



Is the Supreme Court Holding in *Padilla v. Kentucky*, Mandating that Defense Counsel Inform Defendants of Possible Deportation Consequences Retroactive?

BY PETER DUNNE

In *Padilla v. Kentucky*¹, the United States Supreme Court held that it was ineffective assistance of counsel in 2002 to fail to advise a client of the immigration consequences of a guilty plea to a drug charge.

This article will examine some of the consequences of this ruling, some of the questions left unanswered and whether this ruling has retroactive effect.

In 2002, Jose Padilla pleaded guilty to the transportation of a large amount of marijuana in the Commonwealth of Kentucky. Mr. Padilla was born in Honduras, served in the Armed Forces in the Vietnam War and was a lawful permanent resident of the United States for more than forty years. Following his plea, the Federal government began proceedings to deport him as a result of the plea.

Padilla filed a motion in Kentucky to vacate his plea. He claimed that prior to entering the plea, his attorney told him that he “did not have to worry about immigration status since he had been in the country so long.”²

The Supreme Court of Kentucky held that the Sixth Amendment’s guarantee of effective assistance of counsel does not protect a criminal defendant from erroneous advice about deportation because it is merely a “collateral” consequence of his conviction.³ This holding was based on a long line of cases which hold that before pleading guilty, a defendant must be given a full understanding of the rights being waived by the plea and the consequences of the plea.⁴ However, there is a distinction between the direct consequences of the plea, which must be told to the defendant, and collateral consequences, about which the defendant need not be advised.

A direct consequence is one which has a definite, immediate and largely automatic effect of defendant’s punishment.⁵ For example, a defendant must be told that a period of post-release supervision will follow his prison sentence.⁶

On the other hand, some illustrations of collateral consequences are the loss of the right to vote, loss of civil service employment, or loss of the right to possess firearms. Prior to *Padilla*, the New York Court of Appeals stated that “Deportation is a collateral consequence of conviction. . . . Therefore, . . . the trial court need not, before accepting a plea of guilty, advise a defendant of the possibility of deportation.”⁷

The United States Supreme Court reversed the decision of the Kentucky Supreme Court and remanded the case to Kentucky for further proceedings.

The Supreme Court relied on its earlier holdings involving effective assistance of counsel as stated in *Strickland v. Washington*.⁸ In that case the Court established a two pronged test for determining whether counsel was ineffective. In the first prong, counsel’s representation must fall

“below an objective standard of reasonableness”. To satisfy the second prong, the defendant must establish that but for counsel’s unprofessional errors, he would have gone to trial.

The Court reviewed the prevailing norms of professional conduct at the time of Padilla’s plea and decided that the weight of prevailing professional norms supported the view that “counsel must advise her client regarding the risk of deportation.”⁹ Furthermore, in a case like Padilla’s, the relevant immigration statutes were succinct, clear and explicit. The pertinent immigration statute stated: “Any alien who at any time after admission has been convicted of a violation of . . . any law . . . relating to a controlled substance. . . other than a single offense involving possession for one’s own use of 30 grams or less of marijuana, is deportable.”¹⁰ The Court stated that “[W]hen the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.”¹¹ The Court went further and held that it was not only ineffective to give erroneous advice, as Padilla’s counsel did, but it was also ineffective to fail to give advice.¹²

Therefore, the Court found that the advice given to Padilla fell below an objective standard of reasonableness and remanded the case to Kentucky to address the second prong of the *Strickland* test: whether the defendant was prejudiced by the erroneous advice of counsel. The defendant would have to show that if he had been given the correct advice, he would not have taken the plea.

Among the many questions left unanswered by *Padilla* is the scope of the holding and whether the decision is to be applied retroactively to pleas taken before the date of the decision.

SCOPE OF THE HOLDING

The Padilla decision imposes two duties on defense counsel. First, where the law is clear and deportation is “presumptively mandatory”, such as with “aggravated felonies” or crimes involving moral turpitude, counsel must inform his client of those consequences. Where the law is unclear, counsel need only inform the defendant of the risk of adverse consequences.

The problem with these duties was mentioned in the concurring opinion by Justice Alito. “As has been widely acknowledged, determining whether a particular crime is an ‘aggravated felony’ or a ‘crime involving moral turpitude’ is not an easy task.”¹³

One of the intriguing implications of the *Padilla* decision is whether the failure to advise a client of other so called collateral consequences to a guilty plea will be held to be ineffective assistance of counsel in the future. The majority decision explicitly refused to consider whether deportation

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Estates Update - 2010

BY DAVID N. ADLER



David N. Adler

The year in Trusts and Estates was highlighted by the institution of new Federal Estate Tax rates and exemptions, an expanded statutory mechanism for proof of kinship, and a changing of the guard in Queens County.

I) TAXATION

After a roller coaster decade during which the estate tax threshold has evolved from 675,000 to its abolition last year, new standards have been promulgated as of December, 2010 under the Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010. Said Act sets the exemption equivalent for the years 2011 and 2012 at \$5,000,000 per person. Further, the maximal tax rate for that period is set at 35%, and any share of an exemption that remains unused at one’s death, may be utilized by their spouse, in addition to that spouse’s exemption.

Finally as in all prior years except last year, all property owned by a decedent will receive a stepped up basis to its fair market value at the date of death. This both minimizes and simplifies the capital gains impact on any property owned by a decedent.

Apparently due to the drastic tax laws in effect during the year 2010, estates of individuals passing away last year have been granted an election. They may elect to function under last year’s rules and pay no estate tax, but receive a modified carryover basis in their property; or they may elect to function under this year’s rules, and pay the 35% tax rate over their 5,000,000 exemption, but receive a fully stepped up basis in property. In determining said election, the valuation, nature, and date of acquisition of each item of property in an estate must be considered.

II) PROOF OF KINSHIP

As noted in this column last year, both pre-death, and post death DNA testing had been confirmed as one component of proof of paternity of non-marital children. Yet, said component did not stand alone as exclusive proof, but required other evidence, normally open and notorious acknowledgement of the child by the father, as a second prong in the establishment of paternity.

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THE DOCKET . . .

being the official notice of the meetings and programs listed below, which, unless otherwise noted, will be held at the Bar Association Building, 90-35 148th St., Jamaica, New York. More information and any changes will be made available to members via written notice and brochures. Questions? Please call (718) 291-4500.

PLEASE NOTE:

The Queens Bar Association has been certified by the NYS Continuing Legal Education Board as an Accredited Legal Education Provider in the State of New York.

2011 Winter CLE Seminar & Event Listing**February 2011**

Tuesday,	February 8	MHL Article 81/Guardianship Training for the Layman
Friday,	February 11	Lincoln's Birthday Observed, Office Closed
Tuesday,	February 15	Farrell Fritz Seminar PC: Employment Law 2011
Wednesday,	February 16	QVLP Foreclosure Training
Monday,	February 21	President's Day, Office Closed

March 2011

Wednesday,	March 2	CPLR Update (Tentative)
Wednesday,	March 9	Immigration Seminar
Wednesday,	March 23	Basic Criminal Law - Pt 1
Wednesday,	March 30	Basic Criminal Law - Pt 2

April 2011

Wednesday,	April 6	Equitable Distribution Update
Monday,	April 11	Past Presidents, Golden Jubilarians & Judiciary Night
Thursday,	April 14	Civil Court Committee Seminar
Friday,	April 22	Good Friday, Office Closed
Thursday,	April 28	Membership/Young Lawyers/ Mentoring Event

May 2011

Thursday,	May 5	Annual Dinner & Installation of Officers
Tuesday,	May 17	Bankruptcy Seminar (Tentative)

CLE Dates to be Announced

Elder	Juvenile Justice
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EDITOR'S MESSAGE

BY PAUL E. KERSON

Foreclosures and Immigration – Inextricably Linked

Am I the only person who understands that the “foreclosure crisis” is 100% linked to an overly restrictive immigration policy?

Is there any government official out there who understands that neither the City Council, the State Legislature nor the U.S. Congress can ever repeal or modify the “Law of Supply and Demand?”

Anyone out there want to hazard a guess as to why the average house in Queens County, NYC costs *20 times* the price of the same house in Detroit, *10 times* the price of the same house in Cleveland, and *four times* the price of the same house in Binghamton, NY?

Mayor Mike Bloomberg has often announced New York City's Official Policy on Immigration. I am paraphrasing some of his speeches:

–“Trying to hold back immigration to NYC is like trying to hold back the tide.”

–“Whether your parents were born here or whether you just got here, you are a New Yorker.”

–“If you work hard and play by the

rules, we want you here.”

Of course, the Federal Government controls immigration law and enforcement. But local cooperation policy varies widely from city to city and state to state.

Arizona wants to keep people out. But we are the ones with the \$300,000, \$400,000 and \$500,000 beat-up, older houses, while they cannot even sell their brand new ones. So who has the wiser policy here? Who has the more vibrant local economy and why?

Those who seek to ruin our country and hold back its economic progress by depriving it of new blood would do well to reacquire themselves with the ideas of our most thoughtful and prolific Founder, Benjamin Franklin.

In 1784, Franklin wrote a pamphlet addressed to all the people of Europe entitled “*Information to Those Who Would*



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PRESIDENT'S MESSAGE

I hope you have survived the snow storms and are ready for spring!

In celebration of **Black History Month**, I'd like to share the achievements of some of the first African Americans to break down our profession's color barrier. Many of them were pioneering "firsts" not once, but repeatedly throughout their lives:

In 1844, **Macon Bolling Allen (1816-1874)** became the first African American licensed to practice law in the United States (in Portland, Maine). The following year, he became the first African-American attorney to be admitted to the bar in Boston, and the first African-American Justice of the Peace for Middlesex County, MA. In 1968, Bolling moved to Charleston, South Carolina, where he was elected Judge of the Inferior Court of Charleston in 1873 and Judge Probate for Charleston County in 1874.

Correction:

In last month's President's Message, the information for Tracy Catapano-Fox was incorrect. Ms. Catapano-Fox is now the Chief Clerk of the Supreme Court, Queens County. Congratulations and good luck in your new position Tracy!

John Rock (1825-1866) was born to free, but poor parents in Salem, New Jersey and became one of the most distinguished and educated men of his time. By the age of twenty-seven, he had already become a teacher, doctor and dentist; but in 1859, at the age of 35, he was forced to give up his medical and dental practice due to poor health. John Rock then went on to study law, and two years later he passed the bar exam and opened his own practice. His greatest accomplishment came in 1865, when he became the first African-American lawyer to be received on the floor of the United States House of Representatives and the first black attorney to be admitted to practice law before the United States Supreme Court. Rock, who is said to have originated the notion of "black is beautiful" was also a passionate abolitionist who fought for racial equality throughout his life, until his sudden death at the age of 41.

Charlotte E. Ray was born in New York City in 1850. In 1869, while Ray was both a student and a teacher at Howard University, she applied to the Law School under the name C.E. Ray, because Howard did not permit women to enroll in their law program. She graduated from



Chanwoo Lee

Howard Law School in 1872, and became the first African-American female lawyer in the United States.

William Tucker Garvin, who was born in South Carolina in 1898, became the first African-American Assistant District Attorney to ever serve in the County of Queens. A graduate of St. John's University Law School in 1931, he was appointed ADA in 1952 and served until his retirement in 1966.

Long Island City resident **Jane Bolin (1908-2007)** was the first African-American woman to ever graduate from Yale Law School; the first to join the New York City Bar Association; and the country's first female African-American judge. She was appointed to the Domestic Relations (Family) Court bench in the County of Queens by then-Mayor of New York City in 1939 and served until she reached the mandatory retirement age of 70.

Thanks and Upcoming Events

Thank you to Joseph Carola and Mark Weliky for organizing January's successful Stated meeting on Foreclosure Settlement Conferences and the current foreclosure situation in Queens County.

The meeting was very informative, and pointed out the need for more volunteers to help with foreclosure proceedings.

I would also like to thank Erwin B. Newman, Chair of the Civil Court, for organizing our annual meeting with Judges of the Civil Court; and to thank Judge Charles S. Lopresto, Supervising Judge of the Civil Court, Queens County and Judge Gilbert Badillo, Supervising Judge of the Housing Court in Queens County, for their presentations. This event was an excellent opportunity for both young and seasoned attorneys to exchange ideas with sitting judges, to meet the new judges assigned to Queens County, and to share a meal with colleagues at the Bar Association. Our Board of Managers has approved the expansion of next year's event to include judges in the Criminal and Family Courts; if you did not attend in January, I hope you will join us next year to meet the judges in your area of practice.

Until next month:

Wednesday, March 2 - 2011 CPLR Update
Wednesday, March 9 - Immigration Update at St. John's Law School
Wednesday, March 23 - Criminal Law Seminar, Pt 1
Wednesday, March 30 - Criminal Law Seminar Pt 2

Chanwoo Lee
President



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Dear Member:

The Queens County Bar Association's Scholarship Fund was created in 2005 to offer financial assistance to law students who are residents of Queens County or who attend law school in Queens County.

The recipients of the QCBA Scholarship are carefully chosen based on academic achievement, community service and financial need and is awarded at the Annual Dinner in May.

I know that times are hard, but I would hope that you could donate to this worthwhile purpose and your tax deductible donation (of any amount) will help to support and recognize those deserving law students who provide community service to the residents of Queens County. It also enhances the good name of our Association.

As President of the Queens County Bar Association, I thank you for your support of this valuable community-based program.

Sincerely,
CHANWOO LEE
President

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Marital Quiz

BY GEORGE J. NASHAK JR. *

Question #1 - Is a waiver of an interest in the marital portion of a pension, in an otherwise valid prenuptial agreement, prohibited by The Employee Retirement Income Security Act of 1974 (ERISA)?
Your answer -

Question #2 - Is the presumption that \$25.00 per month child support is the minimum amount to be ordered by the court, under §413(1)(g) of the New York Family Court Act, irrebuttable?
Your answer -

Question #3 - Is the petitioner in the Family Court entitled to a willfulness hearing and willfulness determination in a child support enforcement proceeding?
Your answer -

Question #4 - What is the remedy, if after a divorce the former husband refuses to give the former wife a Get?
Your answer -

Question #5 - The former wife was named beneficiary of her former husband's life insurance policy. The stipulation of settlement is silent concerning the revocation of such designation. Former



George J. Nashak Jr.

husband dies and never changed the beneficiary. Is the former wife entitled to the proceeds of this life insurance policy?
Your answer -

Question #6 - Is it always necessary to have a hearing to determine visitation?
Your answer -

Question #7 - Is it proper to file a notice of pendency against the spouse's real property based upon a claim of equitable distribution?
Your answer -

Questions #8 - Is it proper to sanction the attorney who filed the notice of pendency the sum of \$2,500.00?
Your answer -

Question #9 - In a custody proceeding, does the Family Court have the power to award counsel fees pursuant to Domestic Relations Law §237(b)?
Your answer -

Question #10 - Is an action to enforce the parties' separation agreement, which was incorporated but not merged into their judgment of divorce, subject to a statute of limitations defense?
Your answer -

**Editor's Note:* Mr. Nashak is a Past President of our Association and Vice-Chair of our Family Law Committee. He is of counsel to the firm of Ramo, Nashak, Brown & Garibaldi, LLP

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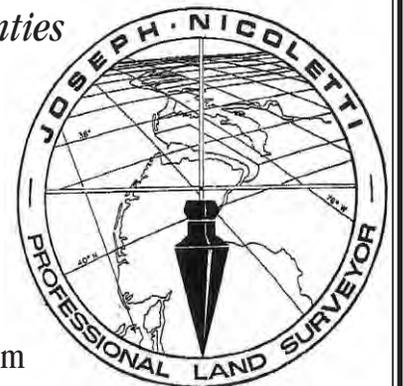
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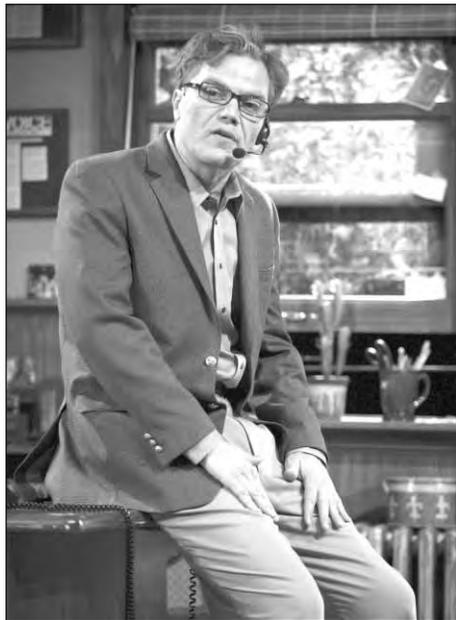
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THE CULTURE CORNER

BY HOWARD L. WIEDER

MISTAKES WERE MADE starring **MICHAEL SHANNON** CLOSES RUN ON FEBRUARY 27: DON'T MISS IT!



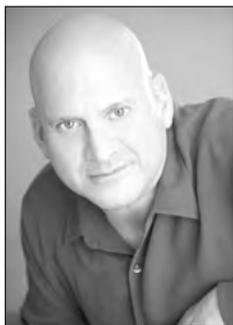
The critically acclaimed Off-Broadway production of the new comedy, **MISTAKES WERE MADE**, by **Craig Wright**, now in its final weeks of a limited engagement, gave its 100th performance as this column was going to print earlier this month, at the Barrow Street Theatre (27 Barrow Street). Directed by **DEXTER BULLARD**, the two-character play features Academy Award-nominee **MICHAEL SHANNON** as producer Felix Artifex and **MIERKA GIRTEN** as his assistant Esther, with puppetry by

SAM DEUTSCH, and reunites the creative team of the Off-Broadway smash hit *Bug* (Bullard, Shannon and Barrow Street). The 16-week limited engagement began performances November 5, 2010 and opened on November 14, 2010. **The final performance is set for Sunday evening, February 27, 2011 at 7:30 p.m. DON'T MISS IT!!**

The play is hilarious and has opened to universal rave reviews. If you are a fan of HBO's smash hit, **BOARDWALK EMPIRE**, you should not miss **MICHAEL SHANNON's** performance in **MISTAKES WERE MADE**. On HBO's **BOARDWALK EMPIRE**, **MICHAEL SHANNON** plays a savvy, but deeply troubled and tormented Federal Prohibition agent Nelson van Alden. **SHANNON** is a 36-year-old American actor of film, stage, and television. The highest praise a director can bestow upon an actor is that "the camera loves him." **SHANNON** deserves that distinction because his images on screen, on film and television, are electric. His Academy Award nomination was for **REVOLUTIONARY ROAD**, where he starred with **LEONARDO DICAPRIO** and **KATE WINSLET**.

The mother of **MICHAEL SHANNON**, of interest to our readership of judges and lawyers, is an attorney. His father is an accounting professor.

MISTAKES WERE MADE is a hilarious, but also deeply moving, character study of a man seeking redemption, but



Howard L. Wieder

inescapably creating destruction. Felix Artifex, a B-list Off-Broadway producer, gets in way over his fast-talking head, when he takes on a gargantuan epic about the French Revolution which he thinks is going to be his ticket to professional and personal reclamation. While trying to land a big star for the lead role, he uses all his powers of persuasion, seduction and intimidation to

strong-arm the writer into massively rewriting his play.

At the same time, Felix Artifex attempts to reconnect with his estranged wife and untangle himself from a mess involving sheep in a distant war-torn country. **MISTAKES WERE MADE** received its world premiere at A Red Orchid Theatre in Chicago in 2009.

The creative team includes **TOM BURCH** (sets), **TIF BULLARD** (costumes), **KEITH PARHAM** (lights), **JOE FOSCO** (sound), **MICHELE SPADARO** (props), **NAN ZABRISKIE** (makeup) and **SAM DEUTSCH** (puppeteer). The Production Stage Manager is **RICHARD A. HODGE**.

The performance schedule for **MISTAKES WERE MADE** is as follows: Tuesdays – Fridays at 7:30 p.m., Saturdays and Sundays at 2:30 p.m. & 7:30 p.m.

Mistakes Were Made is produced by Scott Morfee, Jean Doumanian, Tom Wirtshafter, Marc Biales, Rebecca Gold, Christian Chadd Taylor, and The Weinstein Company, in association with Starry Night Entertainment.



CLASS A: DRUG ADDICTS FACE THEIR VICIES

Cameron Moir's new drama, **CLASS A**, will receive its premiere this February at the historic **GENE FRANKEL THEATRE**, in Manhattan, running February 23rd-27th. Directed by **ALYSE M. FROSCH**, **CLASS A** centers on four addicts, each partnered with their drug of choice (personified as a separate character) and the conversations between these drugs and their respective addicts lead to startling conclusions and hilarious revelations. The production is presented by Valhalla Productions and will feature lighting design by **TOM WILSON** and costume design by **NINA VARTANIAN**.

CLASS A is a play about drugs and addictions that have become the embodiments of us all. In the play, four addicts sit at separated class desks, each with two chairs centered downstage while Dorey, the drug dealer, pimp and teacher of the class takes her pupils and the audience

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What is Your Next Play...



Who Takes Care of Your Elder Law and Special Needs Clients?

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QCBA Holiday Party December 11, 2010



Art Terranova, Janice Ruiz and George Nashak



Caren Samplin, Jeff Boyar, Hon. Seymour Boyers and Hon. Robert Nahman



Jenn Gilroy, Mona Haas and Alexandra Zervopoulos



Pam Hirschhorn, Sue Beberfall and Alexandra Zervopoulos



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Ronald Eith, Richard Bass, Anthony Camisa and Elaine Lupo

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QCBA Holiday Party December 11, 2010



Brandon Cruz, Joe DeFelice, Carl Landicino and Peter Bongiorno



Christina McGreevy, Barry Seidel and Diana Gianturco



Geo Nicholas, Janet Kronrad and John Dalli



Janet Kelly, Michelle Musarra, John Dalli and Michelle Vlosky



Mary Marshall, Kenneth Padilla, Melba Feliberty and Gary Muraca



Maureen Heitner, Geo Nicholas, June Briese and Peter Gallanter



Maureen Heitner, Michelle Musarra, Jeff Blum and Geo Nicholas

Is the Supreme Court Holding in *Padilla v. Kentucky*, Mandating that Defense Counsel Inform Defendants of Possible Deportation Consequences Retroactive?

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was a direct or collateral consequence of a plea of guilty because “deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or collateral consequence.”¹⁴ Therefore, other so called collateral consequences may be deemed to be closely connected to the criminal process.

For example, should counsel advise that a guilty plea may effect eligibility for subsidized housing, or the loss of employment, or even the loss of a driver’s license. All of these, as well as the other collateral consequences mentioned above may be deemed as important as remaining in the United States.

RETROACTIVITY

One of the questions left open by the *Padilla* decision is whether the decision is to be applied retroactively. Whether or not this decision can form the basis of a post conviction motion to vacate the plea, for pleas taken prior to the *Padilla* decision was not specifically addressed by the Court.

The leading case on retroactivity is *Teague v. Lane*.¹⁵ In *Teague*, the Supreme Court held that a new decision would be applied on collateral review to post judgment motions only if the decision fell into one of two categories.

The first category is that of an “old” rule; that is, the decision applied settled law to new facts. Such a decision is to be applied retroactively.

The second category is that it is a “new” rule. But a “new rule” is retroactive only if the new rule establishes that the defendant’s conduct was not criminal at all and not subject to prosecution, or that the new rule is a watershed rule that is “so fundamental to the fair administration of justice in the adjudication of innocence or guilt that its retroactive application is required.”¹⁶

The second category is rather easily addressed. Clearly *Padilla* did not decriminalize any conduct. With regard to whether the rule is a “watershed” rule, within the meaning of *Teague* is also easily addressed. The only case which the Supreme Court has identified as a “watershed” rule is *Gideon v. Wainwright*,¹⁷ which established the requirement that counsel must be appointed for every indigent defendant charged with a felony.

Among recent ground breaking decisions which have been held not to be “watershed” new rules are the decision in *Crawford v. Washington*¹⁸, involving testimonial statements from absent witnesses, and *Ring v. Arizona*¹⁹, involving the requirement that aggravating factors necessary for the imposition of the death penalty must be found by a jury.

It is unlikely that the failure to advise a defendant of the immigration consequences of a plea is so fundamental to the fair administration of justice in the adjudication of innocence or guilt that its retroactive application is required.

Therefore, the issue of retroactivity comes down to this. If *Padilla* applied settled law to new facts, then it will be retroactive. If not, then it is a “new” rule and is not retroactive.

The post-*Padilla* decisions are split on this question, with the large majority favoring the view that the decision applied settled law to new facts.²⁰

Among the factors to be considered in deciding whether a decision applied settled law to new facts or is a “new” rule are 1) whether the decision breaks new ground or imposes a new obligation on the states or on the federal government; 2) whether the result was dictated by precedent existing at the time the defendant’s conviction became final; and 3) whether, at the time of conviction, the unlawfulness of the defendant’s conviction was apparent to all reasonable jurists.²¹

The pro-retroactive cases focus on a number of facets of the decision. First, they point to language in the decision which implies that the Court is merely applying *Strickland* to a new set of facts. “We conclude that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel. *Strickland* applies to *Padilla*’s claim.”²²

In a case involving the effectiveness of counsel during the death penalty phase of a trial, the Supreme Court held that applying *Strickland* to a new scenario does not create a new rule as “it can hardly be said that recognizing the right to effective assistance of counsel breaks new ground or imposes a new obligation on the states.”²³

The Court of Appeals has also held that when a Supreme Court decision applies a well-established rule to a new circumstance, it is considered to be an application

of an old rule and is always retroactive.²⁴

Another facet relied upon by the pro-retroactive cases is that *Padilla* has did overrule any prior decision of the Supreme Court. In fact one court²⁵ viewed that *Padilla* was a foreseeable decision based upon the Court of Appeals ruling in *People v. McDonald*²⁶ which stated a defense attorney’s incorrect advice as to deportation consequences of a plea constituted ineffective assistance of counsel.

Lastly, the pro-retroactive decisions also rely upon the extensive discussion in the majority opinion about whether its decision would be applied retroactively. “It seems unlikely that our decision today will have a significant effect on those convictions already obtained as the result of plea bargains Likewise, although we must be especially careful about recognizing new grounds for attacking the validity of guilty pleas, in the 25 years since we first applied *Strickland* to claims of ineffective assistance at the plea stage, practice has shown that pleas are less frequently the subject of collateral challenges than convictions obtained after trial.”²⁷ These statements appear to all but literally state that the Supreme Court intended the *Padilla* decision to be applied retroactively.

The anti-retroactive cases focus on the same three factors.²⁸

First, these cases argue that the decision was not dictated by precedent. No case had ever held that counsel’s failure to apprise the defendant of the immigration consequences of a plea was ineffective assistance of counsel.

Second, although *Padilla* did not overrule any existing Supreme Court case, it did overrule decisions from 10 federal circuits and 23 states.

Essentially, the anti-retroactive cases argue that applying *Strickland* as the standard to judge the effectiveness of counsel is not new, but applying *Strickland* to an area which had been considered collateral by the vast majority of jurisdictions is new, and therefore not retroactive.

As far as the “floodgates” discussion by the Supreme Court, these decisions argue that there is nothing in the *Padilla* decision which indicates that *Teague* and the rest of retroactivity jurisprudence has been changed, and that because, in the view of these cases, *Padilla* is a new rule under *Teague*, and the discussion is irrelevant and dicta.

SUGGESTIONS FOR ATTORNEYS

In terms of current practice, it is absolutely essential that defense counsel, at a minimum, familiarize themselves with the portion of the immigration statutes which describe “aggravated felonies” and “crimes involving moral turpitude” and other offenses which render a client deportable. These crimes would presumably subject the client to deportation, and the client must be informed of that fact.

Attorneys who are contemplating bringing a motion to vacate a plea taken before the *Padilla* decision face a number of significant hurdles.

First, assuming that one is able to persuade the court that *Padilla* is retroactive, the defendant must also establish the second prong of the *Strickland* test: that he was prejudiced by the ineffectiveness of counsel. Essentially, the defendant must prove that if he had been told of the depor-

tation consequences of the plea, he would not have taken the plea. Obviously, the credibility of this claim will depend on things as disparate as the proof against the defendant, the background of the defendant, and the nature of the promised sentence. Whether this can be done merely by an affidavit from the defendant or would require a hearing is obviously another question.

Secondly, even assuming that the defendant prevails in the motion, the defendant is no better off than when he was arrested. The original indictment is reinstated and the defendant is faced with full exposure to the charges. The likelihood of a retrial will depend on the circumstances of each case, but obviously the possibility of a trial on the original charges must be considered.

Anecdotally, this writer has seen and read a large number of motions to vacate pleas based upon *Padilla*. In the unpublished opinions which I have read, most have denied the motion without a hearing, on the grounds that the affidavit submitted by the defendant establish neither of the *Strickland* prongs.

CONCLUSION

Although a persuasive argument can be made that under existing retroactivity jurisprudence *Padilla* should not be applied retroactively, it seems likely that in the future the Supreme Court will rule that *Padilla* applied settled law to a new set of facts and will be applied retroactively.

Endnotes

1. ___ U.S. ___, 130 S. Ct. 1473, 176 L. Ed. 2d 264.
2. *Id.*, at 1478.
3. *Commonwealth v. Padilla*, 253 S.W. 3d 482.
4. *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274.
5. *People v. Ford*, 86 N.Y.2d 397, 657 N.E.2d 265, 633 N.Y.S.2d 270.
6. *People v. Catu*, 4 N.Y.3d 242.
7. *People v. Ford*, *supra*, at 403.
8. 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674.
9. *Padilla*, *supra*, at 1482.
10. 8 U.S.C. 1227 (a)(2)(B)(i).
11. *Padilla*, *supra*, at 1483.
12. *Id.*, at 1484.
13. *Id.*, at 1488.
14. *Id.*, at 1482.
15. 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334. The retroactivity principles in *Teague* have been adopted by New York in *People v. Eastman*, 85 N.Y.2d 265, 648 N.E.2d 459, 624 N.Y.S.2d 83.
16. *Teague*, at 311.
17. 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799.
18. 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177; *Wharton v. Bocking*, 549 U.S. 406, 127 S. Ct. 1173, 167 L. Ed. 2d 1.
19. 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556; *Schriro v. Summerlin*, 542 U.S. 348, 124 S. Ct. 2519, 159 L. Ed. 2d 442.
20. Among the notable New York cases holding that *Padilla* should be applied retroactively are *People v. Bennett*, 28 Misc. 3d 575, 903 N.Y.S.2d 696, *People v. Paredes*, 29 Misc. 3d 1202A, and *People v. Garcia*, 907 N.Y.S.2d 398.
21. *Teague*, *supra*, at 301.
22. *Padilla*, *supra*, at 1482.
23. *Williams v. Taylor*, 529 U.S. 362, 391, 120 S. Ct. 1495, 146 L. Ed. 2d 389.
24. *People v. Eastman*, *supra*.
25. *People v. Bennett*, *supra* at 700.
26. 1 N.Y.3d 109, 802 N.E. 2d 131, 769 N.Y.S.2d 781.
27. *Padilla*, *supra*, at 1485.
28. For an excellent review of the anti-retroactive arguments, see *People v. Kabre*, 29 Misc. 3d 307, 905 N.Y.S.2d 887; *People v. Ebrahim*, 2010 N.Y. Slip Op. 32794U.

Peter Dunne is presently serving as the law secretary to Queens Supreme Court Justice Robert McGann. While at Boston University School of law, he served as the Editor of the Law Review.

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Marital Quiz

ANSWERS TO MARITAL QUIZ ON PAGE 4

Question #1 - Is a waiver of an interest in the marital portion of a pension, in an otherwise valid prenuptial agreement, prohibited by The Employee Retirement Income Security Act of 1974 (ERISA)?

Answer: No. *Strong v. Dubin* 901 N.Y.S. 2d 214 (1st Dept. 2010)

Question #2 - Is the presumption that \$25.00 per month child support is the minimum amount to be ordered by the court, under §413(1)(g) of the New York Family Court Act, irrebuttable?

Answer: No, 42 U.S.C.S. § 667 mandates a rebuttable presumption in all cases. *Clancey v. Moody* 83 N.Y.2d 65, 607 N.Y.S. 2d 906 (Ct. of Appeals, 1993)

Question #3 - Is the petitioner in the Family Court entitled to a willfulness hearing and willfulness determination in a child support enforcement proceeding?

Answer: No. This remedy is only available in a proceeding commenced by a violation petition not an enforcement petition. *Matter of Peled v. Kamahachi* 2010 NY Slip Op 07548 (2nd Dept.)

Question #4 - What is the remedy, if after a divorce the former husband refuses

to give the former wife a Get?

Answer: §253 (8) of the DRL provides that "Any person who knowingly submits a false sworn statement under this section shall be guilty of making an apparently sworn false statement in the first degree and shall be punished in accordance with section 210.40 of the penal law."

Question #5 - The former wife was named beneficiary of her former husband's life insurance policy. The stipulation of settlement is silent concerning the revocation of such designation. Former husband dies and never changed the beneficiary. Is the former wife entitled to the proceeds of this life insurance policy?

Answer: No, if the former husband died after July 7, 2008, which is the effective date of EPTL §5-1.4. Under this law the former wife is treated as if she predeceased the former husband. This statute is not limited to life insurance, it is very broad.

My thanks to Gerald Chiariello, Esq., the father, for bringing this to my attention.

Question #6 - Is it always necessary to have a hearing to determine visitation?

Answer: No, when the court possesses sufficient information to render an informed determination in the child's best interest. *Matter of Feldman v. Feldman* 2010 NY Slip Op 09262 (2nd Dept.)

Estates Update - 2010

Continued From Page 1 — Further, the statute was inconsistent and confusing as different sections, pursuant to case law interpretation, applied either to pre-death or post death testing.

This year, Estates, Powers and Trusts Law Section 4-1.2

(c) was modified and rewritten streamlining the prior statute, and indicating that paternity must be established by clear and convincing evidence. Said evidence may include DNA testing (genetic marker testing) or open and notorious acknowledgment. Thus, either prong of the prior mode of proof of paternity may be applied on its own. Of course, in meeting a clear and convincing standard, the inclusion and utilization of all manner of proof is beneficial.

III) RENUNCIATION

Renunciation of interests has been a valuable tool for post mortem estate planning, as well as indirect gifting. It is addressed by Internal Revenue Code Section 2518, and New York Estates, Powers and Trusts Law Section 2-1.11. It constitutes a refusal to accept an interest in property. It must be in writing, received by a fiduciary within 9 months of death, and must state that no consideration was received. Yet, depending on the nature of property, the parameters of Federal and State renunciations were different. In dealing with joint bank accounts, or joint brokerage accounts, in New York only, any disclaimer had been held not to apply to any portion of the account contributed by the surviving joint tenant. This conflicted with Federal Law, which permitted a qualified disclaimer of any survivor's full one half interest, regardless of the amount of that survivor's contribution. As such, Estates, Powers and Trusts Law Section 2-1.11 has been amended in Sections (c)(i) to permit full renunciation of interests in conjunction with Federal Law.

IV) MISCELLANEOUS

The Simultaneous Death Law (EPTL 2-

1.6) has been modified to provide that in the event that the order of demise is relevant, and that there exists no clear and convincing evidence that one individual survived the other by at least 120 hours, then that individual is deemed to have predeceased the other. There was no time period contained in the prior statute, and said statute remains subject to any contradictory terms of the Will or Trust.

There were a series of relatively minor technical modifications to the Power of Attorney Law that went into effect last year. (General Obligations Law Section 5-1501). An updated version of the Power of Attorney documentation is available at the State Bar web site. Please note that the agent still must execute the document, a monitor may still be designated, and that the Statutory Major Gifts Rider remains a vital component of this form.

V) QUEENS COUNTY

A primary reason for the success in this County of legal education in the area of Trusts and Estates over the past 20 years has been the participation of Surrogate Robert L. Nahman. He has always played a vital role in moderating, planning and organizing our seminars, and has continually opened up his Courtroom and excellent staff to the legal community. This year, two seminars were conducted in the areas of electronic filing, and Probate and Execution of Wills. Special thanks to Gerard J. Sweeney and Scott Kaufman for serving as speakers this year. Judge Nahman is officially leaving the Surrogacy this year, after 19 years. We thank him for his efforts expended on behalf of our Bar Association, and wish him well in his future endeavors. His successor, Surrogate Peter J. Kelly maintains an extensive background himself in the area of Trusts and Estates, and has a strong history with this Court and this County, and we eagerly anticipate his arrival.

Happy New Year to all.

Question #7 - Is it proper to file a notice of pendency against the spouse's real property based upon a claim of equitable distribution?

Answer: No, since title, possession, use, or enjoyment of the subject property will not necessarily be affected. *Arteaga v. Martinez* 2010 NY Slip Op 09459 (2nd Dept.)

Question #8 - Is it proper to sanction the attorney who filed the notice of pendency the sum of \$2,500.00?

Answer: Yes, after the action was dismissed for lack of jurisdiction, the attorney unreasonably delayed in canceling the notice of pendency, generating unreasonable motion practice. *Arteaga v. Martinez* 2010 NY Slip Op 09459 (2nd Dept.)

Question #9 - In a custody proceeding, does the Family Court have the power to award counsel fees pursuant to Domestic Relations Law §237(b)?

Answer: Yes, Family Court Act §651 grants the Family Court the same powers possessed by the Supreme Court in custody and visitation matters. *Dempsey v. Dempsey* 2010 NY Slip Op 08942 (2nd Dept.)

Question #10 - Is an action to enforce the parties' separation agreement, which was incorporated but not merged into their judgment of divorce, subject to a statute of limitations defense?

Answer: No, *Fragin v. Fragin* 2011 NY Slip Op 00485 (2nd Dept.)

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REPORT OF THE NOMINATING COMMITTEE

The Nominating Committee of the Queens County Bar Association, after due and timely notice, in accordance with the provisions of the By-Laws of the Queens County Bar Association, have nominated the following list of members for the positions to be filed at the coming election at the Annual Meeting of the Association on March 4, 2011.

TO THE QUEENS COUNTY BAR ASSOCIATION:

We, the undersigned, members of the Nominating Committee do hereby respectfully report that pursuant to the provisions of Article VI, Section 3, of the By-Laws of the Queens County Bar Association, we have nominated for the respective offices the following named members:

OFFICERS 2011-2012

For President	RICHARD M. GUTIERREZ
For President-Elect	JOSEPH J. RISI, JR.
For Vice President	JOSEPH F. DEFELICE
For Secretary	PAUL E. KERSON
For Treasurer	JOSEPH CAROLA, III

FOR FOUR MEMBERS OF THE BOARD OF MANAGERS FOR A TERM OF THREE YEARS (expiring May 31, 2014)

TIMOTHY B. ROUNTREE
ZENITH T. TAYLOR
LOURDES M. VENTURA
CLIFFORD M. WELDEN

FOR ONE MEMBER OF THE BOARD OF MANAGERS FOR A TERM OF THREE YEARS AS IMMEDIATE PAST PRESIDENT (expiring May 31, 2014)

CHANWOO LEE

NOMINATING COMMITTEE

Lucille S. DiGirolomo	David Neil Adler	John Robert Dietz
Stephen J. Singer	George J. Nashak, Jr.	Seymour W. James, Jr.
Steven Wimpfheimer	Leslie S. Nizin	Paul Pavlides

The following members have been designated by petition, pursuant to the By-Laws of the Association, as candidates for election to the office of members of the Nominating Committee to serve for a period of three years (expiring May 31, 2014)

DAVID LOUIS COHEN
EDWARD H. ROSENTHAL ELISABETH A. VREEBURG

THE ANNUAL MEETING of the Queens County Bar Association will be held in the Bar Headquarters Building, 90-35 148th Street, Jamaica, New York on **FRI-DAY, MARCH 4, 2011, at 4:00 P.M.**

The election of officers will take place at that time, together with such other business as may regularly come before the meeting. **SINCE NO INDEPENDENT NOMINATIONS HAVE BEEN FILED WITHIN THE TIME LIMITED BY THE BY-LAWS, THE ELECTION WILL BE PRO FORMA.**

Dated: Jamaica, N.Y.
February 15, 2011

Editors Note

Continued From Page 2 —————
Remove to America”:

“Strangers are welcome, because there is room enough for them all, and therefore the old inhabitants are not jealous of them; the laws protect them sufficiently, so that they have no need of the patronage of great men; and every one will enjoy securely the profits of his industry.”

See Jared Sparks, *The Works of Benjamin Franklin*, Volume II, pages 470-471, Whittemore, Niles & Hall Co., Boston, Mass. 1856.

How, exactly, does the anti-immigrant fringe propose that 309 million Americans complete with 1.3 billion recently awakened Chinese? Should each of us do the work of four people?

Or perhaps we desperately need computer geniuses from New Delhi, nurses from Manila, and artists from France. Every person who comes here “to enjoy securely the profits of his industry” makes each one of us more prosperous. If nothing else, each newcomer will seek to buy a house, ending the surplus of unsold units, and bidding up prices throughout the real estate market, *effectively ending the foreclosure “crisis”, which is currently manufactured in Washington by anti-Franklin immigration law and policy.*

There will be no crisis when financially troubled homeowners can sell their homes to newcomers for a price in excess of the existing mortgage, and then seek less expensive housing.

And all we have to do is follow what Benjamin Franklin told us to do in 1784, and what Mike Bloomberg is telling us today. Now how hard is that?

Culture Corner

Continued From Page 5

through a journey exploring various aspects of these addicts' lives, eventually revealing their fate. An inquiry into the public and cultural space through which our notions of good, evil, right, wrong, joy and sorrow circulate, **CLASS A** is a powerful meditation on human emotion in the landscape of addiction and will feature an exciting array of avant garde costumes.

The cast of **CLASS A** will feature **DAVID ARKEMA**, the Drama Desk nominated *Fabrik: The Legend of Moritz Rabinowitz*. **DAVID ARKEMA** is a dedicated, exciting, and gifted actor, who has performed both on stage and in film in leading roles. Also appearing with **DAVID ARKEMA** are: **PARKER HURLEY**, **ANDREW J. LANGTON** (*Enemies* opposite Sam Waterston at Williamstown), **ANDREW LERNER**, **OLGA MALYKHIN**, **HAILEY MCCARTY**, **CAMERON MOIR**, **SETH NORRIS**, **SUSAN YOUNG**, and **PETER ZERNECK** (*Off-Broadway's George and Laura Bush Perform*).

CLASS A will run at the **GENE FRANKEL THEATRE**, 24 Bond Street, in Manhattan, from Wednesday, February 23 through Sunday, February 27, and continuing also on March 4 and 5, 2011, with shows at 8:00 PM from Wednesday-Saturday, and 3:00 PM on Sunday. Tickets, priced at \$15 can be purchased online at www.BrownPaperTickets.com.

BARGEMUSIC: MIRROR VISIONS ENSEMBLE

The **MIRROR VISIONS ENSEMBLE** a vocal trio featuring soprano **VIRA SLYWOTZKY**, tenor **SCOTT MURPHREE**, baritone **JESSE BLUMBERG**, and pianist **ALAN DARLING** gave an inspired performance at the **FULTON FERRY LANDING'S BARGEMUSIC** on an icy, slushy Saturday, January 29, 2011.



ALAN DARLING was phenomenal, even spectacular at the piano. The three vocalists, soprano **VIRA SLYWOTZKY**, tenor **SCOTT MURPHREE**, baritone **JESSE BLUMBERG**, were superb, bringing out the beauty, humor, and melancholy of the pieces, with their gifted voices.

In celebration of the Bargemusic series' focus on 20th and 21st century music, the **MIRROR VISIONS ENSEMBLE**, whose artistic director is **TOBE MALAWISTA**, performed two commissioned works exploring literary themes: **RUSSELL PLATT's** "From Noon to Starry Night: A Walt Whitman Cantata" and **TOM CIPULLO's** brilliantly crafted *A Visit With Emily*.

In the words of composer **TOM CIPULLO**, "A Visit With Emily is something of a genre bender, part song cycle in its intimacy and accompaniment, part opera in its size and ensembles." Through the use of Emily Dickinson's poetry, along with letters to and from her and T.W. Higginson, **TOM CIPULLO** constructs a revealing portrait of the enigmatic poet.

RUSSELL PLATT's "From Noon to

Starry Night: A Walt Whitman Cantata" is based on a selection of Walt Whitman's poems, displaying the roughneck Whitman, the democratic Whitman, the transcendentalist Whitman, Whitman the "lover of comrades," and Whitman the "bard of war." **RUSSELL PLATT's** goal was to "emulate the combination of expressive intensity, precise word setting, and lyric driven recitative of the Spanish and Italian Songbooks, in a more twentieth century harmonic idiom."

After the concert, running into **GRIMALDI'S PIZZERIA**, the new name and old site of the legendary **PATSY'S PIZZA**, near the **BARGEMUSIC** was a perfect excuse to escape the cold weather.

92Y

The 92Y, the excellent home of concerts and great programming at the corner of the Upper East Side's YM-YWHA announced their classical music schedule for the 2011-2012 season. It is great. It includes visits with established artists, like superstar pianist Garrick Ohlsson. Please go to www.92Y.org for further details or to find how you can order a catalog and subscribe to the program and concert series at affordable prices.

A good example of the excellent programs at the 92nd Street Y was violinist **JENNIFER KOH's** violin concert on Sunday, January 30. This accomplished Korean-American violinist juxtaposed works by Bach with those of contemporary composers.

HALLUCINATIONS: METROPOLIS ENSEMBLE

On Thursday and Friday, January 27 and 28, at **POISSON ROUGE**, a nice cabaret-bar lounge on Bleeker Street in Greenwich Village, the Grammy nominated **METROPOLIS ENSEMBLE** presented "Hallucinations: A mind bending concert" featuring the world premiere electro acoustic remix by Ricardo Romaneiro of John Corigliano's "Three Hallucinations", based on his Academy Award nominated film score to "Altered States," and electro acoustic works by Du Yun, Gity Razaz, and Ricardo Romaniero.

Hallucinations is an adaptation of selections from composer John Corigliano's Academy Award nominated iconic film score "Altered States", as re imagined by Ricardo Romaneiro for chamber orchestra and live electronics. Surrealistic instrumental and electronic effects are combined with frenetic orchestral textures and sparse, eerie melodies.

Hallucinations featured four World Premiere Metropolis Ensemble commissions, including Romaniero's *Strata*, an excellent *The Metamorphosis of Narcissus* by Gity Razaz, and Du Yun's *Fallen Warriors*.

METROPOLIS ENSEMBLE is a non-profit professional chamber orchestra and collective of the finest emerging performing artists and composers today. Led by Grammy nominated conductor **ANDREW CYR**.

NIGHTSONG FOR THE BOATMAN

NIGHTSONG FOR THE BOATMAN was performed at the Barrow Group Theatre, 312 W. 36th Street, in Manhattan, from January 6-30. This show was a posthumous premiere of the late playwright **JOVANKA BACH**. Director **JOHN STARK** was rummaging through the belongings his deceased wife, playwright **JOVANKA BACH**, when he

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uncovered a never before seen copy of **NIGHTSONG FOR THE BOATMAN**, which she had written over twenty years ago and had never shown him.

NIGHTSONG FOR THE BOATMAN centers on aging, alcoholic, washed up poet Harry Appleman. When he attempts suicide by jumping off a bridge, Harry is stopped by a sardonic boatman. The boatman wants Harry to give his life to the devil unless Harry wins a round of dice. After Harry loses, he must cross the River Styx or find a willing participant to go in his place.

NIGHTSONG FOR THE BOATMAN starred **JOHN DIFUSCO**, **NICOLE SCIPIONE**, **ALEX WELLS**,

MICHAEL BYRNE, **DONNA LUISA GUINAN**, **GEOFFREY HILLBACK**, **AMANDA LANDIS**, and **JOHN LANDIS**. The production was directed by **JOHN STARK**, and it featured costumes by **JARET SACREY** and lighting and sound by **JOE MORRISSEY**.

HOWARD L. WIEDER is the writer of both "THE CULTURE CORNER" and the "BOOKS AT THE BAR" columns, appearing regularly in **THE QUEENS BAR BULLETIN** and is **JUSTICE CHARLES J. MARKEY'S PRINCIPAL LAW CLERK** in Supreme Court, Queens County, Long Island City, New York.

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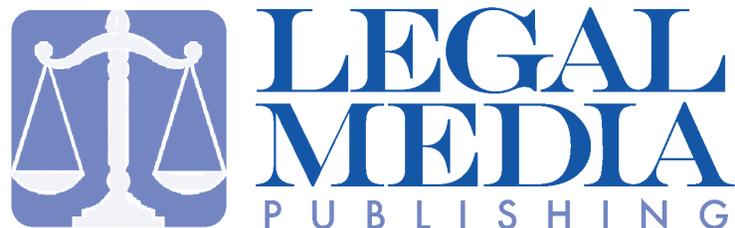
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