next step in the analysis involves the equitable nature of audita querela. To issue the writ, the court in *Haro* stated: "What is required is that in the *totality of circumstances* the interests of justice urge that the conviction be vacated."[303] This standard requires that the interests of the petitioner, the government, and society be balanced, and, if they weigh in favor of the petitioner, relief should be granted.[304] The court proceeded to balance the petitioner's interest in obtaining amnesty and the government's interest in preserving the conviction,[305] and concluded that justice did not demand relief in this case.[306]

To summarize, audita querela can be used to provide post-conviction relief in certain situations. Since it requires satisfaction of the judgment, it only can be used when the petitioner has served his or her sentence and been released from custody. Furthermore, it can only be used where, given the totality of the circumstances, the court finds that relief is warranted. In making this totality determination, the court

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300. *Id.* at 3-4.

301. *Id.* at 4.

302. This result might also follow from the enactment of 28 U.S.C. § 2255. As discussed earlier, coram nobis relief was initially available because § 2255 did not provide relief for individuals who were not in custody. *See supra* notes 160-71 and accompanying text (discussing grounds for issuing coram nobis relief). Since § 2255 arguably provides the complete range of relief for individuals still in custody, one could argue that, to grant audita querela relief, the individual must not be in custody.

303. CR No. 85-00612 WJR (C.D. Cal. May 30, 1990) (memorandum decision and order), at 4.

304. *Id.*

305. *Id.*

306. *Id.* The courts in *Acholunu* and *Holder* similarly analyzed whether the writ should be granted on equitable grounds. Without deciding whether the writ can be issued where the continued effect of the judgment is unjust, the court in *Acholunu* concluded that justice in this particular case did not require that the conviction be vacated. *Acholunu*, 717 F. Supp. at 710. The court denied the writ, distinguishing the case from *Ghebreziabher* by noting that vacating the conviction in this case would eliminate the petitioner's record, whereas in *Ghebreziabher* the petitioner still had a record. *Id.* The court also distinguished the case from *Salgado*, in which the government did not oppose vacating the conviction as it did in *Acholunu*. *Id.* Moreover, the conviction in *Salgado* occurred 24 years earlier, whereas the conviction in *Acholunu* occurred only 9 years before. *Id.* at 711.

The court in *Holder* similarly found that justice did not demand that the conviction be vacated. United States v. Holder, 741 F. Supp. 27 (D.P.R. 1990), *aff'd*, 936 F.2d 1 (1st Cir. 1991). Although the petitioner had married a United States citizen after his conviction, had resided in the country since that time, and had college-aged children, there were no "extraordinary circumstances," such as threat of financial, health, or safety problems, to justify such relief. *Id.* at 29. The fact that the petitioner was about to start work at a hospital also was found unpersuasive. *Id.* In addition, the court stressed the government's interest in preserving the conviction, including the maintaining of a criminal record, the deterrent effect of such a record, and the enforcement of the immigration laws. *Id.* at 30.

must balance the interests of the government in maintaining the conviction against the interests of the individual in having it vacated, such as the immigration consequences of the conviction. Relief can be granted for individuals seeking amnesty under the IRCA, as well as for individuals seeking relief to avoid more general immigration-related consequences of their criminal convictions. This definition of the writ is consistent with the original purpose of the writ, which was to alleviate the harsh consequences of a conviction after the judgment had been satisfied. The remaining question is how the courts should balance the equities in a case to determine whether to grant relief.

3. *Circumstances that Justify Issuance of the Writ*

Determining the circumstances necessary to grant relief, the third step in the audita querela analysis, has obviously been discussed by those courts that have granted such relief; the circumstances have also been discussed in dicta by some courts that have denied the writ. A review of these cases indicates that courts have examined a variety of factors, including: the governmental interests in maintaining the conviction; the government's position on whether relief should be granted; the actions of the defendant; the time that has elapsed since the petitioner's conviction; the hardship to the petitioner's family that will result from his or her deportation; the nature of the crime for which the petitioner was convicted; and other alternatives for obtaining relief.

The governmental interests in maintaining the conviction are varied, and include such items as keeping the record for purposes of classification and possible impeachment.[307] Another factor is the public's interest in bringing closure to litigation.[308] In *Ghebreziabher*, for example, the court found that had the petitioner pleaded guilty to two instead of three misdemeanor counts, he would have received the same sentence and the government would have received the same restitution; thus, the court decided to vacate the conviction on one of the counts because it "would serve the interests of justice and not in any way prejudice the United States."[309]

Along the same lines, courts have weighed the government's position on whether the writ should be granted. In *Salgado*, for example, the

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307. *Acholunu*, 717 F. Supp. at 711 (citing as support for governmental interests in maintaining convictions statutory requirement that Attorney General keep certain criminal records for classification purposes and Rule 609 of Federal Rules of Evidence, which allows convictions for crimes involving dishonesty to be used for impeachment purposes); Government's Opposition to Defendant's Petition for Writ of Audita Querela at 6, United States v. Haro, CR No. 85-00612 WJR (C.D. Cal. May 30, 1990) (citing classification and impeachment value as governmental interests).

308. *See* Government Response to Defendant's Motion to Vacate Conviction, United States v. Louder, CR No. 82-1084 WWE (D. Conn. May 1, 1989).

309. *Ghebreziabher*, 701 F. Supp. at 117.

court emphasized that "[i]t was the general consensus of all concerned [parties] that the equities militate strongly in favor of relieving defendant from prospective operation of the judgment."[310] Similarly, in *United States v. Louder*,[311] the government did not oppose the granting of relief. Other courts have emphasized government opposition to the writ in denying audita querela relief.[312] Yet, this opposition to granting the writ is not dispositive in making the audita querela determination, as the writ has been granted by at least one court despite such opposition.[313]

In addition, courts have considered the conduct of the petitioner in deciding whether to grant audita querela relief. In *Salgado*, for instance, the court relied upon the petitioner's model citizenship, except for the one mistake, during forty-five years in the United States.[314] Similarly, the court in *Ghebreziabher* emphasized the petitioner's work as an "industrious member of [the] community for almost ten years," his otherwise clear record, and his employer's testimony that he was a hard worker, in deciding to vacate the judgment.[315] In *Louder*, the court granted the writ where the petitioner, in her memorandum supporting the motion to vacate her conviction, stressed the fact that she had worked as a nursing assistant and a social worker and was an active member of her church and community.[316] By contrast, since his conviction in 1980, the petitioner in *United States v. Gizar*[317] had reentered the country without the Attorney General's permission, had been convicted of petty theft, and had made a false statement to the INS in an application for legalization.

Courts also examine the time that has elapsed since the conviction. In *Acholunu*, for example, the court noted that the conviction at issue had occurred only nine years prior to the filing of the petition for audita querela relief, whereas the conviction in *Salgado* had occurred twenty-four years before the request for relief.[318] The effect of deportation on the petitioner's family was assessed in *Ghebreziabher*, in which the court relied on the fact that the petitioner's four children would be harmed by his deportation.[319] The court in *Haro* addressed the nature

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310. *Salgado*, 692 F. Supp. at 1266; *see also supra* note 248 (quoting *Salgado* court concerning United States Attorney's support for granting writ).

311. CR No. 82-1084 WWE (D. Conn. May 1, 1989).

312. *See* United States v. Haro, CR No. 85-00612 WJR (C.D. Cal. May 30, 1990) (memorandum decision and order), at 5 (noting that government "vigorously opposed" granting relief); *Acholunu*, 717 F. Supp. at 711 (mentioning government opposition).

313. *See Ghebreziabher*, 701 F. Supp. at 117.

314. 692 F. Supp. at 1268.

315. 701 F. Supp. at 117.

316. Louder Memorandum, *supra* note 239, at 3.

317. CR No. 80-0559-T (S.D. Cal. Apr. 4, 1990) (decision and order).

318. *See Acholunu*, 717 F. Supp. at 711 (comparing facts at bar to facts in *Salgado*).

319. *Ghebreziabher*, 701 F. Supp. at 117; *see also Salgado*, 692 F. Supp. at 1268 (noting that petitioner's family would be deprived of benefits were he to be deported).

of the crime that was the basis for the conviction. The petitioner had sought to vacate her conviction for "aiding and abetting the unlawful procurement of evidence of United States citizenship."[320] In denying relief, the court focused on the extent of the scheme, the amount of money involved, and the fact that her crime had been committed against the INS — the very agency from which the petitioner now sought a benefit.[321] The court in *United States v. Javanmard*,[322] on the other hand, stressed the fact that it was unlikely that the offense would happen again in discussing whether the conviction should be vacated.[323] A final factor that courts address is the petitioner's other alternatives for obtaining relief. In *Haro*, for example, the court thought that denial of relief would not foreclose petitioner's other options, such as "suspension of deportation."[324] Thus, audita querela relief might be granted only when it is the petitioner's last resort.

In sum, a variety of factors influence a court's decision to grant the writ of audita querela. After weighing these factors, a court may find that, either alone or in combination, they warrant audita querela relief.

V. AUDITA QUERELA RELIEF FOR DEFENDANTS SENTENCED UNDER RECIDIVIST STATUTES

The writ of audita querela can be a significant post-conviction remedy in the immigration context. The writ can be used to provide relief from the consequences of a judgment where the judgment has been satisfied and, considering the totality of the circumstances, relief is deemed to be appropriate. These general precepts suggest that the writ could provide relief in other contexts as well. One such context would

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320. United States v. Haro, CR No. 85-00612 WJR (C.D. Cal. May 30, 1990) (memorandum decision and order), at 1.

321. *Id.* at 5.

322. 767 F. Supp. 1109 (D. Kan. 1991).

323. *See id.* at 1111-12. It is difficult to determine precisely what the court decided in this case. In order to qualify for the amnesty provisions of the IRCA, the petitioner sought to vacate his conviction for making a false statement to the Department of Education. *Id.* at 1110-11. Part of his probation required him to make restitution payments on the loan he had improperly received. *Id.* at 1110. In its analysis, the court rejected the contention that the IRCA presented a "defense or discharge" necessary to grant a writ of audita querela. *Id.* at 1111. The court, however, concluded that it could grant "the relief required here on equitable grounds under the All-Writs Act." *Id.* The court conditioned this relief on the defendant continuing with his restitution payments. *Id.* at 1112. It would appear that the court was not using audita querela to vacate the conviction; in its conclusion, however, the court stated that "defendant's motion to vacate conviction upon a writ of audita querela is held in abeyance, pending defendant's satisfaction of his remaining restitution obligation." *Id.* Although it is unclear whether the court was granting relief based on audita querela, its analysis of the equities involved is nevertheless relevant for determining when the writ should be granted.

324. CR No. 85-00612 WJR (C.D. Cal. May 30, 1990) (memorandum decision and order), at 4; *see also* United States v. Gizar, CR No. 80-0559-T (S.D. Cal. Apr. 4, 1990) (decision and order), at 2-3 (noting that government had presented evidence that petitioner had not exhausted his INS remedies before seeking writ of audita querela); *cf.* 28 U.S.C. § 2255 (1988) (containing exhaustion-of-remedies language in final paragraph).

be sentences imposed under recidivist, or habitual-offender, statutes.[325]

The factual scenario presented to the United States Supreme Court in *Rummel v. Estelle*[326] is illustrative of the type of case in which audita querela relief might be justified.[327] In *Rummel*, the state petitioner applied for federal habeas corpus relief when, after conviction for his third felony — all property crimes totaling less than $230 — he received a mandatory sentence of life without the possibility of parole, pursuant to the Texas recidivist statute.[328] Rummel argued that the life sentence violated the Eighth and Fourteenth Amendments because it was grossly disproportionate to the crimes for which he had been convicted.[329] After noting both the lack of success in cases challenging the proportionality of sentences for noncapital crimes as well as the goals of recidivist statutes, a 5-4 majority of the Supreme Court held that the sentence did not violate the Constitution.[330]

An application of the principles that justify audita querela relief indicate that such relief might have been warranted under the facts of this case. Rummel was seeking to avoid the consequences of his judg-

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325. *See* D. Brian King, *Sentence Enhancement Based on Unconstitutional Prior Convictions*, 64 N.Y.U. L. REV. 1373, 1373 n.3 (1989) (defining recidivist statutes as "criminal statutes that provide for a heavier sentence for a given offense if the defendant previously has been convicted of the same offense or a certain number of unrelated offenses.").

326. 445 U.S. 263 (1980).

327. It should be noted, however, that had Rummel sought audita querela relief in either federal or state court, it likely would not have been granted. In Quintana v. Nickolopoulos, 768 F. Supp. 118 (D.N.J. 1991), the court explicitly recognized that a petition for audita querela relief from a state conviction could not be brought in a federal court. Quintana was an illegal alien who had resided in the country since 1979. *See id.* at 119. In 1985, he was convicted of possession of cocaine with intent to distribute. *Id.* After his release from prison in 1990, he sought to legalize his residency status under the IRCA; meanwhile, the INS brought deportation proceedings against him. *Id.* He sought a writ of audita querela to overturn the conviction. *Id.* The court held that, "[e]ven if the writ of error audita querela is a viable procedural mechanism in criminal cases, its use is limited solely to *federal* criminal cases." *Id.* at 120. The court stated that the Supreme Court had held in such cases "that the writ of habeas corpus is his *exclusive* remedy." *Id.* (citing Wolff v. McDonnell, 418 U.S. 539, 554 (1974) and Preiser v. Rodriguez, 411 U.S. 475, 489-91 (1973)). Quintana's petition for audita querela was therefore denied. *Id.* at 121. Obviously, this is the result in one district court and is not necessarily representative of how all courts would decide the question. This case, however, coupled with the requirement that audita querela be brought in the court that rendered the original judgment, suggests that Rummel's petition for audita querela relief in the federal courts would have been denied.

A petition brought in state court also almost certainly would have been denied, as the writ of audita querela does not exist in Texas. In that state, "the exclusive post-conviction remedy in final felony convictions in Texas courts is through a writ of habeas corpus," Charles v. State, 809 S.W.2d 574, 576 (Tex. Ct. App. 1991), pursuant to TEX. CODE CRIM. PROC. ANN. art. 11.07 (West 1977 & Supp. 1992).

328. *See* 445 U.S. at 264-66. Rummel was convicted of the following three felonies: In 1964, he pleaded guilty to fraudulent use of a credit card, to which he had charged $80 worth of goods or services. *Id.* at 265. Because the amount was more than $50, the crime was classified as a felony. *Id.* In 1969, Rummel pleaded guilty to forging a rent check for $28.36. *Id.* In 1973, he was charged with accepting $120.75 under false pretenses. The prosecution thus elected to prosecute Rummel under Texas' recidivist statute. *Id.* at 266. The jury convicted Rummel, and found it proven that he had been convicted of felonies on two prior occasions; thus, he received a mandatory life sentence. *Id.*

329. *Id.* at 265.

330. *Id.* at 272, 284-85.

ment, as were the petitioners in the immigration cases. Certainly there was a matter that had arisen since the judgment, in this case an additional criminal conviction. Since Rummel had satisfied the earlier judgment by serving his sentence, this element would be met in this case.

The final step in the analysis is to determine whether continued enforcement of the conviction would be unfair under a totality-of-circumstances test.[331] The court in *Haro* made this determination by balancing the interests of the petitioner, the government, and society.[332] Using this approach, Rummel would have had a reasonably strong argument that one of his prior convictions should have been vacated. Rummel's interest in vacating the conviction was to avoid serving a life sentence for the commission of the three property crimes. As the court did in *Haro*, a petitioner like Rummel might focus on the nature of his crimes and then compare them to his sentence. The Supreme Court in *Rummel* addressed two such claims: first, that the crimes lacked violence, and, second, that the crimes involved only small amounts of money.[333] As Justice Powell wrote in his dissenting opinion in *Rummel*, "[i]t is difficult to imagine felonies that pose less danger to the peace and good order of a civilized society than the three crimes committed by the petitioner."[334] Moreover, as Justice Powell noted, "[s]ince the petitioner was convicted as a habitual offender, the State has reclassified his third offense, theft by false pretext, as a misdemeanor."[335] Justice Powell concluded his dissent by writing: "We are construing a living Constitution. The sentence imposed upon the petitioner would be viewed as grossly unjust by virtually every layman and lawyer."[336] But not by the Supreme Court majority, which rejected both of Rummel's claims — the first on the ground that the violence in a crime was not always indicative of society's interest in deterring or punishing that crime, and the second on the ground that choosing the dollar amount at which a crime becomes a felony was always in some sense "subjective."[337] It must be remembered, of course, that Rummel's claims were being considered in a proportionality analysis pursuant to the cruel and unusual punishments clause of the Eighth Amendment. The claims might be stronger in the audita querela context, in which the goal is to determine whether relief should be granted on equitable principles.

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331. *See supra* notes 261-70 and accompanying text (concluding that petitioner in *Salgado* met standard); *see also supra* notes 271-76 and accompanying text (discussing factors used by court in *Ghebreziabher* to analyze "totality of the circumstances"); notes 298-306 and accompanying text (discussing "totality of the circumstances" analysis in *Haro*).

332. *See supra* notes 304-06 and accompanying text (describing approach of court in *Haro* to "totality of the circumstances" standard).

333. 445 U.S. at 275.

334. *Id.* at 295 (Powell, J., dissenting).

335. *Id.* (citation omitted).

336. *Id.* at 307.

337. *Id.* at 275.

The petitioner's interest in equity must be weighed against the governmental and societal interests in preserving the conviction. One general governmental interest is in the finality of judgments present in all cases.[338] Another concern is to prevent the behavior identified in the statute.[339] A third interest is allowing the states to experiment with diverse ways to prevent and control criminal conduct; recidivist statutes reflect the state's belief that repeat offenders are more blameworthy, and merit substantially more punishment, than first-time offenders.[340] On an application for audita querela relief, a court must decide whether these state and public concerns outweigh Rummel's interest in avoiding a sentence of life in prison without the possibility of parole.

It is difficult to conduct a comprehensive analysis of the issue based on the facts presented in the case. For example, there was no evidence about Rummel's life outside of his criminal activity; such evidence might be essential in determining whether one of his previous convictions should be vacated. Based on the facts presented, however, it is more than plausible — particularly considering the nature of the crime — that the governmental interests would have been adequately served by a lesser sentence, such as ten or twenty years in prison.[341] Such a sentence would have been both retributive and a strong deterrent to future participation in such activities, and Rummel would still have received a substantially enhanced sentence as a repeat offender. Given

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338. *See supra* note 308 and accompanying text (noting this view in *Louder*).

339. *See Rummel*, 445 U.S. at 276 (articulating this concern as interest in "making criminal the unlawful acquisition of another person's property").

340. *See id.* (emphasizing societal interest "in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law").

341. *Compare id.* at 288 (Powell, J., joined by Brennan, Marshall & Stevens, JJ., dissenting) ("The Court concedes today that the principle of disproportionality plays a role in the review of sentences imposing the death penalty, but suggests that the principle may be less applicable when a noncapital sentence is challenged. Such a limitation finds no support in the history of Eighth Amendment jurisprudence.") *with* Harmelin v. Michigan, 111 S. Ct. 2680 (1991). The Supreme Court in *Harmelin* affirmed a mandatory sentence of life without parole for possession of 650 grams of cocaine. Justice Scalia wrote for the majority, using a cruel and unusual punishment analysis: "Severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation's history." *Id.* at 2701. He concluded:

> It is true that petitioner's sentence is unique in that it is the second most severe known to the law; but life imprisonment *with* possibility of parole is also unique in that it is the third most severe. . . . In some cases, moreover, there will be negligible difference between life without parole and other sentences of imprisonment — for example, a life sentence with eligibility for parole after 20 years, or even a lengthy term sentence without eligibility for parole, given to a 65-year-old man. But even where the difference is the greatest, it cannot be compared with death. We have drawn the line of required individualized sentencing at capital cases, and see no basis for extending it further.

Id. at 2702.

In 1992, the Michigan Supreme Court held that the Michigan statute that was at issue in *Harmelin* was unconstitutional under the cruel *or* unusual punishment clause of the Michigan Constitution. People v. Bullock, 485 N.W.2d 866, 870-77 (Mich. 1992).

the nature of his crimes, a term of years arguably would have been a more equitable treatment of Rummel. Thus, audita querela relief would have been justified on the facts of this case.[342]

On a theoretical level, allowing audita querela relief in cases involving recidivist statutes serves the postulates that guide sentencing. Recidivist statutes, commonly found in criminal-justice systems, are justified on grounds of general and specific deterrence, incapacitation, and "the perception that recidivists are more culpable than first-time offenders."[343] Without guidelines, judges have relatively unfettered discretion in sentencing. Giving such discretion to the judiciary is founded on the idea that judges are in the best position to make sentencing determinations; however, broad discretion can result in wide disparities in sentencing. Guidelines remove much of this discretion, but simultaneously remove the advantages of having a judge make the individual determination that he or she is in the best position to make.[344]

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342. Unbeknownst to many observers of the *Rummel* case, six months after the Supreme Court's decision affirming his life sentence, a federal court granted habeas corpus relief on the ground of ineffective assistance of counsel for the proceedings involving the third felony offense. Rummel v. Estelle, 498 F. Supp. 793 (W.D. Tex. 1980). Rummel later pleaded guilty to *misdemeanor* theft for the third offense. Since this was not a *felony* conviction, Rummel did not come within the Texas recidivist statute. He was sentenced to time served, which was nearly eight years in prison. *See* WASH. POST, Nov. 15, 1980, at A12.

343. King, *supra* note 325, at 1373-74.

344. For a flavor of some of the vast literature critiquing the lack of judicial discretion in individual cases under the Federal Sentencing Guidelines, see, *e.g.*, Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901 (1991); Edward R. Becker, *Flexibility and Discretion Available to the Sentencing Judge Under the Guidelines Regime*, 55 FED. PROBATION 10 (Dec. 1991); Judy Clarke, *The Sentencing Guidelines: What a Mess*, 55 FED. PROBATION 45 (Dec. 1991); Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681 (1992); Donald P. Lay, *Rethinking the Guidelines: A Call for Cooperation*, 101 YALE L.J. 1755 (1992); Gerald Bard Tjoflat, *The Untapped Potential for Judicial Discretion Under the Sentencing Guidelines: Advice for Counsel*, 55 FED. PROBATION 4 (Dec. 1991); Thomas E. Zeno, *A Prosecutor's View of the Sentencing Guidelines*, 55 FED. PROBATION 31 (Dec. 1991); José A. Cabranes, *Sentencing Guidelines: A Dismal Failure*, N.Y.L.J., Feb. 11, 1992, at 2; WALL ST. J., Aug. 28, 1992, at A11 (letter to editor entitled "Incoherent Sentencing Guidelines," written by Judge Cabranes).

For a case concerning the relationship between the collateral consequences of a conviction and the Federal Sentencing Guidelines, see United States v. Restrepo, No. 91-CR-1399, 1992 U.S. Dist. LEXIS 12408 (E.D.N.Y. Aug. 17, 1992). Addressing the issue of "whether unusually harsh collateral consequences [such as deportation] that are visited by law on a defendant as a result of his conviction may provide a basis for mitigating the penal sanction that would otherwise be required by the Sentencing Guidelines," *id.* at *1, the court held: "The penalty of deportation . . . is perhaps the most severe and drastic consequence that can result from the conviction of an offense." *Id.* at *28. "A downward departure that would mitigate a sentence to which 'the severest of punishments' attaches is plainly appropriate, even if it would be justified in a large number of cases." *Id.* at *30. It is conceivable, although beyond the immediate scope of this Article, that the writ of audita querela can play some role in post-conviction challenges, on the ground of harsh collateral consequences, to sentences imposed under the Federal Sentencing Guidelines. Such an argument would not necessarily have to be restricted to deportation cases. *See, e.g.*, United States v. Johnson, 964 F.2d 124, 128-30 (2d Cir. 1992) (extraordinary family circumstances can be valid reason for downward departure from sentencing guideline range); United States v. Gonzalez, 945 F.2d 525, 526-27 (2d Cir. 1991) (extreme vulnerability of defendant due to youthful and fragile appearance can be ground for downward departure).

The writ of audita querela at common law was flexible and equitable in nature. Enabling a petitioner to have a conviction vacated through audita querela in cases in which a sentence imposed under recidivist statutes results in extreme injustice is consistent with the common-law origins of the writ; it also complements the legislative scheme of recidivist sentencing. Sentence consistency is promoted by the recidivist statute, while the harm of outrageously unfair or unjust results can be protected by audita querela. Permitting the audita querela relief does not detract from these goals in the vast majority of cases. It also serves another important aim of the criminal-justice system: ensuring that justice is afforded to the petitioner.

VI. CONCLUSION

Determining whether post-judgment relief should be granted in any case requires a delicate balancing of the competing values of finality of litigation and an assurance that cases are decided in a fair and just manner.[345] Audita querela began as a common-law writ used to grant relief to judgment debtors when creditors sought to enforce judgments that had already been paid. Focusing on the concepts of satisfaction of the judgment and the equities of a particular fact situation, the writ proved to be flexible enough to grant relief in a wider variety of circumstances, including matters occurring both before and after the judgment.

Like the writ of error coram nobis, the writ of audita querela has been abolished as a civil remedy. Also like coram nobis, however, audita querela has not been abolished as a criminal remedy. Thus far, audita querela has been employed successfully to vacate criminal convictions in order to enable petitioners to qualify under the amnesty provisions of the Immigration Reform and Control Act of 1986 — if the judgment has been satisfied and the equities strongly favor the petitioner. The rationale for granting the writ suggests that audita querela can also be used in the future to provide post-conviction relief under recidivist-sentencing statutes, and perhaps in other situations as well.

345. *See* Moore & Rogers, *supra* note 112, at 623 (discussing considerations involved in determining when post-judgment relief should be granted); *see also supra* note 110 and accompanying text (discussing how Rule 60 of Federal Rules of Civil Procedure was intended to weigh these considerations).