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*, 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 that holding, and 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.”

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. 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.

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. For example, a defendant must be told that a period of post-release supervision will follow his prison sentence. 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.” Consequently, the trial court need not, before accepting a plea of conviction, advise a defendant of the risk of deportation.

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.” 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 of less of marijuana, is deportable.”

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.” 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. 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 unananswered 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 felony” or “crime 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.”

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

1) 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 deceased.

Appareently 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.
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)

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**NEW MEMBERS**

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Daniel Schleim
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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 reacquaint 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

Continued On Page 9

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**2010-2011 Officers and Board of Managers of the Queens County Bar Association**

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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 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.

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!
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 -

George J. Nashak Jr.

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 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 -

Question #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

ANSWERS APPEAR ON PAGE 9
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 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 VICES
Cameron Mon’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 embodiment 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

Continued On Page 11
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 Haus and Alexandra Zervopoulos

Pam Hirschhorn, Sue Beberfall and Alexandra Zervopoulos

QCBA Staff-Shakema, Sasha and Janice

Ronald Eith, Richard Bass, Anthony Camisa and Elaine Lupo

Photos by Walter Kurling
QCBA Holiday Party December 11, 2010

Brandon Cruz, Joe DeFelice, Carl Landicino and Peter Bongiorno

Christina McGreervy, 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

Photos by Walter Karling
Is the Supreme Court Holding in Padilla v. Kentucky, Mandating that Defense Counsel Inform Defendants of Possible Deportation Consequences Retroactively?

Continued From Page 1 — 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.

RETOACTIVITY

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 it is 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 to be “watershed” are the new rules in the decision in Crawford v. Washington18, involving testimonial statements from absent witnesses, and Whorton v. Bockting19 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 a decision that Padilla applied settled law to new facts.20 Among the factors to be considered in deciding whether a decision applied settled law to new facts are: 1) whether the decision breaks new ground or imposes a new obligation on the states or imposes a new requirement on the states or imposes a new requirement on the states; 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 unavailability 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 highlight a 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 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. McDonald26 which stated a defense attorney’s incorrect advice as to deportation consequences of a plea constituted ineffective assistance of counsel. Fortunately, Pro-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. 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 overturned, and that because none 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 mandates of the immigration policies 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 should be aware of 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 deportation consequences of the plea, he would not have pleaded guilty. 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 promise made by the State. 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 prevailing in the motion, the defendant is no better off than when he was arrested. The original indictment is reinstated and the defendant is subject to 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 new grounds and must be considered.

Anecdotally, this writer has seen and read a large number of motions to vacate pleas based upon Padilla. In the unpublished cases 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 the 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.
7. People v. Ford, supra, at 403.
8. 406 U.S. 668, 101 S. Ct. 2052, 80 L. Ed. 2d 674.
11. Padilla, supra at 1483.
12. Id., at 1484.
13. Id., at 1488.
15. 449 U.S. 288, 100 S. Ct. 1060, 103 L. Ed. 2d 334.
18. 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799.
21. 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 496; People v. Paranecz, 29 Misc. 3d 1202d, and People v. Garcia, 907 N.Y.S.2d 398.
22. Teague, supra, at 301.
23. Padilla, supra, at 1482.
25. People v. Eastman, supra.
27. 1 N.Y.3d 109, 802 N.E.2d 131, 769 N.Y.S.2d 781.

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.
ANSWERS TO MARITAL QUIZ ON PAGE 4

Question #1 - Is it 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)?


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, unenforceable?


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

Answer: No. This remedy is only available in a proceeding commenced by a violation of a prior enrollment 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 statement or document 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 216.40 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 event that the order of demise is reversed. In what situation shall the other be entitled to the proceeds of this life insurance policy?

Answer: No, the former husband died after July 7, 2008, which is the effective date of EPTL §5-1.4. Under statute, and 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., 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.)

Question #7 - Is it proper to file a notice of pendancy 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 notice of pendancy the sum of $2,500.00?

Answer: Yes, after the action was dismissed for lack of jurisdiction, the attorney unreasonable delayed in canceling the notice of pendancy, 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 authorizes the Family Court the same powers possessed by the Supreme Court in custody and visitation matters. Dempsey v. Dempsey 2010 NY Slip Op 08694 (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.)
“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. 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.

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 FRIDAY, 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 13, 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.”

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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 Fabric. The Legend of Morvitz Rabinowitz. **DAVID ARKEMA** is a dedicated, exciting, and gifted actor, who has

**PARKER HURLEY**, **ANDREW J. LANGTON** (Enemies opposite Sam Waterston at Williamsporten), **ANDREW LERNER**

**OLGA MALYKHIN**, **HAILEY MCCARTY**, **CAMERON MOIR**, **SETH NORRIS**, **SUZAN 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 on 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 SLY-WOTZKY**, tenor **SCOTT MURPHEE**, 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 SLY-WOTZKY**, tenor **SCOTT MURPHEE**, 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.

**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 Romaniero 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 Romaniero 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 Premieres Metropolis Ensemble commissions, including Romaniero’s “Metamorphosis of Narcissus" by Gity Razaz, and Du Yun’s Fallen Warrior.

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

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