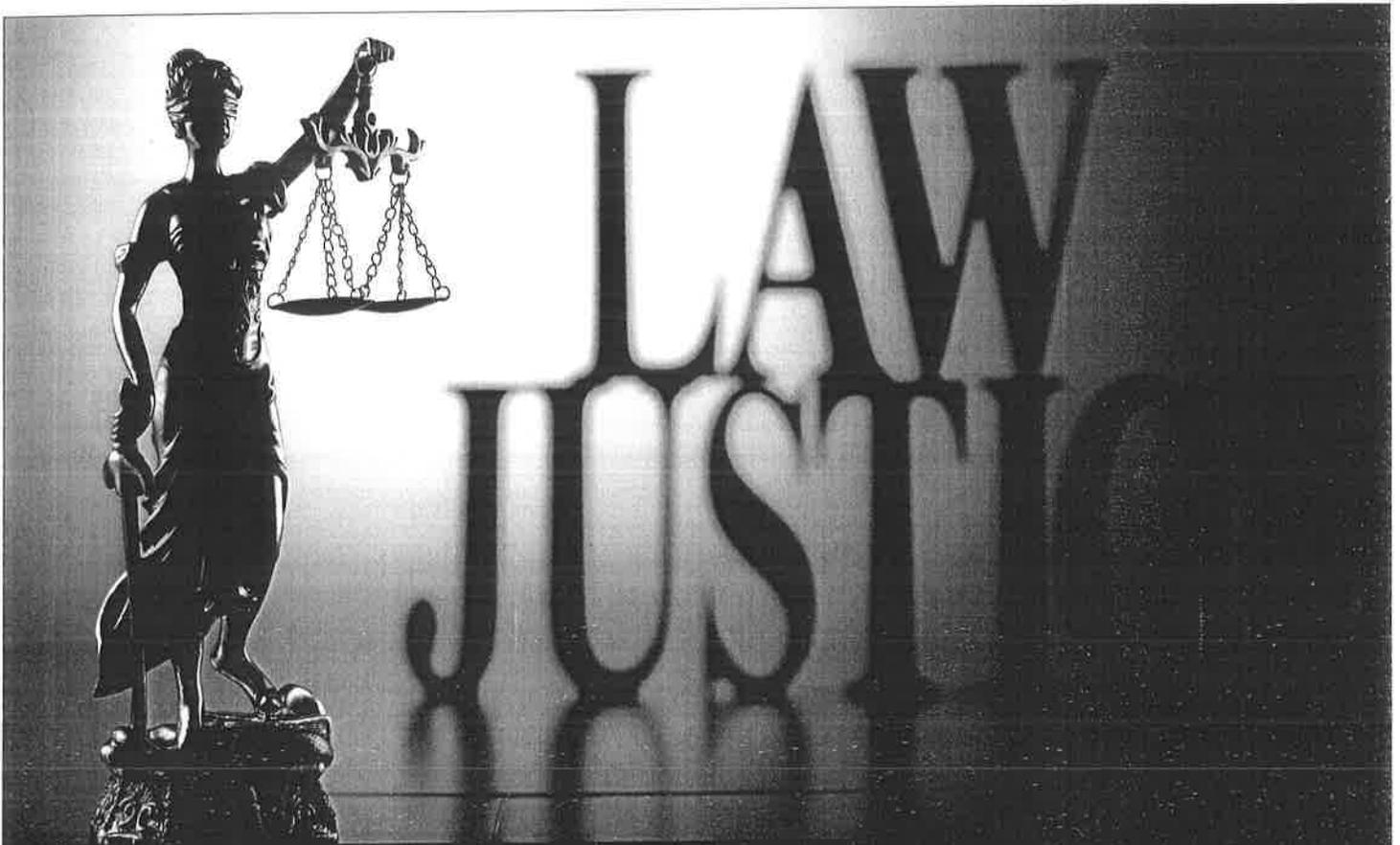


# New York Criminal Law Newsletter



A publication of the Criminal Justice Section of the New York State Bar Association



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- Re-visiting *In re of Jimmy D.*: What a Great Idea!
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## NEW YORK STATE BAR ASSOCIATION



If you have written an article you would like considered for publication, or have an idea for one, please contact *New York Criminal Law Newsletter* Editor:

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*Articles should be submitted in electronic document format (pdfs are NOT acceptable), along with biographical information.*

# REQUEST FOR ARTICLES

# My Year as an Appellate Public Defender

By Nicolas Duque Franco

As I approached my graduation from New York University School of Law last spring, I carefully considered what to do in my first year of practice. I had been fortunate to receive an offer to clerk for a federal district court judge starting in the Fall of 2019 and, in the interim, was interested in finding a one-year opportunity that could further my career goals and provide excellent training. I knew that I wanted to litigate, and I was hoping to do so as a public defender. As I had come to find out, however, those opportunities were few and far between for someone in my position. Most public interest fellowships that interested me required a two-year commitment, and local public defenders' offices expected new hires to stay at least two to three years. I was at a crossroads.

I found my solution at the Center for Appellate Litigation (CAL), a non-profit that represents indigent clients who want to appeal their convictions in the First Department. With the financial support of my university, and the guidance of CAL's leadership, I was able to secure a fellowship placement at CAL until my clerkship, and have been humbled by how much I have learned since joining the office last August. I credit that growth to the way in which leadership supports new hires, the emphasis CAL places on client-centered lawyering, and the creativity of the work done by the incredible attorneys who dedicate their time to CAL's mission.

Like many other new attorneys just joining the profession, I felt as though I didn't know what I was doing on Day 1. While I came to the role with some relevant experience, including internships at the Department of Justice and in public defense, as well as a year-long clinic with the Federal Defenders of New York, CAL presented me with a much greater level of responsibility, and an appellate practice different from the trial-level experiences I had encountered before. I found that managing my own docket, writing full appellate briefs, and handling the day-to-day processes of the job—e.g., how to file an appeal, how to set up a prison visit upstate, how to appear before the Appellate Division—were foreign to me.

Looking back on that first week now, I realize how far I've come because of the support I received from the attorneys, staff, and paralegals around me. CAL, for example, partners with another service provider in the Second Department, Appellate Advocates, to offer training to new attorneys across a wide variety of subject areas: prudential doctrines like preservation and harmless error, the mechanics of many commonly raised claims, and writing exercises that teach you how to draft statements of fact and appellate arguments. Today, I still refer to the detailed manuals we received in training whenever I brief a new issue or as a starting point for my research.

The office's model of supervision offers another helpful support for new lawyers. While one supervising at-

torney helps track your productivity, individual briefs are supervised by a rotating group of senior attorneys, each with their own method of delivering feedback, approaching the arguments, and appetite for risk. Similarly, the office encourages recent hires to argue their own cases. As a result, I have been fortunate to appear three times thus far in the Appellate Division under the guidance of my supervisor, David Klem. As a young lawyer, it is invaluable to be able to learn from so many attorneys in the course of a single year.

Importantly, the informal discussions I've had with CAL's attorneys about my work are equally valuable. I often talk to my officemate about how to frame a new argument and discuss with the other attorneys on my floor how I can best brief an issue or how to preempt a prosecutor's potential counterargument. We also have weekly meetings with a cross-section of the office that serve as a sounding board for novel claims, tough issues, or new cases. Together, these processes and structures make CAL an ideal place for a new appellate lawyer.

This first year in practice has also helped me understand how practicing with a client-centered approach translates to the more academic world of appellate law. For example, to help build strong relationships with clients shortly after being assigned to CAL, attorneys and client advocates — pre-law school hires that work with clients, support office projects, and provide critical services like parole representation — visit incarcerated clients at the various Department of Corrections and Community Supervision facilities around the state. The office aspires to visit every client at least once before CAL receives their record on appeal, and these visits can be highly beneficial. In addition to reminding the clients that, even while incarcerated, there is someone they can turn to for support, each visit also helps the office get a preliminary understanding of their case and address medical or conditions issues a client might be facing.

At these monthly visits, I have experienced some of the most fulfilling moments of my first year in practice, and I am reminded during each visit that every person CAL represents is so much more than the crime for which they were convicted. CAL's clients have families, dreams, and fears, just like anyone else, and part of our role as public defenders is to ensure that the system recognizes that humanity. My work at CAL consistently reminds me of that truth.

I have also come to appreciate the ways in which clients are as critical in an appeal as at trial or in a plea negotiation. Reflecting on this year, I recall several instances

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Before graduating from NYU, **NICOLAS DUQUE FRANCO** attended the University of Chicago (majored in English and minored in philosophy) and graduated in the spring of 2012.

where a client has helped identify issues in their cases or provided background as to why, or how, certain things happened during their prosecutions. CAL's guidelines on contacting clients, the expectation that CAL attorneys visit their clients in every appeal, the understanding that clients must be kept updated on their cases, and the office's commitment to visiting clients, even before receiving their records, all evince the office's core belief that the client comes first.

In addition to CAL's support structures and client-centric model, I have been inspired by the creativity of the office's attorneys. That creativity is evident in the individual appeals brought by the office. Recently, for example, the Court of Appeals recognized in *People v. Suazo*, 32 N.Y.3d 491 (2018) a constitutional right to a jury trial for all crimes that might subject someone to deportation. That decision followed from an appeal brought by one of our office's supervisors, Mark Zeno, and tracks a growing recognition by courts around the United States that deportation presents a unique, extreme penalty rivaling a person's loss of liberty.

Similarly, through the office's commitment to representing immigrants under the Immigrant Justice Project (IJP), CAL has helped dozens of non-citizen clients find relief from deportation and secure a future in the United States alongside their families. By attacking the validity of their convictions on *Padilla* and other legal grounds, our IJP attorneys and leaders, Robin Nichinsky and Marianne Yang, have meaningfully advanced the growing field of immigration law.

In working with IJP, I have been excited to see the traction that can come from approaching an appeal through this lens. As a new appellate lawyer, it is also helpful to learn skills—e.g., analyzing medical records, reviewing evidence, and interviewing people in our client's lives—through the fact-finding process in these cases that can complement the writing and research at the heart of a direct criminal appeal. Most importantly, working on these cases reminds me of the duty attorneys have to try to find new, more impactful ways to represent their clients. Innovation is critical.

My time at CAL has showed me the practical benefits of working at an office with a commitment to supporting new lawyers, taught me how to humanize the practice of appellate law, and reinforced the importance of creative lawyering. When I leave CAL this summer and enter the next phase of my career, I will approach it with these lessons in hand and with a gratitude for the attorneys and staff who have supported me and provided me with the opportunity to become a better advocate. Representing clients from some of the most underrepresented sectors of society, and seeing the clear need for robust criminal and civil legal services, has been a humbling and profound experience. I strongly encourage everyone reading this to consider the many ways in which we can all help address that need—by, for example, joining an organization, donating, doing pro bono work, or advocating for reform—and get involved today.

## New York Court of Appeals Review

By Jay Shapiro

The Court of Appeals issued two decisions of note relating to criminal practice in the first quarter of 2019.

### Past Recollection Recorded/Confrontation Clause *People v. Tapia* (decided April 2, 2019)

The Court held that it was not an abuse of discretion for the trial court to permit the prosecution to introduce into evidence the grand jury testimony of a witness as past recollection recorded. The witness, a retired police officer, could not recall the events surrounding the defendant's arrest. However, he did recall testifying truthfully and accurately before the grand jury. The requirements of admissibility are: "1) the witness must have observed the matter recorded; 2) the recollection must have been fairly fresh at the time when it was recorded; 3) the witness must currently be able to testify that the record is a correct representation of his or her knowledge and recollection at the time it was made; and 4) the witness must lack sufficient present recollection of the information recorded."

Additionally, the Court found no confrontational clause violation because the witness was available for cross-examination, even though his memory of the events was faulty.

### Fourth Amendment—Monitored Telephone Calls *People v. Diaz* (decided February 21, 2019)

Defendant was incarcerated at Rikers Island. At trial, the prosecution introduced excerpts of four of his more than 1,000 telephone calls he had made from prison. The defendant was on sufficient notice that calls were being monitored but he argued that there was no notice that the recordings could be provided to prosecutors. The Court of Appeals held that there was no "additional Fourth Amendment protections" that prevented the Corrections Department from turning the recordings over to the prosecution.

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