

Fire, Death, Coerced Confession, and a Wrongful Conviction: The Mark Kirk Story

By Michael H. Fox

"In the event of a fatal fire, the survivors will likely be charged with arson."
Gerald Hurst¹

Introduction

Ask 100 defense attorneys in the U.S to cite the major problem with criminal defense and you will get a variety of answers. There is a strong belief that the burden of proof, not only in theory-but in fact, is on the prosecution. And where there is not strong evidence of guilt, the defendant will likely walk free. The O.J. Simpson case did much to bolster this view.

Mark Kirk's case in Delaware vividly exposes that an innocent person can easily be convicted by prosecutors who disregard facts and common sense while relying on a coerced confession and junk science.

The Mark Kirk Case: Is something rotten in the state of Delaware?

On December 4, 1996, 35-year-old Mark Kirk and his girlfriend Darlene entertained some guests at their New Castle, Delaware apartment. New Castle is a few miles south of Wilmington, and about 40 miles south of Philadelphia, Pennsylvania.

Mark had moved in with Darlene and her two sons just two weeks before. The four had been drinking since early in the day. When Darlene began flirting with one of the guests, Mark became enraged. A vicious argument erupted and the guests left.²

Mark and Darlene continued to argue, and eventually agreed to a truce until the next day. In the early morning hours, while all were asleep, smoke began billowing from the kitchen. All four occupants managed to escape the apartment unharmed. The family in the apartment above were not so fortunate. A cruel act of fate, a father, and his two children ages 17 and 8, died in the blaze.

Kirk was told to appear at the police station the next day. He was interrogated by Fire Marshall Willard Preston. After many hours of pressure, Kirk admitted on video to deliberately starting the fire by pouring Captain Morgan's Spiced Rum onto one of

the stove's electric burners. He was arrested and charged with three counts of murder.

Junk Science

There is one serious problem with this confession. Captain Morgan's Spiced Rum is entirely non-flammable. It is only 35% alcohol (70 proof). The remaining 65% is water, flavors, and other ingredients which retard burning. It is not like Bacardi 151, which is 75.5% alcohol, and labeled "Danger: Flammable."

So how did the fire start? Several days before the blaze, a grease fire occurred on the same stove. Mark, just newly moved in, cleaned the electric coil, and then lifted up the stove top. He was shocked to see a pool of grease. Keeping the house clean and safe was not part of Darlene's agenda. The occupants agreed not to use the problematic burner until the apartment complex maintenance man was available for repair. A stroke of vicious irony, the maintenance man was the father who perished in the above apartment.

Grease fires usually occur when a stove is hot. So how, did the fire start in the middle of the night? The partiers, smoking without lighters, were using the stove to light cigarettes. It is quite likely that the stove was left on before the angry couple turned off the lights and went to sleep.

While awaiting trial, a guard at the jail, a part time firefighter who was called to the scene, offered Kirk an opinion. "I have never seen a fire spread so fast. It is hard to believe the building was constructed properly. A normal apartment should be better able to withstand a fire from a stove."³

Kirk begged the guard to testify but he refused. "I have to think about my family."⁴

Further Evidence: Grease and Fire

Ten months after the fire, at the request of the prosecution, a technician examined the stove. The stove was made by Roper for Sears but the prosecution erred and requested Whirlpool to make the examination. The technician reported that there was no malfunction.⁵

This finding was unsurprising. In fact few fires ever occur from stove dysfunction. The technician testified that "The Consumer Product Safety Commission has established *inadvertent* (my emphasis) fires from the use of cooking appliances is now the leading cause of fires in the United

States."⁶ He also added that "the typical inadvertent cause is usually related to fat, grease or oil", a fact reiterated time and time again by the National Fire Protection Association.⁷

A perusal of archives from Delaware's largest newspaper, *The News Journal*, strongly confirms this fact. A simple web search turned up a shocking amount of articles caused by grease fires.⁸ In fact, a fire in the exact same apartment complex in the year 2000 was ruled an accident!⁹

Death Aware in Delaware

Ineffective assistance of counsel occurs in different varieties. The most heinous is when an innocent defendant is deemed guilty by counsel without even a perfunctory investigation. When attorneys believe a client is guilty, the triers of fact will certainly think the same. Before trial, one of Kirk's attorneys openly admitted his client's guilt. He commented to the press, "Kirk never intended to burn the building, but was trying to destroy the alcohol that fueled the couple's problems."¹⁰

Apparently, Kirk's lawyer's only goal was to spare their client from Delaware's well used needle. A sentence of life, with or without parole, was the goal. Unknown to the public, Delaware is still one of the nation's leading per capita execution states. In fact, the second smallest state in the nation ranks as number three in gross per capita executions, just behind Oklahoma and Texas. With three executions alone in 1996, the year Kirk was arrested, the attorneys fear was not unfounded.¹¹

At trial, the prosecution announced that it would seek death. In order to save their client, Kirk's attorneys opted for a bench trial – that is a trial by a judge without a jury. They convinced Kirk to waive his right to a jury trial. Juries are easy to inflame, convention goes, especially with victim impact statements. Better to leave the verdict to an impassive judge.

Needless to say, how could the prosecution prove the impossible? What evidence could possibly prove how an inflammable liquid could be used to start a fire? The problem was easily solved. The state furnished a filmed burn test showing Captain Morgan's Spiced Rum erupting into a pyrotechnic flame when pooled upon a hot electric burner. Kirk's attorneys presented their own burn test in which the rum failed to ignite. In the end, the judge ruled that the two tests

Kirk cont. on p. 4

Kirk cont. from p. 3

canceled each other out, and the confession carried weight.

The defense strategy worked. Kirk was spared the death penalty and sentenced to three consecutive life terms plus 23 years.

Could Kirk's attorneys have done more for their client? In fact, they could not have done any less. The obvious action would have been to contact the manufacturer of Captain Morgan's Spiced Rum and subpoena information about the product's flammability. But neither attorney bothered to do the obvious.

Kirk Case. Pro se: the only way?

Delaware has a two tier criminal court system: the superior court, and the supreme court. After his direct appeal was rejected, Kirk asked the court for new PCR counsel. Despite the fact that this was originally a capital case, the court refused. A situation without rhyme or reason, Kirk was forced to become his own lawyer. His PCR appeals were rejected.

The Expert's Test

Ten years into his incarceration, Kirk wrote John Lentini, Ph.d, author of "Scientific Protocols for Fire Investigation"¹² and considered the leading expert in the field. Lentini travels the country and lectures to all sort of audiences. He has spoken at the Innocence Network Conference and is sought after from both sides of the bench. Above all, he enjoys speaking in front of prosecutors, whom he refers to as "the gate keepers of our criminal justice system."¹³

In 2006, Lentini conducted three tests to check the flammability of Captain Morgan's Spiced Rum. Despite his best effort, the rum would not ignite.¹⁴ The tests were filmed by Lentini, and the video was posted on Youtube.com by Justice Denied on December 5, 2006. The video can be viewed online at, <https://www.youtube.com/watch?v=zDqGhdxBceQ>.

With this new evidence, Kirk again requested that the state appoint PCR counsel. The request was turned down. Once again, he submitted this new evidence pro se. It should have been a slam dunk, the Lentini tests unequivocally prove that the state's burn test was an utter fabrication. Needless to say, his PCR appeals were rejected. The courts found the new evidence



John Lentini in controlled experiment to determine the flammability of Captain Morgan's Spiced Rum.

to be "untimely" and "cumulative".¹⁵

Needing assistance with a writ of habeas corpus, Kirk contacted the Federal Public Defender in Philadelphia, enclosing copies of the Lentini tests. They also refused the case. Once again he was forced to file for habeas relief pro se. Once again, his appeals were denied.

Poetic Justice?

Kirk did have several pyrrhic victories. In 2003, with a change to the definition of the state's felony murder rule, he made a timely pro se appeal which resulted in re-sentencing. He was re-sentenced to 46 years, a fair decrease from his first sentence of three life terms plus 23 years.

The Lentini tests did bring an unexpected result. Fifteen days after Kirk submitted this new evidence, J. Willard Preston, the fire marshall who both interrogated Kirk and fabricated the state's burn test, abruptly resigned on April 6, 2007. Fire commission members were startled. "The sudden resignation was a shock." Preston gave no reason for the resignation.¹⁶

A second instant of poetic justice would soon follow. On November 12, 2008, Donald Roberts, one of Kirk's two prosecutors, was arrested. He was charged with drunk driving and public intoxication. He continued to drink and drive and was arrested again on December 4th. In addition to DUI, this time, he was also charged with breaking and entering. He plead guilty, and later resigned his position as prosecutor.¹⁷

Death would be better

As mentioned above, Kirk's attorneys only goal was to spare their client from the needle. This they achieved, but ironically, a sentence of death would have been better. Had Kirk received the death penalty, his case would have attracted attention. Death

sentences play prominently in the media. Attorneys would have been appointed for all his appeals, and with the Lentini evidence, his sentence would certainly have been reversed.

And nobody understood this better than the prosecution. On the last day of his original trial, after the state asked for death, a special evening session was convened. Kirk, back at the jail, and already changed out of his court clothes was suddenly called back to court. After demanding death, the prosecution requested a sentence of life imprisonment.

Interestingly enough, this episode was not transcribed, and no record exists. District Attorney Roberts complained that "Kirk is cunning enough to beat the system. We want to keep him inside. We therefore ask that he be sentenced to life without parole."¹⁸

Redux: The Question of 'Why'?

The Kirk case is nothing less than a complete frame-up. The fire marshall, a law school graduate with 19 years experience in that office, and whom we can assume to be a competent authority, even an expert in fire analysis, knew from the get-go that Captain Morgan's Spiced Rum was inflammable. Needless to say, he pressed ahead with investigation, knowing this defendant to be innocent. And his sudden resignation and flight from the state after the submission of the Lentini tests certifies this malfeasance.

Why would the authorities want to frame Kirk? Two reasons come to mind. If indeed the apartment was not built according to code, somewhere, someone, would be guilty of fraud. Indeed more than someone, perhaps a large part of the building industry in this small state could come under the microscope. And it is not hard to imagine that one of the actors would be the fire marshall's office. Conspiracy theories aside, the potential for a statewide scandal is quite palpable.

A second likely reason for the Kirk arrest was to divert the investigation away from Darlene, Kirk's girlfriend. Upon arriving at the police station for questioning the day after the disaster, Kirk was surprised to learn that the police knew Darlene by name, and were convivial toward her. Either they knew her previously, or were advised in advance that she was not to be interrogated.¹⁹

So the police motives come into focus. As mentioned above, this story begins with a grease fire. The investigation certainly

Kirk cont. on p. 5

Kirk cont. from p. 4

discovered that the grease build up inside the stove was unsafe. As mentioned above, Darlene was not one to put too much time into housekeeping.

Still, one has a legal duty to keep one's home safe and free from hazard. Ignoring the danger of grease build up and endangering others is a crime. A strong case could be made for negligent homicide or manslaughter. But Darlene was spared from prosecution, and Mark Kirk became the public enemy.

Mass Indifference of the Mass Media

One would think that with scientific evidence of wrongful conviction, the mass media would take interest in Kirk's case. I have sent enquiries to every major American news show. These include *Dateline NBC*; *American Justice*; *20/20*; *Primetime: What Would You Do?*; etc. Not one has shown an iota of interest.

In fact, when I broached the case to Ofra Bikel at the 2012 Innocence Network Conference, she replied, "I don't like fires or burned bodies. I like DNA."²⁰ Though I mentioned that burned bodies would not play a part in this case, she nevertheless spurned my request.

And not only the media. I have contacted the Delaware offices of the NACDL, the International Association for Arson Investigators (IAAI), the ACLU, and even C.U.R.E (Citizens United for the Rehabilitation of Errants) seeking advice and support. I have received none. Kirk has written to various Innocence Projects and has never received a reply. It appears that something is rotten in the state of Delaware.

An Unusual Friendship

I learned of the Mark Kirk case through the 2004 article "Convicted of Starting a Deadly Fire with an Unburnable Substance" in the *Justice Denied: The Magazine for the Wrongfully Convicted*.²¹ I wrote Mark, enclosed a donation, and requested that in lieu of thanks, he send a letter to Boku.

Effective Assistance of Counsel: NOT

Though Mark proclaimed his innocence, and suggested many things to support his own defense, his attorneys never bothered to explore the totality of the evidence, and defended perfunctorily. Their strategy was to save their client from the needle, and in

this they succeeded. As shown above, a sentence of death would have been better.

Despite having evidence of actual innocence, the Federal Public Defender in Philadelphia ignored Mark Kirk's pleas. And even with proof of innocence, pro se submissions are frequently trash canned in the chambers of justice.

Mark Kirk: What Next?

With present appeals exhausted, Kirk's only chance for freedom maybe a commutation from the governor of Delaware.

Kirk had a hearing commutation in June of 2015, after serving 19 years, and with an exemplary record behind bars.

Having seen the many successes of prisoners who have launched petitions on change.org, I began a petition ahead of Mark's commutation hearing. I fully expected that Change.org would further the campaign. They are very active in supporting the criminally accused, and gathering 50,000-100,000 signatures is not unusual. Such grassroots support has helped many prisoners earn freedom. Certainly a nationwide/worldwide petition drive would greatly help Mark's cause, and bring with it the tide of freedom.

Despite my best efforts, [Change.Org](http://www.change.org) did not choose to promote this appeal. So far, only a handful of people have signed the petition.²²

Other subsequent actions I have undertaken have not brought any fruit. I contacted the manufacturer of Captain Morgan's through their website seeking a statement on the flammability of the product. The company by law is required to have a Material Safety Data Sheet which describes among other things, "the potential hazards associated with a particular material or product."²³ I requested this sheet and any other information on the product's flammability. The company never responded.

On November 17, 2013 I filed a report with the Food and Drug Administration requesting an investigation into the flammability of Captain Morgan's Spiced Rum. A court of law found that this product was flammable and responsible for three deaths. That said, the FDA should require a warning on the label, much like that found on products like Bacardi's 151 proof rum. I received no response from the FDA.²⁴

It is quite clear that the company knows of this incident and is trying to keep it under

lids. I went to the Captain Morgan's Rum Wikipedia page and made careful insertions about the Delaware incident, reference to my FDA request, and gently mentioned that the product should be treated with caution pending investigation. My additions were quickly deleted. I re-inserted them, only to have them again deleted, and over and over again. The page is obviously the creation of the company, strictly against Wikipedia rules.

Prayer for Relief

It is true that those who strive to correct miscarriages of justice are always overworked, often exhausted, and badly remunerated. Nevertheless, the Mark Kirk's of the world need our assistance. He is one of the innumerable innocent people whose case is ignored by the courts, the media, and the innocence projects.

About the author

Michael H. Fox is a long time member of NACDL and its sole member in Japan. He is director of the Japan Innocence and Death Penalty Information Center (jiadep.org) and two other wrongful conviction websites: the Worldwide Women's Criminal Justice Network (wcjn.org), and the Network for Innocent Arson Defendants (niad.info). He was deported from India in 1981, at age 24, for reasons still unknown. Seaside walks and meditation help him maintain sanity. He lives and teaches in Japan.

Endnotes:

¹ Gerald Hurst, 1937-2014, a leading arson investigator, offered evidence in many cases. He opined that the case against executed death row inmate Cameron Todd Willingham was "junk science." https://en.wikipedia.org/wiki/Gerald_Hurst

² Information and documentation about this case is available at http://www.niad.info/Mark_Kirk.html

³ Mark Kirk. Convicted of starting a deadly fire with an unburnable substance: The Mark Kirk Story. *Justice Denied* (Seattle: 2004)

http://www.niad.info/Mark_Kirk_Story.html

⁴ *Ibid*

⁵ Testimony of Marvin McDowell. Trial Transcripts, October 10, 1997.

⁶ *Ibid*.

⁷ "67% of home structure fires involving cooking equipment begin with the ignition of cooking materials. . . especially fat, grease, cooking oil and related substances." Marty Ahrens. NFPA No. USS11. November, 2013.

⁸ <http://www.niad.info/grease-fires.html>

⁹ http://www.niad.info/Beaver_Brook.html

¹⁰ Murder, arson trial under way. The News Journal. October 9, 1997. (<http://www.niad.info/reportage/Oct9.html>)

¹¹ <http://www.deathpenaltyinfo.org/state-execution-rates?scid=8&did=477>

¹² Lentini, John. (2013) Scientific Protocols for Fire Investigation. CRC Press: Boca Raton, FL.

¹³ Personal Communication, John Lentini, Innocence Network Conference, Cincinnati, Ohio, April 8, 2012

¹⁴ See the tests, http://www.niad.info/Lentini_Tests.html

¹⁵ *State v. Kirk*, No. 9612002650 (Del. Superior Ct 2007); *Kirk v. State*, No. 293, 2007 (Del. Supreme Ct 2007)

Kirk cont. on p. 6

Murphy's Law In Action — Appeal Electronically Submitted Four Days Early Was Untimely Because It Wasn't Filed By Clerk

Filing a notice of appeal on time is critically important because dismissal of an appeal can be expected if it is filed even 5 minutes late. The proliferation of electronic filing of documents in federal and state courts has increased the diligence necessary to ensure compliance with a filing deadline — because electronically submitting an appeal with proof of the date and time of its submission may not constitute filing of the appeal. Luther Franklin learned that the hard way. On October 30, 2015 the U.S. Second Circuit Court of Appeals ruled his appeal electronically submitted four days before the filing deadline was untimely because it wasn't docketed by the court clerk.

Franklin is a retired Lieutenant Colonel in the United States Army Reserve. He filed a complaint in the United States District Court for the Eastern District of New York on February 5, 2013, seeking correction of his military records, a retroactive promotion, and back pay.

On August 28, 2014, the District Court's memorandum and order was filed that granted the government's motion to dismiss Franklin's complaint for lack of subject matter jurisdiction.

Franklin had 60 days to file a notice of appeal to the U.S. Second Circuit Court of Appeals.

Kirk cont. from p. 5

¹⁶ "State fire marshal Willard Preston resigns." The News Journal. April 6, 2007 <http://www.niad.info/Willard.html>

¹⁷ http://www.niad.info/Donald_Roberts.html

¹⁸ Personal communication, Mark Kirk, Sept. 17, 2015.

¹⁹ Personal communication, Mark Kirk, March 6, 2006

²⁰ Personal communication, Ofra Bikel. Innocence Network Conference, Cincinnati. April 8, 2011

²¹ Issue 26, November 2004, online at, http://justicedenied.org/issue/issue_26/mark_kirk_jd_issue26.html

²² <https://www.change.org/p/jack-markell-captain-morgan-s-spiced-rum-is-non-flammable-please-free-mark-kirk>

²³ https://en.wikipedia.org/wiki/Safety_data_sheet

²⁴ <http://www.niad.info/FDSA.html>

Twelve years ago *Justice Denied* published an article about Mark's Kirk case in Issue 26 (Fall 2004), pgs. 8, 10, "Convicted of Starting Deadly Fire with Unburnable Substance — The Mark Kirk Story." It is online at, http://justicedenied.org/issue/issue_26/mark_kirk_jd_issue26.html



The District Court requires an attorney to electronically file all documents -- including appeals. The court's ECF ("Electronic Case Filing") [Manual states](#): "All documents must be filed electronically — Electronic Filing is Mandatory — See Administrative Order No. 2004-08."

Four days before the October 27, 2014 deadline, attorney Gary Port uploaded Franklin's notice of appeal and other necessary documents to the federal judiciary's computerized case management CM/ECF system on October 23, and he paid the required \$505 filing fee by accessing www.pay.gov, the federal government website for making payments to government agencies. Port received an email that same day from www.pay.gov transmitting a receipt for his payment.

On October 28 Port learned the Eastern District Court's docket did not reflect the notice of appeal he submitted on October 23. Port's office [contacted the court clerk's office](#), which "assured that the initial receipt of October 23, 2014 would stand as proof that we did timely file, but due to issues with the ECF system [the notice of appeal] did not get properly docketed."

Port later [related in a declaration](#) that "the [C]lerk's [O]ffice specifically instructed my office to refile the documents, and pay the fee again." Port followed the Clerk's instructions and again electronically filed the notice of appeal. The District Court docket reflected it was filed on October 28.

On January 5, 2015, the government filed a motion to dismiss Franklin's appeal as untimely. Franklin opposed the government's motion by principally arguing his notice of appeal was timely filed on October 23, 2014, when he electronically submitted it and he paid the required fee, even though it did not appear on the District Court's docket until he refilled it on October 28 and again paid the fee.

On October 30, 2015 the Second Circuit issued its ruling dismissing Franklin's "untimely" appeal. [The Court stated](#) in *Franklin v. McHugh*, No. 14-4096-cv (2nd Cir., 10-30-2015):

"The timely filing of a notice of appeal in a civil case is a prerequisite to the appellate court's jurisdiction. As the Supreme Court observed in *Bowles* in 2007, "[T]ime limits for filing a notice of appeal have been treated as jurisdictional in American law for well over a century." 551 U.S. 10 at 209 n.2. Like other jurisdictional requirements, the timely

filing mandate is not subject to judicially created equitable exceptions."

...
In the Eastern District, electronic filing has been mandatory in counseled civil cases since 2004.

...
Here, although Franklin's counsel undoubtedly intended to file a notice of appeal electronically on October 23, 2014, his efforts fell short of the mark. His account of his attempt to file electronically a notice of appeal on October 23 suggests strongly that counsel simply overlooked the last step of the process: he appears to have followed the electronic filing process through the fee paying stage only, stopping upon receiving the receipt for payment. He does not represent that he proceeded past that point or that he received the critical Notice of Electronic Filing screen; and he appears to have failed at the time to notice the shortcoming.

We thus conclude that a notice of appeal is not "filed" for purposes of 28 U.S.C. § 2107 and Federal Rule of Appellate Procedure 4 until counsel completes the CM/ECF filing process in compliance with the applicable local district court rules ... Because Franklin did not timely complete the filing process, the Secretary's motion to dismiss the appeal as untimely is granted, and the appeal is dismissed for want of jurisdiction."

Even though the Clerk's Office conceded there were "issues with the ECF system" on October 23 when Franklin's appeal was submitted, the Second Circuit disregarded that and placed the entire blame on his attorney for the dire consequences of the electronic problems. The Court's ruling emphasizes the importance of every attorney developing the habit to double check to make sure that an electronic submission has been properly processed.

Franklin's case was civil, but the principle underlying the Court's ruling applies to the electronic filing of a document in a criminal case.

[Click here to read](#) the ruling in *Franklin v. McHugh*, No. 14-4096-cv (2nd Cir., 10-30-2015).

Source: [Franklin v. McHugh](#), No. 14-4096-cv (2nd Cir., 10-30-2015) (Untimely Filed Notice of Appeal Not Properly Filed Under CM/ECF System on Oct. 23, 2014) [cm/ECF User's Guide](#) (U.S. District Court Eastern District of New York)

