04-0717-cr

To Be Argued By:
WILLIAM J. NARDINI

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 04-0717-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

ARIF DURRANI,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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BRIEF FOR THE UNITED STATES OF AMERICA

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STATEMENT OF JURISDICTION

The district court (Stefan R. Underhill, J.) had subject matter jurisdiction over this collateral challenge to his federal criminal conviction under the All Writs Act, 28 U.S.C. § 1651. *See United States v. Mandanici*, 205 F.3d 519, 521 n.1 (2d Cir. 2000). The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b), and this Court has appellate jurisdiction over the defendant's challenge to the denial of his petition for collateral relief pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

1. Did the district court abuse its discretion in denying Durrani's petition for *coram nobis* relief, on the multiple grounds that

   (a) he was procedurally barred from relitigating claims he had raised in his prior § 2255 petition, which had been dismissed with prejudice for failure to prosecute,

   (b) he had failed to demonstrate sound reasons for the delaying in filing the present petition -- ten years after resolution of his § 2255 petition and seven years after he was declared deportable, and

   (c) he had failed to demonstrate any colorable claim under *Brady v. Maryland*, 373 U.S. 83 (1963)?

2. Did the district court abuse its discretion in denying Durrani's petition for *audita querela* relief?

3. Did the district court abuse its discretion in denying Durrani's request for discovery of numerous documents in the possession of numerous federal agencies, in light of his lack of a colorable *Brady* claim, his delay in requesting such relief, and the burdensome nature of his requests?

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Preliminary Statement

Seventeen years ago, a federal jury convicted Arif Durrani, a Pakistani national, of illegally exporting spare parts for Hawk anti-aircraft missiles to Iran. His conviction was affirmed on appeal by this Court in 1987, and in 1992, after much litigation including abundant discovery, the district court dismissed with prejudice his motion to vacate his conviction pursuant to 28 U.S.C. § 2255, based on Durrani's failure to prosecute the case. Now, years after completing his sentence and being

deported, Durrani has sought yet another round of collateral review by petition for a writ of *coram nobis* or *audita querela*, or alternatively for discovery. He claims primarily that the Government withheld exculpatory information which could have proven useful in his far-fetched defense that he was authorized to act on behalf of the United States (and at the direction of Oliver North) during the Iran-Contra affair.

The district court (Stefan R. Underhill, J.) dismissed Durrani's present petition on multiple grounds, first and foremost that he was procedurally barred from relitigating these claims. The court held in the alternative that Durrani had failed to establish any of the requirements for *coram nobis* or *audita querela* relief, or for further discovery, primarily because he had unreasonably delayed in bringing his petition, and because his exculpatory-evidence claim was meritless. For each of these reasons, this Court should affirm.

STATEMENT OF THE CASE

On October 3, 1986, Arif Durrani was arrested on a criminal complaint, in connection with his efforts to export spare parts for Hawk anti-aircraft missiles from the United States without a valid license. On October 8, 1986, he was indicted by a federal grand jury on one count of violating the Arms Export Control Act, 22 U.S.C. § 2778(c). His case was assigned to the late Chief Judge of the United States District Court for the District of Connecticut, T.F. Gilroy Daly, who ordered him detained on October 29, 1986. This Court affirmed the detention order on November 21, 1986. *United States v. Durrani,* No. 86-1448, Government Exhibit ("GE") 3.[1]

On February 18, 1987, the grand jury returned a Superseding Indictment, charging Durrani with three counts of violating the Arms Export Control Act: (1) exporting arms without a license in August 1986; (2) attempting to export arms without a license in October 1986; and (3) failing to register as an arms exporter.

On March 16, 1987, trial began before Judge Daly. On April 2, 1987, after less than 90 minutes of deliberations, the jury convicted Durrani of all counts. On May 13, 1987, the district court sentenced Durrani to a total of ten

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[1] To the extent they have not been reprinted in the Joint Appendix, documents appended to the Petitioner's Motion to Vacate in the district court shall be designated "DE," and those appended to the Government's Response to the petitioner's motion to vacate shall be designated "GE."

years of incarceration and a total fine of $2,000,000. JA 95.

On December 3, 1987, this Court affirmed Durrani's conviction by published opinion. *United States v. Durrani*, 835 F.2d 410 (1987).

On July 15, 1988, Durrani filed a motion in the district court pursuant to Rule 35(b), seeking a reduction of sentence. The district court denied that motion on May 23, 1989, JA 115, and Durrani took no appeal.

On March 4, 1990, Durrani filed a *pro se* motion to vacate his conviction and sentence pursuant to 28 U.S.C. § 2255. JA 117. The district court appointed counsel, who filed an amended § 2255 petition on August 6, 1991. JA 159. On May 21, 1992, Durrani moved for voluntary dismissal of his § 2255 petition, JA 191, which was granted without prejudice on the condition that an amended motion be filed before December 31, 1992, JA 190. Durrani was released from prison in September 1992, in accordance with now-repealed federal laws providing for early release. On December 28, 1992, Durrani moved for an extension of time to file an amended § 2255 motion, JA 195. On that same date, the district court denied the motion for an extension, and dismissed the § 2255 petition with prejudice. JA 194. Durrani did not appeal that ruling.

In 1995, Durrani was declared deportable. In January 1998, he voluntarily departed the United States.

On January 14, 2002, Durrani filed the present motion to vacate his judgment of conviction by writ of error

coram nobis or *audita querela*, or alternatively for discovery. The district court (Hon. Stefan R. Underhill, J.) denied the motion in all respects in a ruling filed on November 26, 2003, and entered on December 2, 2003. JA 6; *Durrani v. United States*, 294 F. Supp.2d 204 (D. Conn. 2003).

On January 23, 2004, Durrani filed a timely notice of appeal from the district court's denial of his motion. JA 28. *See* Fed R. App. P. 4(a)(1)(B) (60 days to appeal civil case where United States is party); Fed. R. App. P. 4(a)(1)(C) (order denying application for writ of error *coram nobis* is appeal in civil case for purposes of Rule 4(a)).

STATEMENT OF FACTS

The facts of this case were developed extensively over eleven days of trial in early 1987, and are amply summarized in this Court's published opinion affirming Durrani's conviction and sentence. *See United States v. Durrani*, 835 F.2d 410, 413 (1987). The following Statement outlines only those facts necessary for determination of the present appeal.

A. The Offense Conduct

In August 1986, Arif Durrani arranged for the export of Hawk missile system parts, valued at approximately $347,000, from a company called Radio Research in Danbury, Connecticut. Responding to concerns of the seller and freight forwarder, who were told that the parts

were being shipped to Jordan, Durrani signed the following declaration:

> The export of Hawk Missile parts being sold to you by Radio Research require a U.S. State Department Export License prior to their export. I certify that the appropriate State Department export licenses will be obtained prior to the exportation of Hawk Missile Parts from the U.S.

Contrary to his promise, however, Durrani did not obtain an export license. Moreover, before shipment, Durrani directed that the markings on the boxes containing the missile parts be obliterated, and that they be redirected to Belgium. The boxes were accompanied by an invoice from Durrani's company, CAD Transportation, to KRAM, LTD., valuing the shipment at less than $500. This invoice was typed by an employee of the freight forwarder from a handwritten version faxed to him by Durrani. On the evening of August 30, 1986, the shipment was exported by air to Belgium.

Throughout September 1986, Durrani negotiated with Radio Research for the delivery of further Hawk missile parts he had ordered, as well as the purchase of a TPS-43 radar system for $2.75 million. Durrani sent Radio Research a cashier's check for $148,860 to obtain an early payment discount. On October 3, 1986, Durrani visited Radio Research in Danbury to accept delivery of the Hawk parts, and instructed that they be sent to a freight forwarder for export to Brussels. At this meeting, Durrani signed another statement acknowledging responsibility for obtaining an export license, even though he again failed to

do so. At the conclusion of this meeting, agents of the U.S. Customs Service arrested Durrani pursuant to a criminal complaint.

Durrani was eventually tried before a jury on a Superseding Indictment, charging him with three counts of violating the Arms Export Control Act, 22 U.S.C. § 2778(c): (1) exporting arms without a license in August 1986; (2) attempting to export arms without a license in October 1986; and (3) failing to register as an arms exporter. *See Durrani*, 835 F.2d at 413. Durrani was represented in the trial court by privately retained defense counsel, Ira Grudberg, Esq., who was assisted by William Bloss, Esq.

B. Pre-Trial Proceedings

In the months immediately after his arrest, the defendant made no allegation that his efforts to export the Hawk missile parts had been performed with the authorization of the United States Government. Instead, in a December 1986 motion for reconsideration of his detention order, Durrani argued simply that he had been misled by his customer into believing that the parts were going to Jordan, and that it would have been the freight forwarder's responsibility to obtain any export licenses.[2]

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[2] Durrani made this same argument before this Court on his unsuccessful appeal from his detention order, GE 2, at 3, and in connection with his December 1986 motion for reconsideration of the detention order, he attached as (continued...)

GE 4, at 5-6. Notably, Durrani did not claim any involvement with the emerging Iran-Contra affair. The Government noted at the time, and the defendant did not dispute, that "[c]onspicuously absent from defendant's strained argument is a claim that he was authorized by some branch of the Government to sell the military equipment at issue in the instant case." GE 5, at 2.

On February 4, 1987, with startling alacrity after the Senate Intelligence Committee released its report on the Iran-Contra scandal in January 1987, Durrani deposited a new affidavit with the district court. For the first time, he admitted that he had been shipping arms to Iran, and now claimed that the project had been sponsored by the United States government. JA 29-37. He asserted that he had personally met three times with a man named Mr. White,

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[2] (...continued)
"evidence" supposed purchase orders from KRAM for the Hawk missile parts that showed Jordan as the ultimate shipping destination. *See* GE 4.

At trial, however, Durrani admitted that this story was false, and that he had always known that the parts were destined for Iran. *See* GE 10, 3/25/87 Tr. at 159-60. According to Durrani, he had lied to his own lawyer "hoping I would get out on bail and perhaps later on resolve these other matters." GE 9, 3/24/87 Tr. at 61. On cross-examination, Durrani further admitted the falsity of the invoices listing Jordan as the destination. *See* GE 10, 3/25/87 Tr. at 160-64. Indeed, Durrani claimed not to know where his lawyers had obtained those documents, and said they had not shown them to him before filing the motion. *Id.*

whom he later came to believe was Lt. Col. Oliver North of the United States National Security Council ("NSC"). One of those meetings, in London on October 1, 1986, was also attended by other American officials as well as "a representative of the Anglican Church." JA 33 at ¶15. During these contacts, Durrani claimed, American officials "urged [him] to quickly obtain the parts," and North personally instructed him "not to worry about the paper work" because President Reagan would sign orders on October 3, 1986, to authorize shipments of arms to Iran. *Id.*

Durrani also alleged for the first time that his buyer, Manuel Pires, was actively working with the Central Intelligence Agency ("CIA") and the NSC to ship arms to Iran, JA 30 at ¶5; that Pires told him that these parts "were needed to complete deals that had already been concluded between the United States and the government of Iran," JA 32 at ¶11; and that Durrani "know[s], and knew that Pires had very substantial prior dealings with both the government of the United States" and NATO, JA 35 at ¶20; that Durrani "understood that my mission was to attempt to obtain various spare parts for Hawk missiles . . . at the instance of the United States government for shipment to Iran," *id.*; and that he had been told both orally and in writing by Pires and his companies that the obtaining of licenses would not be his (Durrani's) responsibility, and that reliance on such a representation was reasonable, JA 35 at ¶21. Based on these allegations, Durrani moved to dismiss the indictment, claiming that his actions were "at the instance" of the U.S. Government.

The district court denied the motion by endorsement order on February 26, 1987.

C. Trial and Sentencing

At trial, Durrani testified that he had no need for a license because the U.S. Government -- through North and Pires -- had authorized these exports. Yet his story about meeting Oliver North in London had evolved considerably since his affidavit of February 4, 1987. The multiple officials mentioned in his affidavit were now elsewhere in the hotel lobby, rather than participants in the meeting. GE 9 at 244-47. He now claimed to have called Oliver North by name at the meeting as well (GE 9 at 243-44) -- contrary to the claim in his affidavit that only later did he "come to believe" that the "Mr. White" he supposedly met was in fact Oliver North. JA 33 at ¶15. Durrani then took the courtroom by surprise by testifying, for the first time, that he had also met with a man named Howard Teicher from the National Security Council at a Crystal City hotel outside Washington, D.C., and that they had discussed the purchase of TOW anti-tank missiles by the Iranians. *See* GE 9 at 225-29.

The defense was perhaps even more surprised by the Government's rebuttal case. The Government was able to locate Teicher that evening, and fly him up to Connecticut the following day. Teicher testified that he had never met (nor indeed heard of) Arif Durrani, that he had never discussed the sale of TOW missiles to Iran with anyone, and that he had never been to Crystal City. A CIA employee, Charles Moyer, testified that (among other

things) the CIA had no records of any association with Manuel Pires or Arif Durrani. JA 48a. The Government also offered testimony from an NSC employee, Michael Sneddon, that NSC travel records did not reflect that Oliver North was in London (or had been travelling at all) between September 28 and October 2, 1986, when Durrani claimed to have met him. DE 4 at 109-14.

The docket sheet reflects that the jury deliberated for approximately 90 minutes on April 2, 1987, before returning guilty verdicts on all counts.

At sentencing, the defense argued that "federal judges have virtually unanimously" given lenient sentences to arms exporters in light of the Iran-Contra scandal. GE 11, at 1. Chief Judge Daly rejected these arguments and imposed a $2 million fine and the maximum sentence of ten years in prison: "[W]hatever was going on in Washington is and was no excuse to your profiteering and repeated lying under oath as the occasion suited you." JA 113.

D. Appeal

On appeal, Durrani was represented by newly retained counsel, Alan and Nathan Dershowitz, Esq.. Durrani's brief argued primarily that the Government should have borne the burden of proving that Durrani's arms sales did not fit within the statutory exception providing that export licenses are not required for certain arms sales made on behalf of the U.S. Government; that the district court erred in admitting evidence that an export license is required for

Hawk missile parts; and that Judge Daly's assignment to the case was irregular. This Court rejected each argument, and affirmed Durrani's conviction. *United States v. Durrani*, 835 F.2d 410 (1987).

E. Rule 35 Proceedings

The defendant revived his Iran-Contra claims in a Rule 35(b) motion for reduction of sentence, filed a year after sentence was imposed. In a twenty-page motion, defense counsel argued that "information developed since the date of sentencing indicates that defendant is not as culpable as the Court may have believed at the time of sentencing." GE 15, at 1. Counsel rehearsed extensive factual allegations about the Iran-Contra affair, including (1) that the United States government had sought to provide Iran with Hawk missile parts, *id.* at 9, and (2) that Oliver North received permission from Admiral Poindexter on September 22, 1986, to travel to London to discuss arms sales with Iran, *id.* at 15.

In conjunction with this Rule 35(b) motion, Durrani filed a document that purported to be a National Intelligence Council memorandum dated 18 December 1986, regarding a meeting at the Churchill Hotel, London, on 28 September 1986. *See* GE 16. This document was offered as "new evidence" showing that an American intelligence official was staying at the same London hotel as Durrani on September 28, 1996. Durrani argued that this document (1) bolstered his trial testimony that he had met with Oliver North at that hotel on September 28, 1996,

and (2) showed that the Government had deliberately withheld exculpatory evidence.

The document was a forgery. Investigation revealed that the original, unaltered document was actually dated 18 *February* 1986, and referred to a meeting between an American agent and an *Iranian* (not a Pakistani), which occurred on 26 *January* 1986. *See* GE 17 (originally appended to Gov't Mot. for Inquiry Into Authenticity of Documents dated Jan. 6, 1989). This original document had been made public as part of Congress's investigation into Iran-Contra, and was available via FOIA requests like the ones with which Durrani had deluged the Government. Durrani had submitted to the district court a copy whose dates had been replaced to conveniently correspond with his testimony about the supposed meeting with Oliver North, and portions of the original had been blacked out to make it seem more plausible that the document related to Durrani. Acting pursuant to a search warrant, federal agents searched Durrani's prison cell at the Washington State Penitentiary in Walla Walla on December 22, 1988. They located a copy of the memorandum in the form it was submitted to the Court, along with other Iran-Contra documents on which the page numbers had been obliterated with correction tape, and photocopies of these same documents. Additionally, on at least one document that was seized, a black pen had been used to delete additional material besides what had been excised on the declassified version. *See* GE 27, at 1-2, ¶5-8

On April 7, 1989, Judge Daly held a hearing during which he inquired about the circumstances under which

Durrani's lawyer had obtained the forged memorandum. Defense counsel, in accordance with his ethical duties, asserted the attorney-client privilege. The judge stated that he would not go behind the privilege, but in light of its assertion, he would infer that the source was Durrani. *See* GE 27 at 3 ¶10.[3] Judge Daly emphasized that the petitioner's repeated dishonesty to the court was a justification for upholding his stiff sentence. "[T]he record reveals that defendant on several occasions has committed or has caused to be committed falsehoods in the pre-trial, trial and post-trial proceedings in this matter, reflecting a complete disdain for the law and this Court. In particular, the Court finds that defendant caused the submission of an altered document in connection with the instant motion." JA 115-16.

Judge Daly then turned to the merits of the Rule 35 motion. After reviewing data about other federal prosecutions involving arms exports to Iran, Judge Daly concluded that Durrani's sentence, "especially given the conduct of defendant in these proceedings, is not disproportionate to other sentences imposed in similar matters." JA 116. Accordingly, the court denied the Rule 35(b) motion. *Id.*

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[3] This exhibit is an affidavit of U.S. Customs Agent Peter Ross, which in turn cites a transcript of a hearing before Judge Daly on April 7, 1989, at 15-16. The Government has not been able to locate a copy of that transcript.

F. Section 2255 Proceedings

Less than a year later, on March 4, 1990, Durrani filed a *pro se* motion to vacate his conviction under § 2255. *See* JA 117-58. He repeated his previous claims that he was part of the U.S. Government's efforts to sell arms to Iran and attached a number of exhibits which, he claimed, showed that prosecutors withheld exculpatory material and that government witnesses perjured themselves at his trial.

The district court appointed as habeas counsel William Bloss, Esq., who had assisted in Durrani's defense at trial. On August 6, 1991, Durrani's counsel filed an amended § 2255 motion, alleging the government had withheld three categories of exculpatory material: (1) that, contrary to the testimony of government witness Charles Moyer, the U.S. government did not rely solely on stocks of Hawk parts within the custody of the U.S. Army and within the United States for shipments to Iran before and during 1986; (2) that private persons, including Manuel Pires, were involved in the procurement of weapons including Hawk parts at the behest of the U.S. government in connection with the Iran-Contra scandal; and (3) that Oliver North had met with private parties in an effort to obtain Hawk parts, including at a meeting in London in late September 1986. *See* JA 159-62.

After two years of investigation, a number of depositions throughout the United States, the production of additional government documents, and the expenditure of CJA funds on an investigator of Durrani's choice, his counsel was unable to file supportable findings. Counsel

sought, and obtained, a series of extensions of time in order to pursue discovery and attempt to formulate valid claims. On May 21, 1992, Durrani moved for voluntary dismissal of his § 2255 petition, representing that he wished to resolve his immigration case in Oakdale, Louisiana, but that he wished to be present in Connecticut during the pendency of his § 2255 motion. *See* JA 191-93. After a hearing at which Durrani himself was present, the Court granted the motion, ruling: "On consent of the government, counsel for the petitioner and the petitioner himself and consistent with the Court's Ruling in open court on this same date, the motion is hereby ORDERED dismissed without prejudice to renewal upon a filing, on or before 12/31/92, made in compliance with the appropriate rules Fed. R. Civ. P. 41(a)(2). If no renewed motion is filed on or by that date, this dismissal will be with prejudice." JA 190.

On December 28, 1992, three days before the filing deadline, Durrani's counsel sought a further extension of time. *See* JA 195. Durrani had been out of prison since September 1992, in accordance with now-superseded federal laws providing for mandatory early release.[4] In

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[4] In 1988, the U.S. Parole Commission found that Durrani had lied about his assets and perjured himself at trial, warranting a 60-month presumptive sentence, rather than the guidelines range of 40-52 months. *See* GE 25. As a result of Durrani's further evidence-tampering in the § 2255 and Rule 35(b) proceedings, the U.S. Parole Commission twice found that Durrani was guilty of new criminal conduct that warranted (continued...)

accordance with its earlier warning, the district court denied the extension in an endorsement ruling: "As this matter has been continued innumerable times and as the movant himself has not given adequate attention to this matter, the motion is DENIED in the interest of finality, and the petition hereby ORDERED dismissed with prejudice." JA 194.

Durrani never appealed from the dismissal of his § 2255 petition, despite the fact that he had appointed counsel; that he had already been released from prison; and that his conviction formed the basis for his deportation.

G. *Coram Nobis* Proceedings

On January 14, 2002, the defendant filed a motion in the United States District Court for the District of Connecticut[5] to vacate his judgment of conviction by writ of error *coram nobis* or *audita querela*, or alternatively for discovery. In support, he argued primarily that "newly discovered evidence" showed that the Government had failed to disclose exculpatory or potentially exculpatory information that might have supported his official-authorization defense.

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[4] (...continued)
denying parole, and required him to serve the maximum portion of his prison term allowable under the law then in force. *See* GE 26.

[5] Durrani's brief on appeal contains a typographical error, stating that the present petition was filed in the District of Columbia, rather than Connecticut. *See* Durrani Br. at 19.

In an exhaustive opinion, United States District Judge Stefan R. Underhill denied Durrani's motion in all respects. JA 6-27. *Durrani v. United States*, 294 F. Supp. 204 (D. Conn. 2003).

As an initial matter, the district court held that Durrani's claims were procedurally barred. Applying the three-prong test made applicable to successive habeas petitions by *Sanders v. United States*, 373 U.S. 1, 15 (1963), the court held that (1) the same exculpatory-evidence claims now raised by Durrani had been determined adversely to him in his earlier § 2255 proceedings, (2) that prior determination was on the merits, because his § 2255 petition was dismissed with prejudice, and (3) that the "ends of justice" would not be served by reaching the merits of the repetitious claims, given his failure to produce any "credible new evidence or a change of law" in his favor. JA at 12-15. With respect to this latter point, the court held that:

> Durrani submits, in principal part, an internal OIC memorandum (hereinafter referred to as "Exhibit 8") as evidence in support of his claim that the government was untruthful about its association with Pires and that the government withheld *potentially* exculpatory or impeachment evidence. Exhibit 8 does not indicate that either Durrani or Pires worked on behalf of the United States government or one of its agencies. At most, Exhibit 8 suggests that, in 1988, the CIA possessed a document that connected Pires to the international gray arms market. Even assuming that the CIA had evidence of such a connection, that connection does

> not lend support to Durrani's claim that he worked directly or indirectly for the United States government.
>
> Moreover, the ends of justice would not be served by reaching the merits of the current petition. Durrani was given until December 31, 1992, to gather evidence to support his section 2255 petition. On December 28, 1992, Durrani requested a 30-day extension to support his claim. The request was denied. If Durrani believed that the court erroneously denied the deadline extension, he should have appealed. Instead, Durrani asks the court to take up what amount to a successive section 2255 petition some ten years later after the deadline passed.

JA at 14-15 (footnotes omitted).

The court went on to rule, in the alternative, that Durrani's *coram nobis* petition should be denied on the merits even if it were not procedurally barred. First, it ruled that Durrani had failed to satisfy his burden of demonstrating "sound reasons for delay" in bringing this *coram nobis* petition. JA at 17-21. The fact that Durrani had, in fact, raised these very same *Brady* claims in his § 2255 proceedings showed that he could have brought these arguments to the court earlier than his 2002 *coram nobis* petition. JA at 18. According to the district court, Durrani's claimed desire to first exhaust all his immigration remedies before burdening the court with his *coram nobis* petition did not "excuse Durrani from waiting ten years since he was released from prison to file the

current petition," since "there is nothing inconsistent with a criminal defendant pursuing both immigration and judicial remedies simultaneously." JA at 19.

Second, the court held that Durrani had failed to demonstrate "compelling circumstances" resulting in a "complete miscarriage of justice." JA 22-24. In this regard, the court reiterated its earlier holding that Durrani "failed to demonstrate that there is a real possibility that the government withheld *Brady* material." JA 24. Specifically, Exhibit 8 did not indicate (1) "that the government possessed the undisclosed document referenced in Exhibit 8 either at the time of Durrani's trial, appeal, or during the section 2255 proceeding"; (2) that the unidentified document "is favorable to Durrani"; or (3) that there was any "real possibility" that the unidentified document "could potentially constitute *Brady* material." *Id.*

The court then denied Durrani's request for a writ of *audita querela*, interpreting such a remedy to be available "to challenge 'a judgment that was correct at the time rendered but which is rendered infirm by matters which arise after its rendition.'" JA 20 (quoting *United States v. Reyes*, 945 F.2d 862, 863 n.1 (5th Cir. 1991)). The court found *audita querela* relief improper because (1) Durrani was not raising a new defense, but rather "the same defense that he previously raised on direct appeal and in his section 2255 petition, which was dismissed with prejudice," and (2) "because the relief Durrani seeks was available through alternative post-conviction remedies." JA 25.

Finally, the court denied Durrani's alternative request for discovery. As the court noted:

> Durrani's version of "very limited narrow discovery" includes requesting all documents that reference Durrani, Pires, or the companies involved in the shipment of arms to Iran, that are in the possession of the: Central Intelligence Agency, National Security Agency, National Security Coun[cil], National [A]rchives, INS and the United States Attorney's Office."

JA 25-26. The court ruled:

> Durrani was convicted in 1987. He has sought post-conviction relief through direct appeal, a Rule 35 motion, and a section 2255 motion on the same issue that he raises in the current petition. He has previously been given extensive discovery on the exact same issue. Moreover, if he needed additional discovery in 1992, then he should have appealed Judge Daly's ruling rather than petition the court ten years after the habeas corpus deadline passed. . . . Given the lack of a colorable claim, the time delay, and the inevitably enormous burden that would be placed on the government and its agencies to comply with Durrani's discovery requests, Durrani's request must be denied.

JA 27.

SUMMARY OF ARGUMENT

1. The district court did not abuse its discretion in denying Durrani's petition for a writ of *coram nobis*. Durrani is procedurally barred from pursuing yet another round of collateral relief on *Brady* claims that were raised and rejected in prior proceedings. More specifically, his *Brady* claims were raised in lengthy § 2255 proceedings where the district court appointed counsel and allowed generous discovery, but which were terminated by dismissal with prejudice after the defendant failed to prosecute his petition. Even if these claims were not procedurally barred, the district court did not abuse its discretion in concluding that Durrani failed to demonstrate sound reasons for delaying ten years after his § 2255 petition was dismissed, and seven years after he was ordered deported, to file the present petition. Moreover, the district court did not abuse its discretion in holding that Durrani had failed to demonstrate "circumstances compelling" a grant of *coram nobis* relief, in that none of the newly proffered evidence indicated that the government had withheld exculpatory evidence at his trial.

2. The district court did not abuse its discretion in denying Durrani's petition for a writ of *audita querela*. Because the combination of 28 U.S.C. § 2255 and *coram nobis* covers the full the range of defendants -- those presently in custody, and those not in custody -- there is no gap in the statutory framework of collateral relief from federal criminal convictions that needs to be plugged by the moribund common-law writ of *audita querela* under the All Writs Act, 28 U.S.C. § 1651. Even if *audita querela* were to survive in the criminal arena, this Court has held that it would not lie for the purely equitable reasons advanced by the defendant. Moreover, Durrani's

request for *audita querela* relief would be procedurally barred because it is premised on already-adjudicated *Brady* claims.

3. The district court did not abuse its discretion in denying Durrani's wide-ranging requests for discovery, in light of his failure to demonstrate even a colorable claim to substantive relief.

ARGUMENT

I. The District Court Did Not Abuse Its Discretion in Denying the Defendant's *Coram Nobis* Petition

A. Relevant Facts

The relevant facts are set forth above in the Statement of Facts.

B. Governing Law and Standard of Review

1. Procedural Bars on Relitigating Claims in Collateral Proceedings

In the normal course of events, a defendant convicted of a crime must challenge his conviction on direct appeal. Society's interest in the finality of convictions supports the numerous statutory and common-law doctrines that narrowly circumscribe the availability of collateral challenges to criminal convictions. "While it is important that one convicted of crime in violation of constitutional principles should be accorded relief, it is also important that reasonable diligence be required in order that litigation

may one day be at an end." *Honeycutt v. Ward*, 612 F.2d 36, 42 (2d Cir. 1979). To this end, Congress has codified the procedures governing collateral relief for federal defendants in custody in 28 U.S.C. § 2255. It cannot be disputed that Durrani was given the full benefit of these procedures, that his § 2255 petition was dismissed with prejudice, and that he took no appeal from that dismissal.

Federal law sharply limits the ability of convicted defendants to take a second bite at the collateral apple. Defendants in custody are procedurally barred from relitigating issues already adjudicated. *United States v. Perez*, 129 F.3d 255, 260 (2d Cir. 1997) ("A §2255 motion may not relitigate issues that were raised and considered on direct appeal."); *United States v. Natelli*, 553 F.2d 5, 6 (2d Cir. 1977) (per curiam) (same). This procedural bar applies with equal force to all collateral petitioners, not simply to those in custody who invoke § 2255. *See Chin v. United States*, 622 F.2d 1090, 1092 (2d Cir. 1980) (barring relitigation of issues in *coram nobis* proceedings); *United States v. Michaud*, 925 F.2d 37, 41 (1st Cir. 1991) (same). As the Supreme Court has recognized, "the writ of *coram nobis* was 'available to bring before the court that pronounced the judgment in matters of fact *which had not been put in issue or passed upon* . . . ." *United States v. Mayer*, 235 U.S. 55, 68 (1914) (emphasis added); *Klein v. United States*, 880 F.2d 250, 254 n.1 (10th Cir. 1989) ("coram nobis relief is not available to litigate issues already litigated; it is reserved for claims which have yet to receive their first disposition").

Relitigation of issues on collateral review is precluded if "(1) the same grounds presented in the current petition were determined adversely to petitioner in an earlier collateral proceeding; (2) the prior determination was on

the merits, and (3) the 'ends of justice' would not be served by reaching the merits of the repetitive grounds in the current petition." JA 12 (citing *Sanders v. United States*, 373 U.S. 1, 15 (1963)).

2. Writ of Error *Coram Nobis*

Federal Rule of Civil Procedure 60(b) expressly abolished the writ of error *coram nobis* in civil litigation in the federal courts. Nevertheless, the writ of error *coram nobis* is still available in extraordinary circumstances in criminal cases, where necessary to plug a gap in the otherwise comprehensive statutory framework for collateral relief. The All Writs Act authorizes courts to issue "all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651. Thus, in *United States v. Morgan*, 346 U.S. 502, 510-11 (1954), the Supreme Court held that a person who had completed his prison term and was no longer in custody could seek a writ of error *coram nobis* to vacate his conviction, since 28 U.S.C. § 2255 applied only to defendants "in custody," and *coram nobis* was required to provide relief for those who were not in custody and therefore could not invoke § 2255.

Although *coram nobis* may have survived in the criminal arena, its scope is extremely narrow. As the Supreme Court has explained, "'it is difficult to conceive of a situation in a federal criminal case today where [a writ of coram nobis] would be necessary or appropriate.'" *Carlisle v. United States*, 517 U.S. 416, 429 (1996) (quoting *United States v. Smith*, 331 U.S. 469, 475 n.4 (1947)) (bracketed material in original). In order to qualify for this extraordinary relief, a petitioner bears the

burden of showing three things: "(1) there are circumstances compelling such action to achieve justice, (2) sound reasons exist for failure to seek appropriate earlier relief, and (3) the petitioner continues to suffer legal consequences from his conviction that may be remedied by granting of the writ." *Foont v. United States*, 93 F.3d 76, 79 (2d Cir. 1996) (internal quotation marks, alterations, and citations omitted); *see also United States v. Mandanici*, 205 F.3d 519, 524 (2d Cir. 2000).

Under the first prong of this analysis, a *coram nobis* petitioner must demonstrate an error "of the most fundamental character" which rendered the proceeding itself "irregular and invalid." *Foont*, 93 F.3d at 78 (citations and internal quotation marks omitted). The petitioner must show a "complete miscarriage of justice." *United States v. Marcello*, 876 F.2d 1147, 1154 (5th Cir. 1989). It is not enough to claim that newly discovered evidence would have supported a defense at trial. "Claims of new evidence . . . without constitutional or jurisdictional error in the underlying proceeding, cannot support a coram nobis claim." *Foont*, 93 F.3d at 80; *Spaulding v. United States*, 155 F.2d 919, 921 (6th Cir. 1946) (holding that *coram nobis* "does not lie for prejudicial misconduct in the course of the trial or for newly discovered evidence"); *see also Mayer*, 235 U.S. at 69 (stating that, even assuming that *coram nobis* relief is available in federal courts, it would not cover claims cognizable on motions for new trial such as newly discovered evidence). Indeed, if *coram nobis* relief were available for newly discovered evidence, it would eviscerate Fed. R. Crim. P. 33's requirement that motions for new trial based on newly discovered evidence be filed within three years of verdict, "and the writ would no longer be extraordinary." *Moody v. United States*, 874 F.2d 1575, 1577 (11th Cir. 1989).

Likewise, a petitioner must surmount a high hurdle to obtain relief for alleged violations of *Brady v. Maryland*, 373 U.S. 83, 87 (1963), or *Giglio v. United States*, 405 U.S. 150, 154 (1972). The petitioner must show that "(1) the Government, either willfully or inadvertently, suppressed evidence; (2) the evidence at issue is favorable to the defendant; and (3) the failure to disclose this evidence resulted in prejudice." *In re United States ("Coppa")*, 267 F.3d 132, 140 (2d Cir. 2001) (reviewing *Brady* principles). "Favorable" evidence must either be exculpatory or impeach the credibility of a government witness. *See id.* A defendant is "prejudiced" only if the nondisclosure "was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Strickler v. Greene,* 527 U.S. 263, 281 (1999); *Coppa*, 267 F.3d at 142 ("the prosecutor must disclose evidence if, without such disclosure, a reasonable probability will exist that the outcome of a trial in which the evidence had been disclosed would have been different").

Secondly, as with other forms of collateral relief, "coram nobis relief may be barred by the passage of time," and a defendant is therefore required to demonstrate "justifiable reasons" for the delay. *Foont*, 93 F.3d at 80. In *Foont*, the petitioner argued that his five-year delay in filing a *coram nobis* petition was justified by his accumulation of new evidence. This Court disagreed, finding that Foont "knew or should have known" of the facts underlying his claim for relief from 1990 until the time he filed his petition in 1995. *Id.*

Under the third prong, the petitioner must allege a "continuing legal disability resulting from his conviction." *Fleming v. United States*, 146 F.3d 88, 89 (2d Cir. 1998)

(per curiam). "The principles underlying the 'custody' requirement of § 2255 call for some ongoing legal disability as a custody-substitute" for writs of *coram nobis*. *United States v. Bush*, 888 F.2d 1145, 1146 (7th Cir. 1989).

In *coram nobis* proceedings, this Court "review[s] de novo the question of whether a district judge applied the proper legal standard, but review[s] the judge's ultimate decision to deny the writ for abuse of discretion." *Mandanici*, 205 F.3d at 524; *Fleming*, 146 F.3d at 90. More specifically, a district court's decision that a petitioner has failed to demonstrate "sound reasons" for his delay in seeking relief is reviewed only for abuse of discretion. *See Foont,* 93 F.3d at 79.

C. Discussion

1. The District Court Did Not Abuse Its Discretion in Concluding That Durrani's Claims Were Procedurally Barred

The district court correctly found that Durrani's current petition fit each of the three criteria for finding collateral review procedurally barred: (1) he had raised the same grounds in his earlier § 2255 proceedings, which were dismissed with prejudice; (2) this dismissal was "on the merits" because it constituted a final, binding adjudication of his claims; and (3) that the "ends of justice" would not be served by allowing his *coram nobis* petition to proceed, in light of his failure to demonstrate a viable *Brady* claim and his unreasonable failure to seek appellate review of his § 2255 dismissal. JA 12-16.

This is Durrani's "fourth post-conviction attempt to litigate the same issue that has previously and repeatedly been decided against him." JA 15. Even before trial began, Durrani claimed that the government possessed evidence that would have supported his official-authorization defense. These claims were vetted and rejected during trial, in post-sentencing Rule 35 litigation, and lengthy § 2255 proceedings, during which Durrani was afforded appointed counsel, a court-paid investigator, and ample discovery. Because he may not relitigate already-adjudicated issues in *coram nobis* proceedings, his claims are procedurally barred. *See Chin,* 622 F.2d at 1092; *Michaud,* 925 F.2d at 40.

Durrani's case does not pose any "special circumstances" that might override these well-settled rules barring relitigation. Durrani argues that because the district court "never addressed the substantive merits of Durrani's allegations" but instead dismissed his § 2255 on grounds that only "technical[ly] . . . resolved [it] on the merits," normal considerations of finality should be disregarded. Durrani Br. at 24-25. Yet, as the district court correctly recognized, a "'[a] dismissal with prejudice is a "final judgment" on the merits which will bar a second suit between the same parties for the same cause of action.'" JA 13 (quoting *Cleveland v. Higgins*, 148 F.2d 722, 724 (2d Cir. 1945)). In the § 2255 context, this Court has held that a habeas petition that was properly dismissed as time-barred is deemed to have been "adjudicated on the merits" for purposes of relitigation bars under AEDPA. *Villanueva v. United States*, 346 F.3d 55, 60-61 (2d Cir. 2003). In short, a valid dismissal with prejudice of an earlier § 2255 petition operates to preclude further litigation of claims raised in that petition.

Second, contrary to Durrani's argument, Durrani Br. at 25, the district court did not improperly erect a statute of limitations on *coram nobis* petitions when it considered Durrani's failure to appeal the 1992 dismissal of his § 2255 petition. As this Court has recognized, an essential question in *coram nobis* proceedings is whether the defendant has *unreasonably delayed* in seeking judicial relief. There was no obstacle to Durrani's filing a notice of appeal in December 1992 from Judge Daly's dismissal of his habeas petition. Durrani candidly acknowledges that such an appeal would have been frivolous: "the realistic likelihood of challenging a district judge's denial of an extension request is so min[u]scule that the mere discussion of it is a waste of air." Durrani Br. at 25. But it stands logic on its head to argue that because the petitioner patently lacked any valid basis in 1992 for convincing this Court that he deserved 30 or 60 or 90 days to develop his *Brady* claims, he should be permitted *ten years later* to pick up where he left off.

Third, Durrani offers no citation for his argument that because the factually similar *Brady* claims raised in his § 2255 petition were only unsupported "allegations," whereas his *coram nobis* petition is now supported by pieces of "evidence," he is not barred from relitigating those claims. Durrani Br. at 26. To the contrary, the case law is replete with holdings that "newly discovered evidence" is not a sufficient basis for obtaining *coram nobis* relief. *See Foont*, 93 F.3d at 80; *Spaulding*, 155 F.2d at 921; *Moody*, 874 F.2d at 1577; *see also Mayer*, 235 U.S. at 69. Moreover, the allegations in his present petition remain as unsupported today as they were in December 1992, when his appointed counsel was unable to file proposed findings in support of his § 2255 motion.

As the district court properly found, none of the items attached to Durrani's *coram nobis* petition suggest in any way that the government withheld exculpatory evidence. JA at 10 & n.5, 17-19, 21. Absent any support for his *Brady* claim, the defendant's present petition amounts to nothing more than an attempt to revive § 2255 proceedings which, as Judge Daly found after years of litigation, had been "continued innumerable times" and to which Durrani himself had not given "adequate attention." JA 194.

2. The District Court Did Not Abuse Its Discretion in Its Alternative Finding that Durrani Was Not Entitled to *Coram Nobis* Relief

The district court was also correct in its alternative holding, that Durrani would not be entitled to *coram nobis* relief because (1) he lacked sound reasons for failing to seek relief at an earlier date, JA 17-21, and (2) he failed to demonstrate a defect in his proceedings that resulted in a "complete miscarriage of justice" -- that is, that there was any real possibility that the government had withheld *Brady* material, JA 22-24.[6]

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[6] In light of the multiple grounds for denying Durrani's petition for relief, the district court did not reach the question of whether Durrani's inability to enter the United States as a collateral consequence to his criminal conviction satisfied the second requirement for *coram nobis* relief. JA 21. The Government contended in the district court that the second prong was not satisfied because the defendant would still be excludable based on the conduct underlying his conviction. *See Perez v. Greiner*, 296 F.3d 123 (2d Cir. 2002) (holding (continued...)

a. Durrani Failed To Demonstrate Sound Reasons for His Delay in Seeking Collateral Relief

Durrani makes several arguments regarding his delay in seeking collateral relief. Principally, he argues: (1) the "crucial documents submitted to the court were never previously available," Durrani Br. at 27, and so "[i]t would be entirely unfair to impose a time restriction upon Durrani to prove the intricacies of this never-ending mystery," *id.* at 28; (2) that it would have been "futile" to avail himself of judicial avenues of relief at an earlier date, *id.* at 29; (3) that seeking judicial relief would have required "significant financial resources that [were] not otherwise available," *id.*; and (4) that he properly postponed seeking vacatur of his conviction until after attempting to re-enter the country through INS proceedings, *id.* at 29-31. Each contention is flawed.

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[6] (...continued)
that where petitioner would be permanently barred from re-entering United States due to earlier narcotics conviction, his currently challenged robbery conviction could not serve as a possible "collateral consequences" that, after petitioner's deportation, saved his petition from mootness). Because the district court did not rule upon this issue below, for example by making any factual findings regarding the nature of the defendant's underlying conduct, the record is insufficient for the Court to review this issue. If it were to conclude that the district court erred in its various alternative holdings, the proper course would be a remand for further proceedings with respect to the collateral-consequences prong of *coram nobis*.

As to the first point: The documents submitted to the district court in the present petition are far from "crucial" -- as the district court properly held, and as discussed in further detail in Part I.B.2.b below, none of them constitute exculpatory evidence (much less evidence that was withheld by the government), nor do they point to the existence of exculpatory evidence elsewhere. Moreover, the fact that the defendant did not possess these documents until his present counsel sought them in 2000 does not mean they were not "available." For example, he offers no reason why he did not submit FOIA requests years earlier -- for example, when he had court-appointed counsel during his § 2255 proceedings. And his contention that it would be "unfair" to place any sort of "time restriction" on his application for collateral relief is simply foreclosed by this Court's well-settled precedent requiring a petitioner to establish "sound reasons" for his delay. *Mandanici*, 205 F.3d at 524.

As to the second point: The defendant offers no explanation whatsoever why seeking collateral relief before 2001 would have been "futile." The fact that relief would have been denied does not entitle him to postpone collateral relief as long as he wishes. *See* JA 18; *United States v. Farley*, 971 F. Supp. 184 (E.D. Pa. 1997) (inability to obtain § 2255 relief does not make such relief "unavailable" for purposes of *coram nobis*).

As to the third point: The record belies Durrani's argument that seeking judicial relief would have required "significant financial resources that [were] not otherwise available" at the time. Durrani Br. at 29. After the defendant filed his § 2255 petition *pro se*, Chief Judge

Daly appointed able defense counsel to represent Durrani, and allowed him to hire an investigator of his choice at public expense. JA 8-9. Counsel noticed various depositions, including some that were held out of state. When counsel sought a further extension of time in December of 1992, he claimed that it was necessary not because of any purported lack of resources, but rather because delay would "enable a more thorough and complete investigation and presentation, if one should be made." JA 198. Moreover, the new "evidence" that Durrani claims to have discovered is the result of requests under the Freedom of Information Act. *See* JA 60-64. Durrani has never established that he was financially unable to make such requests earlier -- either through his appointed counsel in the § 2255 proceeding, or with privately retained counsel afterwards.[7]

As to the fourth point: Durrani's professed desire to exhaust all INS administrative remedies does not excuse his failure to seek earlier relief from his criminal conviction. As the district court aptly pointed out, "there is nothing inconsistent with a criminal defendant purs[u]ing both immigration and judicial remedies simultaneously." JA 19. In fact, Durrani was actively pursuing § 2255 relief at the same time he was facing INS proceedings. Durrani had been released from INS custody

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[7] Despite the fact that Durrani has apparently overcome his earlier lack of "significant financial resources" and is now represented by privately retained counsel, he has failed to make any payments toward the present unpaid balance of approximately $5.7 million of principal and interest on his criminal fine.

for over three months before the dismissal of his § 2255 action in December 1992, JA 196, and so he cannot claim that the INS proceedings forcibly precluded him from attending to his criminal case. In the end, just as Durrani's delays ultimately warranted dismissal with prejudice of his § 2255 petition, JA 190, 194, delay warranted dismissal with prejudice of the present petition.

Durrani's situation is analogous to the one presented in *Holland v. Jackson*, 124 S. Ct. 2736 (2004) (per curiam), in which the Court held that a state habeas petitioner's seven-year delay in locating and offering the testimony of an exculpatory witness barred relief. "It is difficult to see . . . how respondent could claim due diligence given the 7-year delay." *Id.* at 2738 (addressing § 2254(e)(2) requirement that petitioner demonstrate "due diligence" in pursuing facts underlying late-filed claim). In the present case, Durrani "missed the habeas deadline by ten years," JA 19, and "waited approximately seven years to file" after being declared deportable, JA 20. By any measure, Durrani tarried far too long before filing the present action.

b. Durrani Failed To Demonstrate a "Complete Miscarriage of Justice"

Durrani has failed to make the showing of compelling circumstances required to obtain *coram nobis* relief, *Foont,* 93 F.3d at 79 -- that is, that his trial resulted in a "complete miscarriage of justice," *Marcello*, 876 F.2d at 1154. On appeal, he identifies only one document that could have yielded impeachment material: He argues that trial counsel could have impeached government witness Charles Moyer, who testified that the CIA had no records

of employment or contact between the CIA and Manuel Pires, with a document referenced in an internal memo of the Office of Independent Counsel ("OIC") dated January 11, 1988. Durrani Br. at 32-42. That memo reads simply as follows:

> The CIA showed me a document yesterday concerning IGAM (International Gray Arms Market). In it were references to one or more of the individuals listed in paragraphs [*sic*] 5 of my Durrani Brady list. (The names are Pires, Dost, Zadeh.) I've requested this document from the CIA and asked Rick Page to draw it to your attention when it comes in. This is a document we may want to turn over the USAO (although we'll probably need CIA's "Third Agency" permission to do so.)

JA 59. The referenced "Durrani Brady list" appears in an earlier OIC memorandum dated January 5, 1988, which listed "***Potential*** *Brady* Material" to include "5. Any evidence indicating communications between the defendant and any of the following individuals: Manuel Pires (Portuguese Arms Dealer) . . . ." JA 73 (emphasis added).

The district court correctly held that the January 11 memo fails to establish a *Brady* violation. First, there is no basis for concluding that the government "suppressed" the document referenced therein. The memo post-dates both the defendant's trial and appeal, and so it offers no basis for concluding that the document in question existed at the time of trial, much less that the government possessed the document and failed to produce it to the defense.

Second, there is no basis for concluding that the referenced memo could have been used to impeach the CIA records custodian, Charles Moyer, who testified at trial. Moyer testified simply that the CIA had no records showing that Pires had been employed by or associated with the CIA. JA 48a. There is no suggestion in the January 11 memo that the referenced document would undercut that testimony. The referenced document is described only as mentioning "the individuals" listed on the *Brady* list, and as concerning the International Gray Arms Market. JA 59. The memorandum does *not* suggest that the document reflected any connection whatsoever between Pires and the CIA. And contrary to Durrani's suggestion, Moyer was never asked -- by the prosecution or the defense -- whether the CIA "knew of the existence of Manuel Pires," Durrani Br. at 42, and so that bare fact could not possibly have been material to the trial.[8]

Finally, there is no basis for Durrani's claim that the "government itself viewed this document as *Brady* material." Durrani Br. at 33. Putting aside his failure to

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[8] Durrani erroneously claims that "[t]here is no question that neither the memo nor the CIA document referenced therein was ever made available to Durrani or his defense counsel." Durrani Br. at 33. In fact, the record does not disclose whether Durrani obtained the document referenced in the January 11 memo. Durrani was afforded lengthy discovery during his § 2255 petition. Because neither the government nor Durrani has any idea to which document the January 11 memo is referring, the parties have no basis for knowing whether Durrani did or did not receive the unspecified document that was apparently in the CIA's possession.

cite any authority for his estoppel-like proposition that internal review of a document for potential *Brady* material somehow transforms it, as a legal matter, into *Brady* material, his claim is factually unfounded. The January 11 memorandum does not describe the referenced document as exculpatory, but simply notes that it "references . . . the individuals" whose names were on a "Brady list." JA 59. Examination of that list reveals that the government regarded as *Brady* material (and only "potential" *Brady* material, at that) documents which involved "communications between the defendant and" Pires. JA 73. In short, there is no reason to believe that just because the OIC was considering forwarding a document that mentioned Pires to the U.S. Attorney's Office for review, that OIC must have regarded that document as exculpatory.

II. The District Court Did Not Abuse Its Discretion in Denying Durrani's Petition for a Writ of *Audita Querela*

A. Relevant Facts

The relevant facts are set forth above in the Statement of Facts.

B. Governing Law and Standard of Review

Historically, the writ of *audita querela*[9] was used by judgment debtors to obtain relief by invoking a legal defense that arose after the court had passed judgment. *See United States v. Reyes*, 945 F.2d 862, 863 n.1 (5th Cir. 1991); 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2867, at 394 (Civil 2d ed.1995) (*audita querela* typically "afford[ed] 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."); 3 William Blackstone, Commentaries on the Laws of England 404 ("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 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 entering satisfaction on the record.").

A typical situation cited in the case law was one in which a plaintiff obtained full judgments against multiple joint tortfeasors; once the plaintiff obtained satisfaction against any one of jointly liable tortfeasors, the remaining ones could then obtain a writ of *audita querela* to avoid having to pay the plaintiff for multiple recoveries. *See*

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[9] The term derives from *audita querela defendentis* -- "the complaint of the defendant hath been heard." 3 William Blackstone, Commentaries on the Laws of England 405 (1st ed. 1765-1769).

Lovejoy v. Murray, 70 U.S. 1, 12 (1865) (citing English authority). Indeed, because *audita querela* was essentially a vehicle for halting execution of civil judgments, the Supreme Court held as far back as 1870 that *audita querela* could not be sought against the United States. *See Avery v. United States*, 79 U.S. 304, 307 (1870) ("Besides audita querela is a regular suit in which the parties may plead and take issue on the merits, and cannot, therefore, be sued against the United States, as in England it could not against the Crown.").

Rule 60(b) of the Federal Rules of Civil Procedure formally abolished the writ of *audita querela* in the civil context, even though the writ had been moribund as a practical matter as far back as 1768, when Blackstone wrote his *Commentaries*. *See* 3 Blackstone, Commentaries 405 ("[T]he indulgence now shown by the courts in granting a summary relief upon motion, in cases of such evident oppression, has almost rendered useless the writ of audita querela, and driven it quite out of practice."). The Supreme Court has treated *audita querela* more as a historical curiosity than anything else. *See Klapprott v. United States*, 335 U.S. 601, 614 (1949) ("few courts ever have agreed as to what circumstances would justify relief under these old remedies" of *coram nobis* and *audita querela*); *McCargo v. Chapman*, 61 U.S. 555, 556 (1857) (noting that in "modern times," courts entertain challenges to executions of money judgments "'upon motion . . . without putting a party to his writ of audita querela'") (quoting *Boyle v. Zacharie*, 31 U.S. 648, 655 (1832) (Story, J.)); *Harris v. Hardeman*, 55 U.S. 334, 346 (1852) ("it is believed to be the settled modern practice, that in all instances in which irregularities could formerly be

corrected upon a writ of error *coram vobis* or *audita querela*, the same objects may be effected by motion to the court, as a mode more simple, more expeditious, and less fruitful of difficulty and expense").

Most circuits to consider the matter have concluded that because 28 U.S.C. § 2255 provides relief to prisoners in custody, and because *coram nobis* is available to those who have been released, there is no gap for *audita querela* to fill in the panoply of remedies for criminal convictions and hence it is unavailable under the All Writs Act in criminal cases. *See, e.g., INS v. Doe*, 120 F.3d 200, 204 n.5 (9th Cir. 1997); *United States v. Kimberlin*, 675 F.2d 866, 869 (7th Cir. 1982); *Reyes*, 945 F.2d at 865 n.5; As the Court of Appeals for the D.C. Circuit has explained, "the traditional writ of audita querela adds nothing to these two forms of relief [§ 2255 and *coram nobis*]." *United States v. Ayala*, 894 F.2d 425, 429 (D.C. Cir. 1990).

This Court has not yet had occasion to decide whether *audita querela* has survived in the federal criminal context, though it has suggested in *dicta* that it may survive. "Audita querela is *probably* available where there is a legal, as contrasted with an equitable, objection to a conviction that has arisen subsequent to the conviction and that is not redressable pursuant to another post-conviction remedy." *United States v. LaPlante*, 57 F.3d 252, 253 (2d Cir. 1995) (emphasis added) (holding that even if *audita querela* were still available, petitioner would not deserve relief) (citing *United States v. Holder*, 936 F.2d 1, 2 (1st Cir. 1991) ("assum[ing], without deciding, . . . that the writ of *audita querela* may still be available in appropriate circumstances in criminal proceedings")). *See also United*

States v. Triestman, 124 F.3d 361, 380 n.24 (2d Cir. 1997) (declining to address viability of *audita querela*).

Even assuming that *audita querela* is still available in the federal criminal context, its scope would be quite limited. "[T]he writ of *audita querela* can only be available where there is a *legal* objection to a conviction, which has arisen subsequent to that conviction, and which is not redressable pursuant to another post-conviction remedy." *Holder*, 936 F.2d at 5; *United States v. Tablie*, 166 F.3d 505, 507 (2d Cir. 1999) (per curiam). A petitioner would have to point to something "occurring since his conviction that would render his conviction illegal." *Id.*; *see also United States v. Garcia-Hernandez*, 755 F. Supp. 232 (C.D. Ill. 1991) (holding that writ is available only if party raises legal objection not cognizable under another remedy).

Audita querela relief would not lie for purely equitable grounds. As the Ninth Circuit has explained, such relief would be available only if there is a "'legal defect in the conviction.'" *Doe*, 120 F.3d at 203 (quoting *United States v. Johnson*, 962 F.2d 579, 582 (7th Cir.1992)). *See also United States v. Hovsepian*, 359 F.3d 1144, 1154 (9th Cir. 2004) (re-affirming *Doe*). "Equities or gross injustice, in themselves, will not satisfy the legal objection requirement and will not provide a basis for relief." *Doe*, 120 F.3d at 203 (quoting *Johnson*). This Court has cited *Doe* with approval, and expressly adopted its related holding that the All Writs Act provides no independent jurisdiction for vacating a criminal conviction. In doing so, the Court endorsed *Doe*'s reasoning, which was applicable to both *audita querela* and the All Writs Act, that allowing

> the courts to void legally sound convictions solely to forestall deportation would "usurp the power of Congress to set naturalization and deportation standards and the power of the INS to administer those standards in each individual case, as well as the power of the executive to prosecute criminal offenses." [*Doe*] at 204 (quoting *United States v. Reyes*, 945 F.2d 862, 866 (5th Cir.1991)). Likewise, equitable vacaturs would trench upon the presidential pardon power. *See id.*

Tablie, 166 F.3d at 507.

By analogy to *coram nobis* proceedings, this Court should "review de novo the question of whether a district judge applied the proper legal standard, but review the judge's ultimate decision to deny the writ for abuse of discretion." *Mandanici*, 205 F.3d at 524. The question of whether *audita querela* is available at all in criminal cases, and if so whether it may be granted as a purely equitable matter, are legal questions subject to *de novo* review. *See, e.g., United States v. Valdez-Pacheco*, 237 F.3d 1077, 1079 (9th Cir.2001) (per curiam) (applying *de novo* review to legal question of whether All Writs Act permits federal prisoner to seek *audita querela* relief); *United States v. Johnson*, 962 F.2d 579, 581 (7th Cir. 1992) (applying *de novo* review to legal question of whether *audita querela* is available on purely equitable grounds to vacate criminal conviction).

C. Discussion

1. This Court Should Hold That the Writ of *Audita Querela* Is Not Available in the Federal Criminal Context, Because § 2255 and *Coram Nobis* Offer Post-Conviction Remedies to Defendants Who Are in or out of Custody

There is no reason for federal courts to resuscitate the ancient common-law writ of *audita querela* and morphing it from a civil into a criminal remedy. As explained above, *audita querela* relief was designed to offer relief for judgment debtors whose discharge or other defense arose after judgment had already entered. See *Kimberlin*, 675 F.2d at 869 ("Our research has failed to discover any criminal case in which this writ has ever been asked for, let alone issued; it appears to be primarily a remedy of judgment debtors."). *But see Ayala*, 894 F.2d at 427 (noting criminal use in some state jurisdictions). Modern criminal defendants have a seamless set of remedies available to them, in that § 2255 and *coram nobis*, respectively, permit challenges to convictions and sentences to those who are in custody, and to those who are not (each subject to various procedural requirements). *See id.* at 429; *Kimberlin*, 675 F.2d at 869. As the D.C. Circuit has explained:

> [U]nder modern federal practice, a defendant may, under appropriate circumstances, rely on a postjudgment contingency to attack the lawfulness of his conviction in a section 2255 or a coram nobis

> proceeding, *see, e.g., Davis v. United States*, 417 U.S. 333, 342 (1974), [and so] the traditional writ of audita querela adds nothing to these two forms of relief.

Ayala, 894 F.2d at 429 (footnotes omitted). Accordingly, *coram nobis* should remain the exclusive judicial remedy for reviewing a federal criminal conviction after a petitioner's release from custody.

2. Even if *Audita Querela* Were Available in Federal Criminal Cases, It Would Not Offer Purely Equitable Relief

Even assuming that *audita querela* might be available in some criminal contexts, Durrani would not be entitled to the relief he seeks. Specifically, Durrani seems to be arguing that *audita querela* relief is available on purely equitable grounds. Durrani Br. at 44. In doing so, he cites none of the decisions of this Court regarding *audita querela*, which squarely preclude such a rule. This Court has already indicated that, assuming *arguendo* the survival of the writ of *audita querela*, a petitioner would at least have to demonstrate a legal defect in his conviction in order to obtain relief. *Tablie*, 166 F.3d at 507; *LaPlante*, 57 F.3d at 253. To the extent that the defendant's proposed purely equitable rule conflicts with this Court's prior pronouncements, they are foreclosed by precedent. *See, e.g., United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir.2004) (holdings of prior panels are binding unless overruled by Court sitting en banc or by Supreme Court).

Rather than this Court's own precedents, Durrani relies primarily on a recent split decision of a panel of the Sixth Circuit, *Ejelonu v. INS*, 355 F.3d 539 (6th Cir. 2004) -- issued over a strong dissent by Judge Batchelder -- that the writ of *audita querela* was available as a purely equitable matter to block the deportation of a sympathetic petitioner who had earlier been convicted of a crime. On July 28, 2004, after the filing of Durrani's brief in this Court, the Court of Appeals for the Sixth Circuit voted to rehear *Ejelonu* en banc, and accordingly vacated the panel decision. Put aside the obvious fact that no precedential or persuasive authority can be attributed to a vacated decision from a different circuit that squarely contradicts binding precedent of this Court; even on its own terms, the panel decision in *Ejelonu* affords no support for Durrani's position.

In *Ejelonu*, the panel majority invoked the writ of *audita querela*, as a purely equitable matter, to prohibit immigration authorities from deporting the petitioner based on her participation in the accelerated rehabilitation program of a state criminal court. The panel majority took care, however, to "stress" that *audita querela* "does not vacate judgments, but the collateral consequences of judgments." 355 F.3d at 551. It emphasized that its mandate did "not vacate or even suggest the invalidity" of the petitioner's criminal judgment; nor did it "purport to lift any of the concomitant sanctions" imposed by the state as a result of that criminal judgment. *Id.* In the present case, Durrani has sought vacatur of his 1987 convictions for illegally exporting arms -- precisely the sort of relief that the *Ejelonu* panel emphasized it could *not* grant. Durrani has not sought review of any decision by

immigration authorities, which is the only relief *Ejelonu* purported to grant. *See* Durrani Br. at 50 (asking for order directing district court "to either vacate Durrani's conviction or permit limited discovery"). Accordingly, *Ejelonu* does not advance Durrani's position.

Besides *Ejelonu*, Durrani also relies on *United States v. Ghebreziabher*, 701 F. Supp. 115 (E.D. La. 1988), and *United States v. Salgado*, 692 F. Supp. 1265 (E.D. Wash. 1988), neither of which remains good law even in their own circuits -- the Fifth and the Ninth. *See Ejelonu*, 355 F.3d at 557 (Batchelder, J., dissenting) ("*Salgado* and *Ghebreziabher* have been widely and, until today, uniformly criticized by each circuit that has considered this issue."); *Doe*, 120 F.3d at 203 ("The *Salgado* and *Ghebreziabher* courts, we agree with each of our sister circuits to address the issue, misconstrued the scope of the writ" of *audita querela*); *Reyes*, 945 F.2d at 866 (holding that "audita querela is not available to vacate an otherwise final criminal conviction on purely equitable grounds," despite *Ghebreziabher*'s holding to the contrary).

It is clear that both *Salgado* and *Ghebreziabher* stand for nothing more than the untenable view -- clearly rejected by this Court -- that *audita querela* is available as a free-floating vehicle for remedying "injustice." Thus, in *Salgado*, the district court expunged the 24-year-old marijuana conviction of a Mexican national who had re-entered the United States in 1969 and worked steadily without incident for fifteen years, on the theory that deportation would be a "gross injustice" to a model resident and that it would be inequitable for Salgado to lose access to "newly created rights" such as amnesty

provisions passed after his entry into the United States. (Durrani's brief is therefore incorrect where it states that Salgado received relief "on the basis that the procedural rights available to him at the time of his *audita querela* request [were] not available at the time of his original trial." Durrani Br. at 43. The "procedural rights" at issue in *Salgado* had nothing to do with the defendant's trial or conviction; they were rights to seek amnesty which were utterly unrelated to the criminal proceeding, and which moved the district court to grant equitable relief.)

Likewise, in *Ghebreziabher*, the district court vacated one of the defendant's misdemeanor convictions for food stamp trafficking, which allowed the defendant to become eligible for immigration amnesty. As in *Salgado*, this decision was based simply on the "interests of justice," 701 F. Supp. at 117 -- not a determination that there had been a legal defect in the original conviction -- and therefore conflicts with the much narrower definition of *audita querela* that this Court has indicated in *Tablie* and *LaPlante* would apply, assuming *audita querela* to have survived at all.

Finally, *audita querela* relief, like any remedy under the All Writs Act, cannot be available unless other remedies are inadequate. *See Tablie*, 166 F.3d at 507. This Court has held that "§ 2255 is not inadequate or ineffective, such that a federal prisoner may file a § 2241(c)(3) petition, simply because a prisoner cannot meet the AEDPA's gate-keeping requirements, provided that the claim the prisoner seeks to raise was previously available on direct appeal or in a prior § 2255 motion." *Jiminian v. Nash*, 245 F.3d 144, 147-48 2d Cir. 2001).

The same principles should apply to *audita querela* relief. Where a petitioner's claims "could have been pursued in a § 2255 motion, they cannot come through the *audita querela* backdoor." *United States v. Logan*, 22 F. Supp.2d 691, 694 (W.D. Mich. 1998); *see also Kimberlin*, 675 F.2d at 869 (*audita querela* "cannot lie simply to enable a defendant to [avoid] . . . complying with the rules governing [§ 2255] motions"). As the district court correctly found, Durrani has litigated these same claims over and over, most recently in his years-long § 2255 proceedings. Having had the benefit of appointed counsel, a government-funded investigator, and ample discovery during those proceedings, Durrani cannot now be heard to complain that those remedies were inadequate or ineffective.

III. The District Court Did Not Abuse Its Discretion in Denying Durrani's Request for Further Discovery

A. Relevant Facts

The relevant facts are set forth above in the Statement of Facts.

B. Governing Law and Standard of Review

Discovery is permitted in § 2255 proceedings only if the district judge "in the exercise of his discretion *and for good cause shown* grants leave to do so, but not otherwise." Rules Governing § 2255 Proceedings 6(a) (emphasis added). This rule applies by analogy to *coram nobis* actions as well. *See Mandanici*, 205 F.3d at 527 ("[b]ecause of the similarities between coram nobis

proceedings and § 2255 proceedings, the § 2255 procedure often is applied by analogy in coram nobis cases") (internal quotation marks omitted); *United States v. Balistrieri*, 606 F.2d 216, 221-22 (7th Cir. 1979) (deeming § 2255 rules "highly persuasive" in resolving *coram nobis* actions; affirming quashal of petitioner's broad discovery motions). "The district court should consider the amount of time which has elapsed since the trial, the burden of discovery on the government and witnesses, and the nature of the applicant's claims in deciding on the scope of discovery at each stage of the coram nobis proceedings." *Id.* Accordingly, when a district court determines that the allegations in a petition for collateral relief are facially insufficient, it should not grant discovery.

A district court's decision on a discovery request under Habeas Corpus Rule 6(a) is reviewed for abuse of discretion. *See Bracy v. Gramley*, 520 U.S. 899, 909 (1997).

C. Discussion

The district court did not abuse its discretion in concluding that Durrani had fallen far short of meeting his burden of proving that he was entitled to re-open discovery years after his § 2255 petition was dismissed on the merits.

At bottom, Durrani fails to offer any *evidence* in support of his conclusory assertion that "[t]he government still possesses relevant records that have never been provided to Durrani." Durrani Br. at 48. As the district court correctly observed, the only "newly discovered" document that even mentions Manuel Pires shows only that, at some time *after* trial had concluded, the CIA

possessed a document that cited Pires as a participant in the international gray market for arms.[10] JA 24. There is no indication whatsoever that the referenced document suggested any link between the CIA and Pires -- the only fact that could hypothetically have been used to impeach a government witness, Charles Moyer, who testified that the CIA possessed no records reflecting that Pires had been employed by or associated with the CIA. JA 48a. Moreover, because Exhibit 8 indicates that the document in question was in the CIA's possession on January 11, 1988 -- after Durrani had been convicted and his appeal decided -- there is no basis for his claim that the government possessed (and hence withheld) such a document at the time of his trial, in violation of *Brady*. In

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[10] As the district court observed, none of the other documents proffered by Durrani as having been "newly discovered" suggests in any way that exculpatory material was withheld from him. *See* JA 15 n.10 ("without knowledge that any relevant documents exist, Durrani requests the court to speculate that the government possesses evidence in support of his claims"). Typical of his claims is the one made on page 49 of his brief, that the then-prosecutor (and now Magistrate Judge) Holly B. Fitzsimmons was "stymied" in her efforts to obtain "needed information" from the Office of Independent Counsel. JA 82-85. A cursory read of the letter demonstrates that the prosecutor was not trying to obtain exculpatory information which had been withheld from her, but rather seeking evidence to disprove the new claims that Durrani himself was raising for the first time in § 2255 proceedings -- claims which were leading the prosecutor to give "serious consideration to prosecuting Durrani again for making false statements in these submissions to the Court." JA 85.

light of the defendant's failure to demonstrate the "good cause" required by Habeas Corpus Rule 6(a), the district court acted well within its discretion in denying his discovery request. *See Bracy*, 520 U.S. at 909; *Perez v. United States*, 274 F. Supp.2d 330, 336 (E.D.N.Y. 2003).

Finally, in the last footnote of his brief, Durrani argues for the first time that at a minimum, the government ought to be required to produce the document referenced in Exhibit 8 in the district court -- that is, the document which purportedly mentions Pires and his links to the international gray arms market. *See* Durrani Br. at 50 n.19. The defendant forfeited this argument by failing to raise it in the district court, where instead he sought "all documents that reference Durrani, Pires, or the companies involved in the shipment of arms to Iran, that are in the possession of the: Central Intelligence Agency, National Security Agency, National Security [Council], National archives, INS and the United States Attorney's Office." JA 25-26. Moreover, this Court has repeatedly held that it will "not consider an argument mentioned only in a footnote to be adequately raised or preserved for appellate review." *Koam Produce, Inc. v. DiMare Homestead, Inc.*, 329 F.3d 123, 127 (2d Cir. 2003) (quoting *United States v. Restrepo*, 986 F.2d 1462, 1463 (2d Cir.1993)). Finally, it is wholly unrealistic to say that it poses only a "minimal" burden on the government to be ordered to look for a document which is described in only the most cursory way, which existed over fifteen years ago, which may or may not still exist, and which might, perhaps, be sitting in a box somewhere deep in storage at some unspecified federal agency.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: August 25, 2004

Respectfully submitted,

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CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 13,374 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.

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ADDENDUM

28 U.S.C. § 1651. Writs

(a) 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.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.