

Mock Trial Matters



NATIONAL HIGH SCHOOL MOCK TRIAL CHAMPIONSHIP

Calendar

- **January 14 2011**—Preliminary Interest form due to Michelle Giger
- **February 1**—Justice Gene Franchini Golden Gavel Award Nominations due to Judy Yarbrow
- **March 15**—Deadline to submit letters for Board candidacy to David Berlin (May Elections)
- **March 15**—Deadline to submit items for spring newsletter to Stacy Rieke
- **April 1**—National Case release date
- **April 13**—Team registration & SURVEY deadline
- **April 13**—Deadline to order event tickets
- **April 15**—deadline to request tournament schedule adjustment to John Wheeler & submit MEMBERSHIP FEE to Dewain Fox
- **April 16 (12 PM MT)**—Hotel reservation deadline
- **May 2-6**—National Tournament in Albuquerque, NM! (this is not Mother's Day!)

¡Bienvenidos a Albuquerque, Nuevo Mexico!

By **Michelle Giger** (*New Mexico*), 2012 Host Director and President & CEO for the Center for Civic Values

The **Center for Civic Values** ("CCV") eagerly anticipates hosting the 2012 National Championship in Albuquerque on May 3 - 6. CCV's partners for this outstanding event are the **State Bar of New Mexico**, **National High School Mock Trial, Inc.**, the **Bernalillo County, Metropolitan**, and **United States District Courts** and the **American Board of Trial Advocates ("ABOTA") Foundation**. In addition, law firms, attorneys and other friends of the mock trial program have pledged their financial support.

The 2011 National Championship is dedicated in loving memory to The **Honorable Gene E. Franchini**, former Chief Justice of the **New Mexico Supreme Court**, and an ardent supporter of the mock trial program. The Justice passed away suddenly in November of 2009. He is deeply missed, and the Franchini family and CCV are most grateful to the National Board for renaming their Golden Gavel Award in his honor.

Information about the 2012 Nationals will be available on the 2012 national website soon. The site address is 2012nationalmocktrial.org, and it is online, but it is only a one-page announcement at this time. When the website is complete, state coordinators will be notified by e-mail, and as the event approaches, the website will be updated regularly.

The 2012 Nationals will be headquartered at the recently-remodeled **Hyatt Regency Hotel** in downtown Albuquerque. Rooms at the Hyatt will be for competing teams only. Parents, judges, and others will be housed at the also recently-renovated **DoubleTree Hotel**, which is about two blocks from the Hyatt and an equal distance to the Courthouses. The downtown area is easily accessible from the **Albuquerque International Sunport** by shuttle, taxi or rental car.



The Hon. Gene E. Franchini
1935–2009



NATIONAL HIGH SCHOOL
MOCK TRIAL CHAMPIONSHIP



2012 NHSMTC in New Mexico, continued...



Albuquerque Skyline

Photo Credit—MarbleStreetStudio.com

The Hyatt's group rate is \$110 per night, plus tax for a net rate of about \$125 per night. The DoubleTree's group rate is \$129 per night, plus tax for a net rate of \$146 for up to 4 people per room. Because Albuquerque is a lower-cost city for travelers, both of these rates, inclusive of tax, are considerably lower than those available at the past few national championships. The cut-off for making group reservations will be **12:00 noon Mountain Time on April 16, 2012**. As we get closer to the 2012 Nationals, the website will be updated to include information about making hotel reservations. We have also reserved plenty of practice rooms at the Hyatt on Wednesday and Thursday.

The first formal event of the 2012 Nationals will be the traditional **pin exchange** on the evening of Thursday, May 3, 2012. This New Mexican-themed event will be held at the Hyatt, and will include food and beverages. Complimentary tickets will be provided to all official team members.

The four rounds of competition on Friday and Saturday will take place in courtrooms within walking distance of the hotel. The two rounds on Friday will be held in two Courthouses which are across the street from each other: the Bernalillo County Court and the Metropolitan Court. The two rounds on Saturday all will be held at these same two buildings, with the championship round taking place on Saturday afternoon/evening in the **Rio Grande Ceremonial Courtroom** in the United States District Courthouse.

We anticipate that it will be somewhat of a challenge to ensure that all teams get to the correct courthouse, so we will need everyone's cooperation to make things go as smoothly as possible. CCV will provide teams and state coordinators with directions to and security procedures in effect at the different courthouses.

Entry to the buildings will be on a staggered basis. Pairings for the trial rounds will be posted **OUTSIDE** the Courthouses. In addition, those who choose to do so may sign up to receive the postings via text. More detailed information will be provided in the on-site registration materials, on the website and at the orientation meeting on Thursday afternoon. It is crucial that all teams send a representative to the **Coaches' Orientation** on Thursday, May 3.

Teams may purchase breakfasts and lunches in advance for Friday and Saturday. There are not many eating establishments in the area of the Courthouse, so we have arranged with the Hyatt for teams to purchase breakfasts and lunches on Friday and Saturday. The meals will cost \$25 per person, which is the best deal we could negotiate for high quality food with good proteins. Historically, teams reserve between four and six rooms; since the room rate is so low, teams will save between \$200 and \$300 per day on their hotel expense, which will help to offset the cost of the meals.

On Friday evening, teams may gather after dinner on their own in the **Pavilion Ballroom** at the Hyatt, where there will be board games and a karaoke machine for those who want to relax a bit. In addition, the Host Committee will provide attendees with suggestions for dinner establishments.

On Wednesday and Friday evenings, complimentary transportation to and from **Albuquerque's Old Town** will be provided from the Hyatt Hotel to all attendees. On Thursday evening, complimentary transportation to and from Albuquerque's Old Town will be provided from the DoubleTree Hotel, for adults only.

CCV encourages state coordinators to recruit judges and attorneys from their home states to volunteer as presiding and scoring judges at the 2012 Nationals. Although we expect a large turnout of New Mexico judges and attorneys for this event, we would like to have diverse judging panels with representation from around the country. Fifty-two out-of-state judges attended the 2011 Nationals in Phoenix, and we hope to have as many or more in New Mexico. Competition judges and attorneys will be hosted at an invitation-only reception in the **Celebration Garden of Albuquerque BioPark**. Transportation to and from the BioPark and to and from the Hyatt will be provided.

2012 NHSMTC in New Mexico, continued...

On Saturday evening, after dinner on their own and immediately following the championship round, all teams and guests will be invited to attend an **Awards Gala**. This event will take place in the **Grand Pavilion Ballroom** of the Hyatt, and awards will be presented to the top ten teams and the top individual performers. Complimentary tickets for this event, which will include dessert and beverages, will be provided to official team members. A limited number of additional tickets will be available for purchase. The 2012 Nationals will close with a dance for the students on Saturday night, immediately following the awards' announcement.

Finally, watch for the 2012 Nationals website to be updated soon to include the 2012 NHSMTC (New Mexico) **Pre-liminary Interest Form**. State coordinators are asked to complete and return this form by January 14, 2012, in order to ensure that their state is included in all communications regarding the 2012 Nationals. In the meantime, if you have questions, you may contact the **2012 National Host Director, Michelle Giger** at michelle@civicvalues.org. CCV looks forward to providing a rewarding, educational experience, while giving participants a little taste of life in the Land of Enchantment. We look forward to seeing everyone in Albuquerque in May 2012!



Albuquerque International Balloon Fiesta

Photo credit: 1001lonelyplaces.com

NHSMTC Membership Fee Reminder

By **Emily Reilly** (Minnesota), *Chair, Long Range Planning Committee*

Just a reminder to pay your state's **NHSMTC Membership Fee of \$250** by **April 15th**. This membership fee is **separate** and in addition to your state champion team's \$500 tournament registration fee. The tournament registration fee (and form) is due to Michelle Giger by April 13th. **Both fees are required for participation in the tournament** (see the updated Articles and Bylaws posted online). The funds collected through this membership fee are being earmarked specifically for costs borne by NHSMTC, Inc. for hosting or aiding in the hosting of the national championship. As of this date, there is no host for 2014 and the December 15th date, which triggers the NHSMTC to start the process of hosting the competition itself, is fast approaching. **These funds are more important than ever.**

Checks for the **MEMBERSHIP FEE** should be made payable to **NHSMTC, Inc.** and mailed to our Treasurer, Dewain Fox at:

Mr. Dewain Fox
Sherman & Howard L.L.C.
201 East Washington Street, Suite 800
Phoenix, Arizona 85004-2327

The 2012 team registration process will also include a **required online program survey**. More information will be forwarded to state coordinators about the survey before the 13 April 2012 deadline.

2013 Tournament: Indianapolis, Indiana

By **Ann Marie Waldron** (Indiana), Host Board Director, 2013 Indiana Host Committee

The city of Indianapolis revs up during the month of May as the Indy 500 Festival, and its accompanying activities, accelerate. Adding to the energy and excitement, Indianapolis will host the 2013 National High School Championship tournament May 9th to 11th.

Plans are currently underway for the 2013 tournament. Students will be based at the city's state-of-the-art **JW Marriott** in downtown Indianapolis. Rooms will be available at a group rate of \$129 per night and will be available at that rate three days prior to and after the event.

The JW Marriott is located just blocks from **Victory Field**, home to the **Indianapolis Indians**; the **Indianapolis Zoo**; the **NCAA Hall of Champions**; the **Eiteljorg Museum of American Indians and Western Art**; the **Indiana State Museum** with IMAX theatre and other attractions. Students will have the opportunity to visit many of these venues while in Indianapolis as part of their scheduled events or on their own.

The always-popular pin exchange is planned for the Indiana State Museum on Thursday night, giving students and their families the opportunity to socialize, enjoy the museum galleries, stroll along the city's beautiful downtown canal, or enjoy an exciting feature at the IMAX. Plans are underway for other activities that will entertain while educating students about our nation's heartland.

Courtrooms at **Indianapolis' City-County Building** will serve as the site for the four rounds of competition, with the Championship round being held at the **United States District Court Courthouse**. This historic courthouse will provide a stately setting worthy of the high caliber of competition the National Mock Trial Championship delivers. A video feed will be provided into an overflow room to give others the opportunity to experience the Championship finals.

A judges' reception is being planned for Friday evening at the **Indiana Historical Society**, located on the scenic canal just blocks from the hotel. The awards banquet will be held Saturday evening at the JW Marriott. More information on the 2013 agenda will be provided in the Spring Newsletter.



2014 HOST NEEDED!!

The NHSMTC, Inc. Board needs your help!

Please help us identify a site for the 2014 tournament.

We need an interested host to step forward soon! The Board is willing to work with the state coordinator/new host committee in securing financial assistance and with competition logistics. Please contact **Rando Hicks** (Site Selection Chair—rhicks2177@gmail.com)

BEFORE DECEMBER 15th!

A Word From Our Chair

Random Ramblings from an Exhausted, but Inspired, Mock Trial Junkie

Hi, My Name is John. It's been 2 days since my last mock trial tournament. (But I do have another one tomorrow!)

At regional competitions and at our State Tournaments, I typically thank the many people who contribute to the success of the mock trial program – the lawyers, judges and legal professionals who spend countless hours helping to prepare the students for the competition as coaches; additional legal eagles who volunteer their time and expertise as judges; and the educators who give so selflessly of their time and resources as teacher-coaches. (I've done the math before and between our high school and middle school competitions, these dedicated souls donate more than \$1 million of time to the Iowa program alone!)

A few years ago, however, it dawned on me that there was a significant group missing from my standard "thanks." I'm sure your programs have these folks too – they are perhaps former mockers who are doing something other than law-related work. Or perhaps they are college students. Or maybe they are parents of current or former mockers. Or perhaps they are just people who for various reasons became enamored of the mock trial activity and who continue to give so generously of themselves. They're not lawyers or teachers per se, but they have so much to offer to the students and to the overall success of the mock trial experience. I call these volunteers the "Mock Trial Junkies" (MTJs) They freely admit their addiction – and do everything in their power to get others hooked.

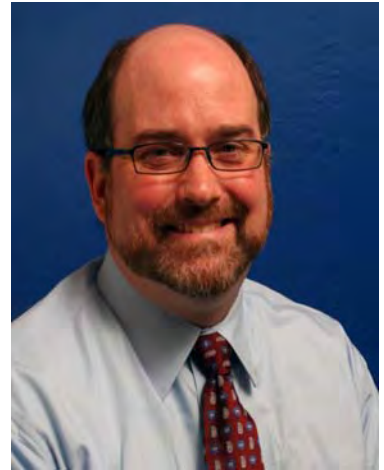
They are tremendous ambassadors for all that mock trial purports to be. As we all know, the vast majority of students involved in mock trial will not go on to careers in law. (I once asked for a show of hands among high school state tournament participants, and there were more raised for Science and Medicine than there were for Law.) Participants do benefit greatly from increased knowledge of the law and of the trial process. They also learn the value of our legal system and recognize the contributions that lawyers, judges and others in the system make to society at large. But perhaps more than knowledge or civic disposition, the magic of mock trial happens in the development of critical skills – preparation, analysis, higher order thinking, and presentation. These skills are transferable to anything and everything they will choose to do in life. Our MTJs demonstrate that you don't need to be a lawyer to appreciate mock trial; and you don't need to be a lawyer to help.

At a recent regional competition, I asked 2 MTJ volunteers why they continued to support the program (but I didn't ask it in a way to make them feel like I thought they were insane!). The parent of a long-ago mocker told me that she understood that this activity was the best activity her daughter had ever been involved in. Doing mock trial gave her daughter a sense of confidence, poise under pressure, and a group of life-long friends who all shared the same bizarre experiences. She told me that she could never repay all that mock trial has done to enrich her daughter's life – but that in a small way she would continue to contribute so that others might have the same experiences.

The other MTJ (I'm still confused on the exact circumstances of his involvement!) gave me a flip answer. He said simply, "I have red blood cells. I have white blood cells. And I have Mock Trial. It's in my veins." I thought it was a real hokey response – and yet it has stuck with me for weeks now. Mock Trial really does get in your blood; and like caffeine it gives you a needed jolt.

We all know how much work goes into organizing mock trial competitions – the endless paperwork, phone calls, emails, tedious event planning stuff, etc. And we all know that there are times when we question whether what we're doing makes any difference at all or has any impact. Once the competitions start rolling and you finally get to see the students themselves in action and realize their excitement and their tremendous development, then it is all worthwhile. It's like another shot of that mock trial drug. And we're addicted once again.

And so another day brings yet another mock trial tournament –and another group of inspired and inspiring students. Yep. I'm hooked. My name is John. I'm a Mock Trial Junkie.



John Wheeler has served as Chair of the NBSMTC Board of Directors since 2005. He is the Director of the Iowa Center for Law and Civic Education in Des Moines.

Rules Changes for 2012 Tournament

At its recent pre-tournament meeting in Albuquerque, the Board approved changes to the following Rules of the Competition: **4.11, 4.5 and 5.6**. Additionally, changes have been made to the following Rules of Evidence: **404(a)(2) and 803(8)**.

All rules updates were emailed by the Rules Chair to state coordinators on October 21, 2011 and will be reflected in the copy of the 2012 rules posted on the NHSMTC website (www.nationalmocktrial.org) by the case release date. Rules questions should be directed to **Pete Jones** (NHSMTC Rules Committee Chair) until the case release date (April 1). After April 1 and until the tournament weekend is complete, all rules questions should be directed to New Mexico Host Director **Michelle Giger**.

Revisions to NHSMTC, Inc. Articles & By-Laws and Policies

The NHSMTC, Inc. Articles and By-laws and the policies of the NHSMTC, Inc., went through an extensive review process before the October pre-tournament meeting in Albuquerque. During the meeting, the Board reviewed the recommended changes and updates and approved changes and updates to language in the following areas of the Articles and By-laws: **Article III, Sects. 1-5 and 7-9; Article IV, Sects. 1-8; Article V, Sect. 3; Article VI, Sect. 2; Article VII, Sect. 1(b)(1) and Article VIII, Sects. 1 and 7**. Updates were also made to the following NHSMTC policies: **3, 6, 10, 19, 21, 23, 28, 34 and 36**. Both the Articles and By-laws and the NHSMTC policy manual are available to state coordinators on the NHSMTC website. For questions about revisions to these publications, please contact John Wheeler, NHSMTC Board Chair.

Spring Board Elections

A scheduled election will be held during the State Coordinators' meeting in Albuquerque in May 2012. There are **two at-large** Board positions up for election this year. The at-large positions expiring in May 2012 are currently held by **John Wheeler** (Iowa) and **Judge Richard Sievers** (Nebraska).

Jane Meyer (Pennsylvania) replaced David Trevaskis in May 2011 as the 2010 Host Board Director from Pennsylvania. The 2010 HBD term expires in May 2012 and the position will be filled with the Host Board Director for the 2014 tournament. However the identity of the 2014 Host Board Director has yet to be determined. The 2013 Host Board Director position has been filled by **Ann Marie Waldron** (Indiana). The 2013 HBD position will expire in May 2015. The appointed "Board Host Director" position is currently filled by **Stacy Rieke**. This appointment is a three year term and will expire in May 2014. Board members are required to attend (in person) the two regularly scheduled board meetings in October and May each year.

Interested candidates for at-large positions must submit their letter of intent to run to the Nominating Committee Chair, **David Berlin** (dberl@duhigglaw.com), no later than **March 15, 2012**. If this deadline is missed, but a person still wishes to be nominated for one of the Board positions, that individual must communicate this intention to Mr. Berlin by the end of the May Board meeting. This communication must be accompanied by a nominating petition signed by at least three State Coordinators. Additionally, nominations may be made from the floor during the State Coordinators' meeting in May. (See *NHSMTC, Inc. By-Laws Article IV, Section 2*)

Nominations for the Justice Gene Franchini Golden Gavel Award are due February 1, 2012.

Consider nominating an outstanding supporter of the NHSMTC for this prestigious award!
Nomination details may be found on p. 10 of this newsletter and on the NHSMTC website.

Mock Trial News and Notes



CALIFORNIA – Laura Wesley, State Coordinator

Greetings from California! We have just started our county competitions and anticipate 450 teams from across the state to participate in the Constitutional Rights Foundations 31st Annual Mock Trial Program. Students will argue a criminal case involving a fatal stabbing at a popular music festival. The stabbing involves a prominent political family, a multi-million dollar trust, and a cheating scandal. Pretrial issue: Do restrictions on concealed firearms violate the defendant's fundamental right to bear arms under the Second Amendment? A special congratulations to California's La Reina Mock Trial Team and their coaches for winning the 2011 World Championship at the Empire City Mock Trial Invitational Tournament in New York City. We are proud of the team and their accomplishments at the county, state, national and international level!

GEORGIA – Stacy Rieke, State Coordinator

The 2012 mock trial season in Georgia is off to a great start! We have 136 schools registered in the program this season and of that number, 13 are fielding a mock trial team for the very first time. We have organized 17 regional competitions statewide in February, welcoming a new region based in Augusta, and will host 19 teams (17 regional champions and 2 wildcards) at state finals in March. We began our season with an outstanding group of 54 student team leaders from around the state at our annual Law Academy, held at the University of Georgia School of Law on September 22nd -25th. The Academy is an intense, clinic-style weekend training session for team leaders that culminates each year with the Student Bar Exam. On November 14th, we held our annual coach orientation meeting with outstanding presentations by Katie Powers (attorney coach for Jonesboro HS and member of the 2002 10th place Georgia team), Jon Setzer (HSMTC Committee chair) and Peggy Caldwell (our power-matching guru). We will continue to offer the popular Craig Harding Memorial Court Artist Contest this season, as well. This year's criminal problem, State v. Capulet, is a murder case and is dedicated to Presiding Justice George Carley of the Georgia Supreme Court, who will retire from the Court in July 2012. Georgia also has a new presence on Facebook at www.facebook.com/GeorgiaMockTrial. Join us!

HAWAII – Mirah Holden, State Coordinator

The Young Lawyers Division of the Hawaii State Bar Association is proud to be involved with and sponsor the Hawaii Statewide Mock Trial Program. The program is designed to stimulate and encourage a deeper understanding and appreciation of the American legal system by giving Hawaii high school students the opportunity to assume the roles of attorneys and process a fictionalized legal case to trial. Through hands-on interaction, students gain a solid understanding of the court and legal system in a real-life judicial environment. It is the Hawaii YLD's hope that students develop useful questioning, critical thinking, and oral advocacy skills, as well as significant insight into the area of law in question through applied learning. As part of the HSBA's initiative to help promote more Civics Education related program and project to the community, the Mock Trial Competitions play an important and vital part in realizing those goals. Member attorneys from the HSBA, who volunteer to share their valuable time to the project by sharing their knowledge and experience with the students, have commented that this is a one of the most rewarding experiences and are happy to help young people understand the important role attorneys play in society and the formation of law. Thanks to an aggressive mail and telephone campaign, the Hawaii Mock Trial competitions have seen a steady increase in participation from Hawaii high schools over the years and as a result 27 teams from 20 schools signed up for the competitions for the 2011 competition year, which was the largest turnout thus far. The Hawaii YLD hopes that it can encourage and inspire even more Hawaii high schools to participate in this challenging and worthwhile project for the 2012 competition year.

INDIANA – Susan Roberts, State Coordinator

In addition to preparing for the exciting plans we have for hosting the National tournament in 2013 in Indianapolis, as previously reported in this newsletter, Indiana Mock Trial has rolled out a few long-time projects that started on a wish list and have now become dreams realized! One of those long-time dreams is the production of a DVD to distribute to schools, students, teachers or attorneys touting the benefits of mock trial and providing some summary highlights of how to prepare a mock trial case. The release date is expected to occur by November 1st. Indiana thanks Georgia for all of their support and assistance in helping us develop the DVD.

Mock Trial News and Notes, cont.



INDIANA (continued)

We have also rolled out a new website! Check us out at www.inmocktrial.com! We have information posted on our website already for the 2013 national championship tournament. The “new face” of the Indiana Mock Trial website has been on the to-do list for some time. Nothing like hosting a national championship to get you motivated! And, of course, we are preparing for our upcoming mock trial season. Our regional competitions will take place in February and our state finals in March. This year’s mock trial case involves a murder – or maybe it was an accident? The story goes like this -- a family of four chartered a schooner to travel on Lake Michigan for a couple of weeks. The family trip, however, had a tragic ending when three family members died. The boat’s captain claims they perished in a storm. The Captain also claims the boat sank when an explosion on board occurred. The surviving member, a child at the time, has come forth 8 years later, having recovered from a memory lapse, and now claims that the Captain murdered the family as a result of a blackmail scheme over smuggling illegal drugs from Canada. Tune in for the jury verdicts!

KENTUCKY – Billy Stover, State Coordinator

For the second year in a row, District Judge Earl-Ray Neal wrote the Kentucky Mock Trial Case. Judge Neal is no stranger to the mock trial program. He participated as a mock trial student and led his team to a state championship and competed at nationals. After law school, Judge Neal became a mock trial attorney coach and helped his team win state 8 years. He then became a district judge and has judged every round of the state’s competitions over the last several years. Judge Neal helped judge at nationals 3 out of the last 4 years as well. This year’s case is about a retired police officer who is charged with murder. This case has many twists and turns and is one the students will really enjoy. The topic of this year’s case is domestic violence. The state competition will be held in Louisville on March 16 – 18 in which all the teams will compete in 4 rounds of competition in which the top 2 teams will compete in a 5th and final round to determine this year’s state champion.

NEBRASKA – Doris Huffman, State Coordinator

The Nebraska High School Mock Trial Competition is now under way. This year’s civil case involves a student who sues a rival mock trial school for slander when that coach’s accusation of cheating costs a mock trial student a full ride scholarship to college. Winners of the 12 regional competitions will compete at the State Championship in Papillion, Nebraska, on December 6 and 7. This is a new venue for the state competition. On the first evening, the annual Mock Trial Banquet will take place at the Embassy Suites – La Vista. There, the students will be awarded certificates of achievement and medallions for their outstanding accomplishments related to mock trial. Then they will engage in what has become an annual tradition – Mock Trial Trivia. Creighton University is sponsoring the banquet, and the Winthrop and Frances Lane Foundation is underwriting the cost of travel for Greater Nebraska teams to travel to the Sarpy County area for the competition. Last year, the Bar Foundation created a mock trial informational podcast, based on video recorded at the 2010 banquet. The video and this year’s case may be viewed at <http://www.nebarfnd.org/mock-trial>. Find us on Facebook at <http://www.facebook.com/pages/Nebraska-State-Bar-Foundation/151880478214593>.

NEVADA – Kathleen Dickinson, State Coordinator

Nevada’s case will be ready to go on October 10, 2011. We have had several schools register already and we’re excited about the new season. We have at least 3 new schools participating this year and at least one school we have not seen in a few years coming back. We now have 8 schools from Northern Nevada and continue with the 10 schools from Southern Nevada. Our Southern Nevada Competition will be January 14, 2012 at the Regional Justice Center in Las Vegas, Nevada. The Northern Nevada Competition will be February 24th 2012 at the Federal Courthouse in Reno, Nevada. The State Competition will be March 9th and March 10th at the Regional Justice Center in Las Vegas, Nevada. We are using a New Mexico Case that will now be called Nevada v. Megan Barry.

Mock Trial News and Notes, cont.



NEW JERSEY – Sheila Boro, State Coordinator

The New Jersey State Bar Foundation’s 30th annual Vincent J. Apruzzese High School Mock Trial Competition is officially underway with the release of the 2011-2012 Mock Trial Workbook containing the case as well as rules and procedures. As a further service to the educational community, the Foundation conducted a free mock trial workshop in October at the New Jersey Law Center in New Brunswick. The high school competition is open to all New Jersey high schools, public, private and home schools. There is no charge to enter the competition. This year’s case concerns a high school basketball star—allegedly a follower of a notorious hate blogger—who surreptitiously enters his/her math teacher’s home and is charged with burglary, criminal trespass, theft and bias theft. The Foundation’s free Mock Trial Workshop for teacher-coaches and attorney-coaches was conducted on October 27. Speakers explained the contest structure and the judging process. Students from last year’s statewide championship finalist teams enacted the new case for 2011-2012. For more information, contact Sheila Boro, director of Mock Trial Programs, at 732-937-7519 or email sboro@njsbf.org.

OHIO - Addie Natalie, State Coordinator

For each of the last 29 years the Ohio Center for Law-Related Education has organized a case committee of volunteer attorneys who write a legally authentic case involving a constitutional issue that is relevant to students’ own personal experiences; and 2012 is no exception! In this year’s case, Storm Jackson, a college freshman, is accused of stealing prescription drugs while attending two real estate open houses and while visiting at the houses of two friends. The Defendant and his parents’ names were on a sign-in list at both of the open houses. Without a warrant, the police subpoenaed and obtained Storm Jackson’s cell phone GPS records before he was arrested. Storm Jackson has filed a motion to suppress claiming that the evidence seized was the result of an improper search and seizure that violated his Fourth Amendment rights. *The Center is on Facebook! Become a Fan!*

Washington Mock Trial – More Than Competition

By **Alexandra Dullea**, student team member, Seattle Preparatory School (Seattle, WA)

The first time I heard someone talk about Mock Trial, they called it an “intellectual combat sport”. I have always loved the competitive environment and competing on something other than the soccer field is a welcome relief. However, despite my love for the tough cross-examination or intense evidence battles, what I have really enjoyed about Mock Trial comes from outside the courtroom.

I have often been asked why I spend so much of my time on Mock Trial. Some people do not understand why reading, writing, rewriting, practicing, rewriting and performing in a mock court setting is fun. To be honest, it is not simply the reading, writing or performing that is fun; it is the people. I know it sounds cheesy, but my team, coaches and teachers are some of my favorite people to spend my time with - arguing over whose side of the case is really right, spending weekends huddled over a table working on the last question of a cross, or laughing at a Mock Trial joke that probably is not really funny. *(continued on next page...)*



Seattle Prep Mock Trial Team after 2011 NHSMTTC in Phoenix, AZ

Washington Mock Trial – More Than Competition (cont.)

I was lucky enough to spend a week last May competing at nationals. I met students from all over the country and world who all share similar interests. I learned that it is not just my team that I like to spend time with, it is also my competitors. They all had different perspectives and talking and competing against them was not only fun, it also challenged my own ideas about the case. It was interesting to see how other people interpreted the exact same witness statements differently, portraying characters and presenting case theories from unique vantages. Meeting them once again underscored why I enjoy Mock Trial.

Mock Trial really is not about competing; it is not about winning or losing. Mock Trial is about working with people. It is about collaboration with peers, respecting adversaries, thinking deeply about complex problems and learning how to work with other people in challenging situations.

One of the unique aspects of the Washington State Mock Trial program is that it is a YMCA run program. The Y's core values of honesty, caring, respect and responsibility are at the heart of the Mock Trial program. The Y's goal is to produce students who, having acquired leadership, team building and public speaking skills, are more active and engaged in their communities.

At its core, Mock Trial is not about competition. Competition is only a means to reach the end of being more thoughtful, engaged citizens. Yes, most of us will always love the tough cross-examination and the intense evidence battles, but the critical thinking and oratory skills we have learned from Mock Trial will be with us for the rest of our lives. We will always have to work with other people, some of them may agree with us and some may not, but the skills we have learned from Mock Trial will help us work with other people no matter the issue. Respecting other's differences and their points of view, while still not losing a voice, is what is going to make us effective citizens, and that is what this intellectual combat sport is really about.

Justice Gene Franchini Golden Gavel Award Nominations



The **Golden Gavel Award** was renamed in May 2010 in memory of the Hon. Gene Franchini of New Mexico and is now known as the **Justice Gene Franchini Golden Gavel Award**. Justice Franchini served as both a trial and an appellate judge over a career spanning decades, and earned a reputation among his peers as a highly-principled man, who truly loved the law. His unflinching passion for helping young people learn about his favorite subject led him to serve each year as a judge in regional, state and national mock trial competitions, and the admiration and respect he garnered from the students whose lives he touched cannot be overstated. This award recognizes any adult individual who has demonstrated this type of exemplary dedication and commitment to the goals and ideals of the National High School Mock Trial Championship.

To nominate someone for this prestigious award, complete the nomination form found on the NHSMTTC website and submit it along with at least two letters of support for the nomination by the published deadline. The nomination should include the nominee's qualifications such as length of service/participation in the NHSMTTC, the extent of that participation, the importance or significance of the nominee's contributions; and how these qualifications help to further the goals and mission of the NHSMTTC. It is helpful to the committee if letters of support are provided by a variety of sources, including members of the local and state mock trial committee with which the nominee works.

Nominations are due each year by **February 1st** to the Chair of the Awards Committee. In 2012, nominations should be sent to **Judy Yarbrow** by mail to 2139 FM 779; Mineola, TX 75773-3289 or by email to jyarrow@saltcreektx.com. Questions may also be directed to Judy at 903/768-2122.

Law Related Education Resources



American Bar Association - Division for Public Education

The mission of the ABA Division for Public Education is to promote public understanding of law and its role in society.

http://www.americanbar.org/groups/public_education.html

Bill of Rights in Action (BRIA)

BRIA is a free resource for social studies teachers. Each lesson includes a content reading and interactive classroom activity. Search the online database for topics such as due process, equal protection and the first amendment.

<http://www.crf-usa.org/bill-of-rights-in-action/blog.html>

Civic Action Project

Have a senior project or service learning requirement at your school? Looking to engage students in project based learning and incorporates 21st learning skills into your classroom? Civic Action Project (CAP) is a free curriculum to engage high school students in civics in a relevant and meaningful way. By taking **civic actions**, students practice what real citizens do when they go about trying to affect policy and solve a real problem.

<http://www.crfcap.org/>

Great Rivers Technologies National Mock Trial Practicum

This is a web resource that provides an opportunity for coaches to supplement the mock trial resources available to teams participating in mock trial programs throughout the nation. It is an interactive site whose purpose is to enhance the mock trial experience for students, teachers, coaches, and judges, to provide an interactive area that will help students better understand how to give a statement, ask questions, control a difficult witness, and make timely objections. It also allows coaches to run a strong Mock Trial program even if they are new to the activity, don't have access to an attorney coach, or would just like to better understand the process and involvement. Contact Tim Shade at tshade@greatrivertech.net for more information or to place an order for this resource.

Justice by the People

A website sponsored by Scholastic and the Foundation of the American Board of Trial Advocates (ABOTA) that provides free classroom materials, games and printables.

www.scholastic.com/americanjustice

Make Your Case

"Make Your Case" is an interactive mock trial online game featured on Scholastic/ABOTA's Justice by the People website. Take part in this courtroom trial simulation and learn how important trials are to the American legal system: <http://www.scholastic.com/browse/article.jsp?id=3752426>

May It Please the Court

A video/print guide resource for mock trial teams offered by the Georgia mock trial office. An order form may be found on the NHSMTC website under the "About the Competition" section. The cost is \$40/copy.

Mock Trials: Preparing, Presenting and Winning Your Case

Steven Lubet and Jill Trumbull Harris

Copies may be purchased online at http://www.lexisnexis.com/store/search/search-results.jsp?_requestid=17828.

NHSMTC Case Library

The National High School Mock Trial Championship, Inc., is pleased to provide a library of mock trial cases online under the Sample Case Database section of the website. The mock trial cases on the website are available to state coordinators interested in using these materials. Access to the case library requires a coordinator to log-in. To get the log-in information or update a program's coordinator contact information, the state coordinator should contact Larry Bakko at larry@nationalmocktrial.org. All questions about the case library should be directed to Larry, as well.

Law Related Education Resources, cont.

NHSMTC Championship Round DVDs

- **2007**—(Dallas, TX—civil case)—Order the '07 championship round DVD online at: <http://www.dallasbar.org/thsmtc/info.asp?id=9>; the cost is \$20. Contact Amy Smith at the Texas Mock Trial Office with questions about the DVD (asmith@dallasbar.org or 214/220-7484)
- **2009**—(Atlanta, GA—criminal case)—the order form is available on the GA mock trial website (www.georgiamocktrial.org) under the Resources section. The cost of the DVD is \$18.
- **2010**—(Philadelphia, PA—criminal case)—the order form for the '10 championship round DVD may be found online at <http://www.2010nationalmocktrial.com/>. The cost is \$20. Questions about the DVD may be directed to Pam Kance at the Pennsylvania Bar Association (Pam.Kance@pabar.org).
- **2011** - (Phoenix, AZ—civil case) - order online at <http://www.azflse.org/mocktrial/2011>

Washington YMCA Youth and Government Website

YMCA Youth & Government has a multitude of resources to ensure that adults and students alike have the greatest opportunity for success. Check them out today!

<http://www.seattlymca.org/Locations/YouthAndGovernment/Pages/MockTrial.aspx>



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SMS Text Service Available to State Programs

The SMS Text Messaging service used during the 2011 NHSMT Championship in Phoenix to announce pairings on competition days was extremely popular. More than 3,000 text messages were sent to subscribers during the Championship week. The NHSMTC Scoring/Power-matching/Decision Support System Coordinator and webmaster, Larry Bakko, is now offering to provide a similar service to any member state mock trial program and/or school team currently registered to compete in a member program. There will be a nominal cost to cover the expenses of this service.



Each state program, or school/team, could have it's own website page to log in, and be able to manage (add, edit, delete) subscribers, set up auto-responder messages, create messages, and send or schedule the text messages to be sent. The advantage of this system is that it allows all text or smart-phone users to easily receive messages without the need to go to Twitter, Facebook, or other social media websites which require an account and a login. The disadvantage is that there is a nominal cost during the time period that the messaging service is being used.

Depending on the number of messages and subscribers, the cost could be as low as \$10-15 per month, and the costs would only be incurred during the months when the service is in use. Larry can also assist state coordinators in adding a web widget to your website to allow subscribers to enter their telephone number to receive your text messages. For more information on the program, its capabilities and costs, contact **Larry Bakko** at larry@nationalmocktrial.org.

The 2012 New Mexico Tournament Website is:

www.2012nationalmocktrial.org

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Mock Trial Matters Newsletter

To submit items for the spring issue
contact: **Stacy Rieke**

(404) 527-8779 or stacyr@gabar.org

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GENE E. FRANCHINI:
REFLECTIONS ON A MAN OF JUSTICE
JUSTICE RICHARD C. BOSSON*

INTRODUCTION

“D’baha.”

Chief Justice of the New Mexico Supreme Court, Gene Franchini, taught a new word to judges and lawyers who traveled from across the country to judge the 1998 National Mock Trial Competition in Albuquerque, New Mexico. The competition focused on Indian law that year, so Justice Franchini coined a Native American term to assist the members of his audience as they interacted with the teen-aged competitors. Translation? The word was an acronym: “Don’t Be A Horse’s Ass.”¹

This and countless other stories about Justice Franchini have been told and retold; now that he is gone, they are well on their way to legend. These stories endure because they are emblematic of an individual who rose to the top of a demanding profession, but who never lost his connection to real people. Gene was a man who stood apart from the rest of us because he knew who he was in a way that few of us do, and because he gave himself the permission—the freedom—to be himself: a man who demanded integrity in all things professional and personal, and who never wavered in his belief that the essential role of a judge must be the uncompromising pursuit of justice.

Gene’s unabashed freedom to be himself gave him license to say and do things that few others could get away with, especially by today’s standards. In conversation, he had a lubricated way with profanity. He jokingly told me that the only exercise he ever got was when he had to get up to pour himself another glass of wine. He was also once a chain smoker. But he embraced his vices in a way that, instead of being offensive, left one thinking, “I can trust that guy—he’s just telling it like he sees it.”

In the pages that follow, I have tried to capture some of who Gene was through his speeches and opinions and from my personal recollections. In an effort at staying focused, I have narrowed the discussion to two parts, based on the themes alluded to above: Gene’s sense of integrity and his unwavering commitment to justice. For those of you who knew him, I hope that my efforts will spark a few of your own special memories. For those of you who never met him, I hope this article leaves you wishing that you had gotten that chance.

I. PROFESSIONAL AND PERSONAL INTEGRITY

Gene’s greatest passion—other than his devotion to his beloved Glynnie—was his love of the legal profession. He was fanatic in his view that practicing law is an *honor* that cannot be taken lightly. To him, lawyers play a vital role in safeguarding a society’s freedoms. In a 1999 speech to attorneys and judges he described his views about the importance of lawyers:

* Justice, New Mexico Supreme Court. Special thanks is acknowledged to my two law clerks for their help on this article—Neil Bell for synthesizing the complex and numerous source materials, as well as for assisting with innumerable drafts; and Stefan Chacón for tireless spadework in investigation and research.

1. See George H. Carley, Justice, Ga. Supreme Court, *Cherished Memories of a Fascinating Man*, TRIBUTE TO JUSTICE FRANCHINI, N.M. B. BULL. (State Bar of N.M.), Jan. 11, 2010, at 7.

When one thinks about it, it is not the words of the Declaration of Independence or the Constitution that make us free. It is the men and women of this country, who daily and in a real way, protect and defend the principles that the words of those documents describe and establish—those men and women of the legal profession who daily put up the fight by practicing their profession. They do it to protect and defend not only the idea, but the fact of freedom.²

Without attorneys to stand up for the rights of individuals, Justice Franchini argued, a society can quickly devolve into an authoritarian regime.

In that same speech, Gene attributed the rise of Nazism in pre-World War II Germany in part to the elimination of the freedom and independence of lawyers. He quoted Adolf Hitler as saying, “I shall not rest until every German sees that it is a shameful thing to be a lawyer.”³ As a result of Hitler’s imposed constraints on lawyers, Justice Franchini concluded, “Since [the Germans] had no defenders, they had no defenses.”⁴

Because of the crucial role attorneys play in safeguarding freedom, Gene took personal offense when he heard of anyone undermining the public’s faith in the legal profession.

Just listen closely to the lawyer’s jokes with vicious, not funny, punch lines. Just read the endless articles and listen to the host of TV commentators about disreputable, dishonorable, cheating, stealing, dishonest, manipulative, and unethical lawyers. Listen to the attacks on the judicial process, the attacks on jury trials, and all the rights of our citizens given them by God and recognized by our Constitution and in the Bill of Rights. Listen *especially* to the attacks upon the independence of the judiciary. Don’t think that it cannot happen here or that it cannot happen again—it can.⁵

His response to what he viewed as the “low public regard for lawyers and the legal system”⁶ was to travel the state and the country giving lectures describing his solutions for restoring faith in his beloved profession.

One particular trip stands out. In 2001, Justice Franchini agreed to address the Wyoming Bar Association on professionalism and ethics at their annual meeting in Cheyenne, Wyoming. The meeting was slated to begin on Tuesday, September 11th, and to continue throughout the week with Justice Franchini scheduled to speak on Friday. However, after the horrific events of that Tuesday morning, Justice Franchini’s flight was grounded, along with most every other flight in the country. Instead of canceling his engagement, Gene got in his car and drove all of the way to Cheyenne to share his thoughts with the members of the Wyoming Bar on

2. Gene E. Franchini, Justice, N.M. Supreme Court, Remarks on Law Day 1 (1999) (transcript on file with author). Some minor alterations were made to the speeches quoted in this article for readability purposes. No changes in substance were made.

3. *Id.* at 3 (quoting Adolf Hitler, Speech Before the Reichstag (Apr. 26, 1942)).

4. *Id.* at 5.

5. *Id.*

6. Bruce Daniels, “We Must Change,” *Justice Says*, ALBUQUERQUE J., Sept. 27, 1997, at A1.

how members of his profession had acquired a reputation for being “dishonest, unethical, selfish, unprofessional, unscrupulous, and uncaring.”⁷

A. “*The Truly Damnable Idea of Billable Hours*”

In his speech to the Wyoming Bar, Gene argued that lawyers made several “big mistakes” over time that undermined their integrity in the eyes of the people.⁸ For example, attorneys “became more concerned about our financial welfare than our clients’ welfare—both financial and personal.”⁹ This self-centered approach to the practice of the law resulted in lawyers who are “[m]ore concerned about financial results and doing *business* than about justice.”¹⁰

In Gene’s view, one of the biggest mistakes lawyers made was yielding to the demands of large corporate clients by adopting “the truly damnable idea of billable hours.”¹¹ Gene railed against the billable hour, saying that it caused attorneys to “become bean counters rather than counselors . . . [to trade] an hourly rate for quality of our service, our talent, and our reputations as lawyers regardless of the complexity of the case, regardless of whether we have succeeded or failed, regardless of the financial status of our clients.”¹²

Interestingly, one of the first opinions Gene wrote as a justice dealt with a dispute over attorney’s fees. In *Lenz v. Chalamidas*, the court was ultimately faced with a challenge to a \$15,000 award of attorney’s fees in a relatively simple lien case worth only \$13,000.¹³ Even though the trial court made extensive findings in support of the award, Justice Franchini was having none of it.¹⁴ The statute that allowed for fee shifting in the case called for “reasonable” fees.¹⁵ Obviously, Gene thought that the trial judge placed too much emphasis on the number of hours submitted by the plaintiff’s attorney.¹⁶ In a move consistent with his views on attorney’s fees but surprising for an appellate judge, Gene observed that the record was adequately developed for the court to determine a reasonable fee.¹⁷ He wrote that, because of the “relatively straightforward proceedings below,” the attorney was only entitled to \$8,000 and reduced the award accordingly.¹⁸

While this type of judicial fact-finding is generally frowned upon on appeal, Gene’s opinion won the support of Justice Baca and Justice Montgomery, resulting in a unanimous decision.¹⁹ I can almost hear Gene in conference with the other two justices ranting about how run-away fees are destroying the profession, and arguing for the need to send a clear message with this opinion.

7. Gene E. Franchini, Justice, N.M. Supreme Court, Address to Wyoming Bar Association on Professionalism and Ethics 1 (Sept. 14, 2001) (transcript on file with author).

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. 113 N.M. 17, 18, 821 P.2d 355, 356 (1991).

14. *See id.*

15. *Id.*

16. *Id.* at 18–19, 821 P.2d at 356–57.

17. *Id.* at 19, 821 P.2d at 357.

18. *Id.*

19. *Id.*

B. Prosecutorial Misconduct

State v. Breit—another unanimous opinion—also provided Justice Franchini with an opportunity to send a message to members of the New Mexico Bar concerning ethics and professionalism.²⁰ This time, the focus was on the courtroom behavior of a prosecutor in southwestern New Mexico who had clearly overstepped the bounds of zealous advocacy. In that case, after the defendant was convicted of assault with a deadly weapon and first-degree murder, the trial judge took the unusual step of granting the defendant's motion for a new trial based on "extreme prosecutorial misconduct."²¹ The question on appeal was whether the defendant's new trial was barred on double jeopardy grounds.²²

Gene's opinion recognized greater double jeopardy protections under the New Mexico Constitution than under its federal counterpart.²³ Beyond that, however, he carefully memorialized the trial proceedings in a way that continues to provide an example for prosecutors, trial judges, and appellate judges alike. The opinion lays out the litany of the prosecutor's misdeeds, and in so doing, serves as a sort of counter-manual for how to behave in a courtroom.²⁴

Gene also made a positive example of the trial judge whose written opinion conceded that she had lost control of the trial and that she should have granted a mistrial early on.²⁵ Gene acknowledged the trial judge's mistake and the courage that it took to admit it, and then proceeded to rely on her opinion, which he attached to the supreme court's, as justification for ruling in the defendant's favor.²⁶

Perhaps most impressively, however, was the restraint Gene displayed towards the prosecutor, given his abhorrence of those who make the legal profession look bad. Instead of engaging in an *ad hominem* attack, Gene focused on the prosecutor's actions, and even went so far as to search for reasons that could justify his behavior.²⁷ By taking such an even-handed approach toward an issue that he felt passionately about, Gene demonstrated that professionalism is important for appellate judges too.

C. Conscientious Objector

Gene wrote in the *Journal of Appellate Practice and Process*, that if a trial judge "simply cannot in good conscience apply a law, that judge can always resign—in fact, that may be the only alternative."²⁸ Easier said than done? Not for Gene.

In another episode that has taken on the veneer of legend, then-Judge Franchini resigned from his position as a district judge rather than sentencing a criminal defendant to a mandatory prison term as required by the state's sentencing laws. The

20. 1996-NMSC-067, 930 P.2d 792.

21. *Id.* ¶ 1, 930 P.2d at 795.

22. *See id.*

23. *See id.* ¶ 32, 930 P.2d at 803 (holding that the New Mexico Constitution bars re prosecution when the state "acts in willful disregard of a resulting mistrial, retrial, or reversal").

24. *See id.* ¶¶ 41–43, 930 P.2d at 805.

25. *See id.* ¶ 47, 930 P.2d at 806.

26. *Id.* at ¶¶ 47–48, 930 P.2d at 806–07.

27. *See id.* ¶ 46, 930 P.2d at 806.

28. Gene E. Franchini, *Conscience, Judging, and Conscientious Judging*, 2 J. APP. PRAC. & PROCESS 19, 23 (2000).

story has been recounted many times, so I will not go into the details here.²⁹ Suffice it to say, Gene steadfastly believed that a judge should have the discretion to sentence a criminal defendant according to the circumstances of each particular case because such discretion was the essence of a judge's role.³⁰ So when the sentencing act required Gene to impose a one-year prison sentence on a military veteran and first-time offender who was responsible for caring for his widowed mother, Gene held the law unconstitutional and placed the defendant on probation instead.³¹ The court of appeals reversed and ordered Gene to comply with the sentencing act.³² Rather than obey the order, Gene resigned. He stated from the bench,

So much for the concept of due process. So much for the duty to consider all circumstances surrounding the offense and all circumstances surrounding the offender before imposing a prison sentence. So much, finally, for a judge's duty, obligation, and responsibility to judge.

The law and administration of justice has always been one of the great loves of my life. I cannot and therefore will not now prostitute it or myself.³³

The move attracted widespread media attention both at the state and national levels.³⁴

D. Fear Leads to Bad Public Policy

Gene maintained that the mandatory sentencing laws which were sweeping the nation at that time were a knee-jerk reaction to fears that were being exploited by politicians and the media.³⁵ He believed that fear was the great motivator for convincing a society to give up its basic rights. "[F]ear is the most devastating of all human emotions. Because a fearful person will believe or disbelieve anything. Do or not do anything. Accept or reject anything just to feel more secure, even if it does not make the person more secure in fact."³⁶ This last point was especially galling to him.

It really doesn't seem to make a difference anymore if there is a connection between a new law and the actual reduction or elimination of our fear.

29. See, e.g., *id.* at 19–21.

30. *Id.* at 20–21.

31. See *id.* at 19.

32. See *id.* at 19–20.

33. *Id.* at 21.

34. See, e.g., Susanne Burks, *Judge Franchini Resigns over Sentence Mandates*, ALBUQUERQUE J., Sept. 29, 1981, at F1; Colman McCarthy, *Prisons, Just Who Is Punished?*, BOSTON GLOBE, Nov. 15, 1981, Editorial Page (discussing a growing national trend of mandatory sentencing laws).

35. After Gene resigned from the district court, the *Albuquerque Journal* ran a political cartoon lampooning his decision. See ALBUQUERQUE J., Sept. 30, 1981, at A5. The cartoon features two older gentlemen, wearing black robes emblazoned with the term "liberal judges," walking away from a jail. One of the judges has the keys to the cell block in his hand and is saying to the other, "Mandatory sentencing?! Dear me—what could have possessed the legislature to infringe upon our constitutional prerogatives like that?" Behind them, the jail door is wide open, and fiendish looking prisoners are pouring forth, with guns and knives raised, as citizens clamber for safety. *Id.*

36. Gene E. Franchini, Justice, N.M. Supreme Court, *Bill of Rights v. Bill of Wrongs*, Address Before the New Mexico Chapter of the ACLU (Dec. 12, 2002) (transcript on file with author).

Today, it's okay if we are in fact fearful, and this new law makes us feel better about ourselves and more secure—even if it reduces our freedom.³⁷

Gene's biggest objection to passing a law that trades freedom for a sense of security is that it will often have consequences that are unexpected and counter-productive. In a typically candid interview, Gene explained his objection to mandatory sentencing laws to a reporter.

I've been at this business a long time. . . . The one thing that I know does not reduce crime is increasing . . . time in prison for an offense. . . . Now, would you rather that [a] person [approaching you in a dark parking lot] be a guy who has just got out of prison and has been raped by everybody and everything and is meaner than snake shit, or would you rather have somebody who has been on probation supervised by a probation officer and in some kind of a program for six months or a year or two years?³⁸

Thus, a law intended to make society safer by getting “criminals” off of the streets, arguably leads to the opposite result—reducing public safety by exposing more people to the dangerous environment of our prison system.

Another example of what Gene believed to be bad public policy motivated by fear was New Mexico's adoption of the death penalty. He was on the New Mexico Supreme Court when it decided *State v. Clark*, in which the defendant unsuccessfully argued that New Mexico's Capital Sentencing Act was unconstitutional.³⁹ Justice Franchini joined the majority opinion but wrote a special concurrence to state his personal views regarding the death penalty, which he opposed on policy grounds.

I write specially to state that I am opposed philosophically and practically to the death penalty. I personally believe it to be a bad public policy. However, public policy is solely within the legislature's domain and this court is powerless to change it unless the statutory law underlying the policy is declared unconstitutional.

For the reasons set out in the opinion, the arguments advanced by the defendant do not convince me or the court that the death penalty statute in New Mexico is unconstitutional. However, those same arguments firmly convince me personally how truly flawed such a public policy is.

Since it is the duty and responsibility of a judge to interpret and apply the law to the facts of a case free of any personal or philosophical leanings or beliefs, I specially concur.⁴⁰

In a later interview, Gene explained one of his complaints about the death penalty.

[T]he death penalty doesn't de[t]er murder. . . . The only kind of a penalty that would deter crime is if you could get the death penalty for a meter

37. Franchini, *supra* note 2, at 2.

38. Nancy Plevin, *Ruling from the Heart*, SANTA FE NEW MEXICAN, Dec. 27, 1998, at F1.

39. 1999-NMSC-035, 990 P.2d 793.

40. *Id.* ¶¶ 94–96, 990 P.2d at 821. Justice Franchini renewed his objections to the death penalty in *State v. Allen*, 2000-NMSC-002, ¶ 121, 994 P.2d 728, 766 (Franchini, J., specially concurring in part and dissenting in part).

violation—that would cut down on meter violations. It may cut down on speeding as well. But other than that, it's very questionable. . . .⁴¹

Terry Clark went on to become the only person to be executed in New Mexico since 1976.⁴² Gene went on to lobby the legislature for the repeal of the death penalty after he retired from the bench in 2002. In 2009, just months before Gene died, Governor Bill Richardson signed a bill abolishing the death penalty in New Mexico.⁴³

Gene believed that education is the key to making us safer. He lamented our society's resistance to such a solution.

Americans want to have quick answers to very difficult problems, and they want them today. . . . We know what causes crime, but we really make an effort to avoid recognizing it. And we would rather spend 150,000 times more money on this superficial 'We're going to be tough-on-crime crap' than on doing what we have to do.⁴⁴

In Gene's view, a desire for instant gratification coupled with an easily manipulated sense of vulnerability make the perfect recipe for unwise policy choices that result in the loss of freedoms. "The problem is that once you give up a freedom—any freedom—you *never ever* get it back."⁴⁵

As Chief Justice,⁴⁶ Gene proudly reported to the New Mexico Legislature during his State of the Judiciary Address about a grant from the U.S. Department of Justice to create a drug court program in New Mexico.⁴⁷ He explained that, instead of having to sentence non-violent drug offenders to mandatory prison terms, the drug courts would be able to order treatment and rehabilitation.⁴⁸ Other states that had enacted similar programs had shown that they result in "reducing further criminal behavior . . . and . . . helping offenders escape their drug dependence."⁴⁹ Furthermore, instead of paying \$28,000 per year, per offender, to incarcerate non-violent drug offenders, the cost of a treatment program through the drug court would be only \$1,000 per defendant.⁵⁰ Gene called the grant "really good news."⁵¹

The drug court model has flourished for exactly the reasons Gene predicted it would—it provides a welcome alternative to mandatory incarceration, and it is

41. Plevin, *supra* note 38, at F3.

42. See Trip Jennings, *Richardson Abolishes N.M. Death Penalty*, N.M. INDEP., Mar. 18, 2009, <http://newmexicoindependent.com/22487/guv-abolishes-death-penalty-in-nm>.

43. See *id.*

44. Plevin, *supra* note 38, at F3.

45. Franchini, *supra* note 2, at 2.

46. Among Gene's accomplishments as Chief Justice was "establish[ing] a unified state judiciary budget for the \$50 million court system so districts with more talented and connected lobbyists—such as those including Santa Fe and Albuquerque—wouldn't benefit at the expense of others. . . ." Plevin, *supra* note 38, at F3.

47. Gene E. Franchini, Chief Justice, N.M. Supreme Court, State of the Judiciary Address to the 43rd New Mexico Legislature (1997) (transcript on file with author).

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

more effective at combating recidivism than the traditional approach.⁵² As an interesting aside, the drug court model likely enjoys much of its success because it returns to a judge the discretion that Gene argued was taken away by New Mexico's Mandatory Sentencing Act.⁵³

E. Sensitivity and Empathy

One of the reasons Gene was so well-loved was that despite his position and influence, he never lost that sense of who he was and where he came from. A person could meet him and come away with the impression of an ordinary guy trying to make a difference. This "everyman" quality inspired trust, confidence, and admiration in most everyone who met him. Gene deserved it.

A key element of the trust he engendered was his enormous sense of empathy with others around him. This ability to put himself in the shoes of others made him a more sensitive judge.⁵⁴ For example, in *Kennedy v. Dexter Consolidated Schools*,⁵⁵ Gene handled a delicate situation with a sense of dignity that a few other, higher profile, jurists failed to show recently when faced with a similar set of circumstances. In *Kennedy*, several high school officials forced two students—a girl and a boy—to submit to strip searches because one of their peers claimed her diamond ring was stolen during class time.⁵⁶ The students successfully sued the district and the school officials.⁵⁷ On appeal, the court of appeals affirmed the school district's liability, but reversed the judgments against the officials, holding that they were entitled to qualified immunity because their actions did not violate law that was clearly established at the time of the search.⁵⁸

Writing for the court, Gene flatly disagreed:

We now reverse the Court of Appeals and hold that, in 1992, the search of Randy Ford violated . . . his clearly established right to be free from strip searches conducted without individualized suspicion. . . .

. . . .

The same common sense that compels the conclusion that a school official cannot strip a child naked without having some individualized basis to

52. Compare Problem-Solving Courts, The Judicial Branch of New Mexico, Frequently Asked Questions, <http://joo.nmcourts.gov/joomla/pscourts/index.php/faq> (last visited Mar. 28, 2010) (claiming a 9.5 percent recidivism rate among participants within the first three years of graduation from a drug court program) with Trip Jennings, *Quarter of State Prison Education Jobs Are Vacant*, N.M. INDEP., Sept. 23, 2009, <http://newmexicoindependent.com/37004/quarter-of-state-prison-education-jobs-are-vacant> ("Currently, New Mexico's 47 percent recidivism rate is lower than the national average of 52 percent. . . .").

53. See DAN CATHEY, N.M. SENTENCING COMM'N REPORT, OFFENDER REHABILITATION AND RECIDIVISM REDUCTION: A RESPONSE TO HOUSE MEMORIAL 68 at 3 (2007), available at http://nmssc.unm.edu/nmssc_reports/ ("In its simplest form, a drug court uses the power of a judge to keep a drug offender in treatment, providing rewards for successes, and sanctions for failures.").

54. In an interview, Gene said that he was most proud of his opinion in *Romero v. Byers*, 117 N.M. 422, 427–28, 872 P.2d 840, 845–46 (1994), in which the court held that statutory beneficiaries could recover damages in a wrongful death action for the deceased's loss of life, even if the beneficiaries had not suffered any pecuniary loss. See Donna Olmstead, *Long Arm of the Law*, ALBUQUERQUE J., Apr. 17, 2005, at A8. *Romero* was also the case in which New Mexico became the last state to recognize a claim for loss of consortium. 117 N.M. at 426–27, 872 P.2d at 844–45.

55. 2000-NMSC-025, 10 P.3d 115.

56. *Id.* ¶¶ 1–3, 10 P.3d at 117–18.

57. *Id.* ¶ 1, 10 P.3d at 117.

58. *Id.*

suspect that child of wrongdoing, also mandates that a child cannot be stripped to his boxer shorts by officials who have no reason to suspect him individually. . . . While forcing the exposure of a child's genitals is more invasive than forcing the exposure of a child's chest, midriff, thighs, and underwear, we cannot accept that this distinction marked the outer boundary of the breadth of clearly established Fourth Amendment rights in 1992. . . .

Regardless of the degree of the student's physical exposure, subjecting a student to any strip search under these circumstances constitutes a violation of his clearly established rights.⁵⁹

Gene's choice of language makes it clear that he was sensitive to the potential effect of a search like this on a teenager. And he interpreted the law as any concerned parent would hope he would.

Interestingly, in *Safford Unified School District v. Redding*, the U.S. Supreme Court recently came to the opposite conclusion on the issue of qualified immunity, holding that the strip search of a student in that case was not a violation of clearly established law.⁶⁰ I have no doubt that Gene was appalled by that decision. I am just as certain that he was pleased by Justice Ginsburg's reproach of her colleagues for their lack of sensitivity.⁶¹ As Gene explained in *Kennedy*, putting legal technicalities aside, the issue was a no-brainer. Sometimes common sense has to prevail.⁶²

Gene brought his sense of empathy to his professional interactions as well. He recognized his own faults, and as a result, he had a tremendous sense of understanding when someone made a boneheaded decision or needed to be taken down a few pegs. He once told me a story about a run-in that he had as a trial judge with a prominent local attorney, Charlie Driscoll. Driscoll was legendary throughout the state as a brilliant, passionate, and aggressive defense attorney who routinely pushed the limits of courtroom practice and conventional decorum. Driscoll was defending a client in Judge Franchini's courtroom and had begun to carry on, eventually crossing the line. Not wanting to embarrass his old friend publicly (or provoke him) Gene recessed the proceedings and ordered Driscoll to his chambers—without the district attorney and without his client(!). Gene told Driscoll, "Charlie, I just want you to know you're doing a hell of a job with this case. But if you pull a stunt like that again, I'll hold you in contempt and throw your ass in jail so fast,

59. *Id.* ¶¶ 11, 15, 19, 10 P.3d at 120, 121, 122.

60. 129 S. Ct. 2633 (2009).

61. In the oral arguments for *Safford Unified School District v. Redding*, several U.S. Supreme Court justices drew attention for their somewhat flippant remarks concerning the strip search of a thirteen-year old girl who was accused of distributing ibuprofen at school. Joan Biskupic wrote in a piece for *USA Today*,

During oral arguments, some other justices minimized the girl's lasting humiliation, but Ginsburg stood out in her concern for the teenager.

"They have never been a 13-year-old girl," she told USA TODAY later when asked about her colleagues' comments during the arguments. "It's a very sensitive age for a girl. I didn't think that my colleagues, some of them, quite understood."

Joan Biskupic, *Ginsburg: Court Needs Another Woman*, USA TODAY, May 5, 2009, http://www.usatoday.com/news/washington/judicial/2009-05-05-ruthginsburg_N.htm; see also Dahlia Lithwick, *Search Me*, SLATE, Apr. 21, 2009, <http://www.slate.com/id/2216608/pagenum/all/#p2>.

62. *Kennedy*, 2000-NMSC-025, ¶ 15, 10 P.3d at 120–21.

you won't know what hit you." The two men returned to the courtroom, and the trial proceeded to its conclusion with everyone behaving amicably.

In a similar vein, I was once on the receiving end of one of Gene's "little talks." While I was a judge on the court of appeals, I was assigned authorship of a case that presented an issue of first impression for New Mexico's appellate courts. We were asked to decide whether a party can recover damages for the loss of a chance of recovery due to a physician's negligence, where the chance of recovery was less than fifty percent.⁶³ I knew that this issue was pending before the New Mexico Supreme Court in another case,⁶⁴ but in one of my more impatient moments, I convinced my colleagues that we should decide our case and issue an opinion anyway. After all, who knew how long it would take those pedantic justices to get their act together? As it turns out, I finished my opinion first and filed it with the clerk.

Shortly thereafter, I got a knock on my door and looked up to see Gene waving a copy of my opinion in the air. "Goddammit, Dick, what the hell were you thinking?" He told me that his chambers had been hard at work writing a very strong opinion, an opinion that he was proud of, and that they were nearly ready to file it. However, since my opinion came out first, "when we file ours, we're gonna' look like a bunch of idiots—like the left hand doesn't know what the right hand is doing." Of course he was right, and all that I could do was sit there and take it in shamed silence. But after he had spoken his mind, he simply said, "Okay," and left.

We never spoke about it again, but when I later read his opinion, I was humbled by the grace with which he handled the situation:

Prior to our publication of this opinion, the Court of Appeals, on its own initiative, issued *Baer v. Regents of the Univ. of Cal.*, in which it expressly adopted the lost-chance concept that we were asked to evaluate in this opinion. Because we find the Court of Appeals' thoughtful analysis in *Baer* to be persuasive, we now affirm the adoption of the lost-chance theory in New Mexico.⁶⁵

The way Gene handled Driscoll, and me, shows that he was a man who was comfortable with his position of authority and that he was unafraid of exercising his power, but that he did not have to make a show of either. More remarkably, though, Gene could put you in your place bluntly and forcefully without making you resent him. No humiliating. No belittling. And he did not hold a grudge once he spoke his peace. He could have berated Charlie Driscoll and gotten into a shouting match in front of the entire courtroom. But he didn't. He could have rebuked me publicly in his lost-chance opinion for being an upstart court of appeals judge. But he didn't. He treated Driscoll and me exactly the way he would have wanted if our positions were reversed.

II. "INJUSTICE IS ALMOST ALWAYS RECOGNIZABLE."

For Gene, the role of a judge was all about justice. For a court to allow an unjust result at the expense of an abstract legal principle could only undermine the faith

63. See *Baer v. Regents of the Univ. of Cal.*, 1999-NMCA-005, ¶ 1, 972 P.2d 9, 10.

64. See *Alberts v. Schultz*, 1999-NMSC-015, ¶ 9, 975 P.2d 1279, 1282.

65. *Id.* (internal citations omitted).

of the public in the legal system.⁶⁶ He wrote, “We cannot always recognize justice but injustice is almost always recognizable. It happens mostly to those people who we as lawyers pledge to protect: the poor, the disenfranchised, the young, the ignorant, the angry, the misinformed, the misguided, and the despised—those without much help, if any, from anybody.”⁶⁷ Gene authored several opinions that reflected his unwavering commitment to justice.

A. *Delgado v. Phelps Dodge*

One of Gene’s highest profile opinions, *Delgado v. Phelps Dodge Chino, Inc.*, avoided injustice by deviating from widely accepted principles of workers compensation law.⁶⁸ *Delgado’s* facts were truly horrific. The defendant employed Delgado at its copper smelting plant in southwestern New Mexico.⁶⁹ The main work done at the plant was extracting copper ore from unuseable rock, or “slag,” by superheating it in a furnace to over 2000 degrees and skimming the ore off of the top.⁷⁰ The molten slag drained down a chute to a fifteen-foot-tall cauldron that workers emptied by sealing off the chute and retrieving the cauldron from the end of a tunnel with a special machine called a “kress-haul.”⁷¹

On the day in question, the cauldron began to overflow because the workers were unable to stop the flow of slag.⁷² Instead of shutting down the furnace, however, the plant managers ordered Delgado to drive the kress-haul down the tunnel and retrieve the cauldron as slag continued to flow from the furnace.⁷³ Delgado protested that he had never operated a kress-haul under those types of conditions, but his bosses insisted.⁷⁴ Delgado obeyed, and shortly after driving into the tunnel, other workers observed black smoke billow out, and Delgado came running out of the tunnel, “fully engulfed in flames.”⁷⁵ He received third-degree burns all over his body and died several weeks later.⁷⁶

Delgado’s wife sued Phelps Dodge for the wrongful death of her husband and various other common law claims, but the trial court dismissed her suit because the Workers’ Compensation Act (WCA) provides that it shall be the exclusive remedy for injuries occurring on the job that are “accidental.”⁷⁷ Our court of appeals affirmed that the WCA was Delgado’s exclusive remedy, citing our prior case law

66. Gene was devoted to the law as an institution, and he worked tirelessly to maintain confidence in the courts and the legal profession in general. During his term as chief justice, he commissioned a survey to measure public sentiment regarding lawyers and the courts. See Plevin, *supra* note 38, at F3. He was dismayed to learn that approximately two-thirds of New Mexicans believed that the legal system was too slow, too expensive, and did not treat them well. See Gene E. Franchini, Chief Justice, New Mexico Supreme Court, State of the Judiciary Address (1998) (transcript on file with author). He responded by enacting several new programs aimed at restoring faith in the New Mexico judiciary. See Plevin, *supra* note 38, at F3. He also traveled the state and put a face on the legal profession that people could relate to.

67. Franchini, *supra* note 7, at 3.

68. 2001-NMSC-034, ¶ 1, 34 P.3d 1148, 1150.

69. *Id.* ¶ 3, 34 P.3d at 1150–51.

70. *Id.*

71. *Id.*

72. *Id.* ¶ 4, 34 P.3d at 1151.

73. *Id.*, ¶¶ 4–5, 34 P.3d at 1151.

74. *Id.* ¶ 5, 34 P.3d at 1151

75. *Id.*

76. *Id.*

77. See *id.* ¶¶ 7–8, 34 P.3d at 1151.

and *Larson's*, a widely respected treatise on workers' compensation law which advocates for the "actual intent" standard.⁷⁸

Gene wrote an opinion in which the court unanimously overruled its prior case law and rejected the "actual intent" standard, despite the "near unanimity with which it has been accepted nationwide."⁷⁹ Gene noted first that the "actual intent" standard is not explicitly stated in the WCA.⁸⁰ However, the WCA contains a provision that requires courts to construe it in a manner that does not favor employers or employees.⁸¹ Looking to the WCA, Gene noted that it relieves an employer from its obligation to pay out benefits to an injured worker if the injury was the result of the worker's intentional *or willful* behavior.⁸² By contrast, the actual intent standard provides an employer with immunity from suit unless the injured worker can demonstrate intentional behavior.⁸³ Gene reasoned that the actual intent standard, therefore, unfairly favors the employer, because it sets a lower standard for employers to deny benefits to employees (intentional *or willful*), than it does for employees to seek compensation beyond the protections of the WCA (intentional only).⁸⁴ Put another way, the actual intent standard virtually guarantees an employer immunity from suit—an intent to cause harm is virtually impossible to prove—while preserving the employer's ability to deny benefits if it can prove the employee's behavior was willful—a much more forgiving standard. The court held that this disparity violated the WCA's command to be construed impartially.⁸⁵

Gene reminded employers that their actions would thereafter be evaluated under the same standards that employers use to deny benefits to their workers under the WCA.⁸⁶ He also responded to a "flood gates" argument that abandoning the "actual intent" standard would "wreak havoc" on the workers' compensation system: "The greater the impact this opinion has on the workers' compensation system, the more profound will have been its need."⁸⁷

A colleague of mine on the New Mexico Supreme Court related to me that Gene was the driving force behind the *Delgado* decision. Gene came up with the idea that the actual intent standard was inconsistent with the WCA's requirement that it be construed even-handedly. Remarkably, he wrote an opinion that broke new ground in a settled area of law, and he convinced his colleagues to join him without drawing a dissent—an accomplishment that I can attest is no easy feat.

78. *Id.* ¶ 8, 34 P.3d at 1151–52 (citing 6 ARTHUR LARSON & LEX LARSON, LARSON'S WORKERS' COMPENSATION LAW § 103.03 (2000) (allowing a common law suit only in the rare circumstance where the employer actually intends to injure the employee)).

79. *Id.* ¶18, 34 P.3d at 1153.

80. *See id.* ¶ 1, 34 P.3d at 1150.

81. *Id.* ¶ 17, 34 P.3d at 1154.

82. *See id.* ¶ 14, 34 P.3d at 1153 (citing NMSA 1978, § 52-1-11 (1989)).

83. *Id.* ¶ 16, 34 P.3d at 1153.

84. *Id.* ¶¶ 20–23, 34 P.3d at 1154–55.

85. *Id.*, ¶ 23, 34 P.3d at 1155.

86. *Id.* ¶ 31, 34 P.3d at 1156–57.

87. *Id.*

B. *Reed v. State ex rel. Ortiz*

Gene's most notable stand against injustice as a jurist came in *Reed v. State ex rel. Ortiz*.⁸⁸ Timothy "Little Rock" Reed, an Ohio convict who fled to New Mexico while on probation, petitioned for a writ of habeas corpus after he was arrested in Taos and faced with extradition.⁸⁹ At the habeas hearing, Reed testified that before being released on probation, he was an outspoken critic of the Ohio Corrections Department, having published several articles from his prison cell and written numerous letters related to the religious rights of Native American inmates.⁹⁰ He continued his advocacy while on probation, drawing the ire of prison officials and threats from guards who claimed that they would hurt or kill him if he ever returned to prison.⁹¹ Shortly before Reed's probation was up, his probation officer informed him that he would be sent back to prison because of a new criminal charge—a charge that Reed could prove was fabricated if given the chance to do so, as required by due process.⁹² His probation officer insisted that Reed first surrender himself to the Ohio authorities. Rather than comply, Reed fled.⁹³ After a three-day hearing, the New Mexico District Court granted the writ, holding that "Reed was not a fugitive from justice because the uncontroverted evidence show[ed] that he left Ohio 'under duress and under a reasonable fear for his safety and his life.'"⁹⁴

On appeal, the New Mexico Supreme Court was confronted with a body of law that is well-established and straightforward. The U.S. Supreme Court's decision in *Michigan v. Doran* severely limits the discretion of a court in the asylum state by establishing a strong presumption in favor of extradition.⁹⁵ However, writing for the majority, Gene reasoned that because *Doran* held that the presumption can be overcome, "[s]ome cases may present circumstances so unusual and egregious that the asylum state has no choice but to deny the extradition warrant and grant habeas corpus to the defendant."⁹⁶ As a result, the judge in the asylum state must have some discretion to determine whether the facts of a particular case can demonstrate that the petitioner is not a fugitive from justice.⁹⁷

After making this small chink in *Doran*'s armor, Gene framed the issue in a way that allowed him to rule in Reed's favor.

The focus of our analysis is whether Reed is a "fugitive from justice"; in other words, whether he seeks to avoid the maintenance and administration of what is just. The facts demonstrate conclusively that Ohio's conduct toward Reed was not just. Reed is thus not a fugitive from justice. Rather, he is a refugee from injustice.⁹⁸

88. 1997-NMSC-055, 947 P.2d 86, *rev'd*, 524 U.S. 151 (1998).

89. *See id.* ¶¶ 1, 34–35, 947 P.2d at 88, 93–94.

90. *See id.* ¶¶ 3–4, 947 P.2d at 89.

91. *See id.* ¶¶ 10–12, 16, 947 P.2d at 89–90.

92. *See id.* ¶ 22, 947 P.2d at 91.

93. *See id.* ¶ 23, 947 P.2d at 92.

94. *Id.* ¶ 42, 947 P.2d at 95.

95. *See id.* ¶ 48, 947 P.2d at 96 (citing *Michigan v. Doran*, 439 U.S. 282, 289 (1978)).

96. *Id.* ¶ 71, 947 P.2d at 100.

97. *Id.* ¶ 69, 947 P.2d at 100.

98. *Id.* ¶ 86, 947 P.2d at 103.

The opinion goes on to explain that the Ohio Parole Authority's decision to deny Reed due process placed him in the untenable position of either violating his parole, or facing death or great bodily harm when he returned to Lucasville.⁹⁹ Refusing to allow Ohio to extradite Reed, Gene concluded,

Extradition laws are intended to bring offenders to justice. They are not intended to be—and we cannot suffer them to be—a vehicle for the suppression of constitutional rights. Courts in this nation have always been empowered to prevent injustice. *See [In re] Hampton*, 2 Ohio Dec. [579, 579 (Hamilton County C.P. 1895)] (refusing to extradite defendant who was in proven danger of being lynched). Habeas extradition proceedings are not exempted from the exercise of this power.¹⁰⁰

After losing at the New Mexico Supreme Court, the State appealed to the U.S. Supreme Court, and in Gene's words, "[i]t didn't take long for them to nail us on that one."¹⁰¹ In a per curiam opinion reversing the New Mexico Supreme Court and remanding the case, the Supreme Court held that our state supreme court went beyond the bounds of the permissible inquiry in an extradition proceeding.

We accept, of course, the determination of the Supreme Court of New Mexico that respondent's testimony was credible, but this is simply not the kind of issue that may be tried in the asylum State. *In case after case* we have held that claims relating to what actually happened in the demanding State, the law of the demanding State, and what may be expected to happen in the demanding State when the fugitive returns are issues that must be tried in the courts of that State, and not in those of the asylum State.¹⁰²

Gene's opinion in *Reed* is—to say the least—controversial. It drew both a dissent and a special concurrence from two of his colleagues that correctly identified where the opinion stretched the limit of existing precedent.¹⁰³ Additionally, the U.S. Supreme Court's language that "*in case after case*" it had clearly defined the limits to which an asylum state could go in reviewing a warrant of extradition, reveals the unorthodoxy of Gene's approach.

Gene's sense of right and wrong, however, compelled him to bend over backwards to find a way to protect Reed from what he saw as oppressive governmental action. Because of the combined efforts of the New Mexico courts, Reed was able to avoid extradition for almost four years. A good case can be made that the national press Gene's opinion drew may have led the Ohio Parole Authority to re-

99. *Id.* ¶ 87, 947 P.2d at 103.

100. *Id.* ¶ 126, 947 P.2d at 112.

101. Plevin, *supra* note 38, at F3.

102. *State ex rel. Ortiz v. Reed*, 524 U.S. 151, 153 (1998) (emphasis added). After the U.S. Supreme Court's reversal, Reed went into hiding for several months until he was arrested in Albuquerque and sent back to Ohio. *See* Rodd Aubrey, *Indian-Prison Activist Released from Prison*, ASSOCIATED PRESS, Dec. 17, 1998. Then, just two weeks later, the Ohio Parole Authority released Reed to serve out the remaining six weeks of his parole. *See id.* After completing his sentence, Reed returned to New Mexico, this time settling in the Jemez Pueblo, and resumed his career as a paralegal. *See* Letter from Deborah Hare, available at <http://www.tahtonka.com/news.html>. Tragically, just a year later, Reed died in a car accident near Cuba, New Mexico, at the age of thirty-nine. *See id.*

103. *See Reed*, 1997-NMSC-055, ¶¶ 128–50, 947 P.2d at 112–20 (Minzner, J., specially concurring); *id.* ¶¶ 151–59, 947 P.2d at 120–21 (Baca, J., dissenting).

lease Reed on parole rather than send him back to prison after his extradition.¹⁰⁴ At the risk of hyperbole, Gene likely played a role in saving Reed's life.¹⁰⁵

Gene explained his reasons for the *Reed* decision in an interview. "The extradition clause and the way it's been interpreted by the U.S. Supreme Court is so austere. They sent people back to the South knowing they were going to be lynched—and they sent them back anyway."¹⁰⁶ This comment reveals the magnitude of what Gene believed was at stake. This was his *Dred Scott*¹⁰⁷ or *Plessy v. Ferguson*,¹⁰⁸ and like the dissenters in those cases, he was not going to sit by and watch as others took what he saw as a near-sighted, though seemingly inevitable, view of the law. That the U.S. Supreme Court later reversed him misses the point.¹⁰⁹ Gene's opinion was more concerned with what he viewed as the fundamental goal of the legal system—justice for all. Remarkably, as in *Delgado*, he was able to persuade a majority of his colleagues to accept this viewpoint and interpretation of the law.¹¹⁰

This last point perhaps best sums up Gene's efficacy as a judge. He was unquestionably bright, but by his own admission, he may not have been the smartest or the most articulate guy on the bench. He was creative and persuasive, and most importantly, he knew what was right. And you could always count on him to *do* what he believed was right. That is what made him eminently qualified to sit in judgment of others. Few people ever develop such a clear sense of themselves *and* have the integrity to follow it.

AFTERWORD

In the Academy Award-winning movie, *Judgment at Nuremberg*, American Judge Dan Haywood, a humble, somewhat ruffled, small-town trial judge played by Spencer Tracey, presides over the trial of accused Nazi war criminals.¹¹¹ Among those before Judge Haywood is Herr Ernst Janning, a brilliant and distinguished

104. See Aubrey, *supra* note 102.

105. As an aside, this was not the first time that Gene defied extradition law to protect a fugitive from an oppressive situation waiting for him back in his home state. As a trial judge, Gene dismissed a writ of extradition of a Mexican National who had agreed to pay a Mexican mafia boss sixty-five percent of his salary in return for a U.S. green card. See Plevin, *supra* note 38, at F3. After realizing that he couldn't survive on so little income, the man fled to Albuquerque, where he was arrested and served with extradition papers. See *id.* According to Gene, the mafia boss had the San Antonio District Attorney "in his hip pocket" and convinced him to charge the man with larceny for refusing to pay the boss his cut of the man's wages. See *id.* After Gene dismissed the writ, he contacted the man and told him, "You better get your ass out of here cause this thing isn't going to hold up." *Id.* The State appealed to the New Mexico Supreme Court, and again, in Gene's words, "they reversed me *como pronto*." *Id.*

106. *Id.*

107. *Dred Scott v. Sandford*, 60 U.S. 393 (1856) (holding that slaves are property that must be returned to their owners when they so demand), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

108. *Plessy v. Ferguson*, 163 U.S. 537 (1896) (holding that a Louisiana law that segregated train passengers by race did not violate the Thirteenth Amendment or Fourteenth Amendment), *overruled by Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

109. Gene probably knew he would be reversed, but he was not intimidated by the U.S. Supreme Court or the federal government. He wrote the *State v. Cardenas-Alvarez* opinion, in which the court held that evidence obtained by federal border patrol agents in accordance with the Federal Constitution is nonetheless inadmissible in New Mexico's state courts if it was obtained in violation of New Mexico's more protective state constitutional requirements. See 2001-NMSC-017, 25 P.3d 225.

110. Justice Serna and Justice McKinnon joined Justice Franchini in the majority opinion. See *Reed v. State ex rel. Ortiz*, 1997-NMSC-055, ¶ 127, 947 P.2d 86, 112, *rev'd*, 524 U.S. 151 (1998).

111. See *JUDGMENT AT NUREMBERG* (United Artists 1961).

German jurist, played by Bert Lancaster, who admits to having sentenced innocent parties to death under pressure from the German government. Judge Haywood himself is under intense pressure to go lightly on Herr Janning and the others for all the usual reasons of convenience: no one could have known of the horrors of Nazism; people were following orders and just doing their duty; there are even questions of *realpolitik* urging leniency so as not to inflame the post-war German public in the imminent Cold War between East and West. The judge agonizes over the age-old conflict between the strict letter of the law and overarching principles of justice.

Acknowledging the logic of such arguments for leniency, Judge Haywood reaches deep into his sense of conviction: "It is logical in view of the times in which we live. But to be logical, is not to be right. And nothing on God's earth could ever make it right."¹¹² The defendants are found guilty; Herr Janning faces life in prison.

As the judge is about to return home to America, he is asked to visit Herr Janning in prison and does so. Herr Janning again acknowledges his crime and the courage it took for Judge Haywood to find him guilty:

I know the pressures that have been brought upon you. You will be criticized greatly. Your decision will not be a popular one. But if it means anything to you, you have the respect of at least one of the men you convicted. By all that is right in this world, your verdict was a just one.¹¹³

And then in perhaps the most gripping moment in the film, Herr Janning turns to the judge, almost pleading for understanding on Judge Haywood's part: "Those people—those millions of people—I never knew it would come to that. You must believe it."¹¹⁴ Judge Haywood's response, simple and direct, says it all: "Herr Janning—it came to that the first time you sentenced a man to death you knew to be innocent."¹¹⁵

Try as I might, I cannot get that image out of my mind. Gene Franchini had what it takes, as few of us do, to be a Judge Haywood when we needed one.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*