

 **Feature Article**

Anti-biotech Artist Indicted for Possessing 'Harmless' Bacteria

FBI confiscates artwork critical of biotechnology

by Brendan Coyne ([bio](#))

Jul 6 - A federal grand jury in Buffalo, NY investigating charges against art professor Steven Kurtz finally handed down an indictment on Tuesday, ending deliberations that began on June 15.

The indictment, technically for mail and wire fraud, also ensnared the University of Pittsburgh's head of human genetics and surprised Kurtz's supporters who had feared more serious charges.

The investigation started when Kurtz woke on the morning of May 11 to find his wife of 20 years, Hope, not breathing. Like most people would, Kurtz dialed 9-1-1 to report the emergency, never imagining the ordeal that was to ensue.

"I was detained for 22 hours by the FBI," wrote Kurtz, prior to being advised not to speak about the incident by his attorney, in an email circulated among supporters and obtained by *The NewStandard*. Kurtz is a founding member of the Critical Arts Ensemble (CAE), a group of "cutting-edge" artists whose primary medium is science.

"They seized my wife's body, house, cat and car. These items were released a week later. In the house they seized computers, science equipment, chunks of my library, teaching files, I-D, and all my research for a new book."

And that was just the beginning of an investigation responsible for pitting law enforcement agencies against artists, academics, and activists, inspiring protests in Buffalo and around the world, and raising concerns over censorship in artistic and scientific speech in the post-September 11 age.

According to information provided by the CAE Legal Defense Fund, an ad-hoc group put together to aid Kurtz's cause, Kurtz and at least seven of his colleagues in the art and academic communities were subpoenaed to appear before the grand jury on Tuesday, June 15, 2004, as it investigated possible violations of the US Biological Weapons Anti-Terrorism Act of 1989.

According to one CAE member who was subpoenaed to testify in front of the grand jury but asked not to be named in this report, FBI questioning prior to the grand jury

appearance centered on bio-terrorism, CAE's methods for handling biological materials, and the writings of the group. The agent did not hand the artist a subpoena until after the questions were answered.

Greg Bordowitz, spokesperson for the CAE Legal Defense Fund, said that out of Kurtz's seven colleagues subpoenaed, only Adele Henderson, chair of SUNY Buffalo's Art Department, testified. The rest refused to testify, invoking their Fifth Amendment rights on the advice of counsel, Bordowitz said.

Bordowitz traveled to Buffalo for a June 15 protest outside the downtown courthouse. He said there were 200 to 250 protesters in Buffalo, many from outside the area. The same day there were sympathetic protests in many places around the world, including Vienna, San Francisco, Chicago, and Amsterdam, according to accounts from CAE Legal Defense Fund members and newspapers.

Bordowitz admits CAE's work, which has included exhibits utilizing DNA, bacteria, and other forms of molecular life to challenge the biotechnology industry's lack of transparency and to spark public debate on scientific issues such as genetically modified food, is controversial.

Bordowitz concedes that the initial circumstances surrounding Kurtz' wife's death -- the discovery of bacteria cultures, lab equipment, and a DNA extractor by paramedics and police on the scene -- were enough to warrant a full investigation. But, after the Erie County Health Examiner ruled the death to be from natural causes, and the New York State Department of Health found the bacteria harmless, Kurtz should have been free to go on with his work and his life, Bordowitz believes.

Instead, both Kurtz and Robert Ferrell, a University of Pittsburgh geneticist, stand accused of "using false and fraudulent pretenses and representations" to obtain samples of *serratia marcescens* and *bacillus atrophaeus*, according to the indictment. Additionally, the indictment charges that the academics "employed the mails and interstate wire communications in furtherance of their scheme and artifice to defraud."

Ferrell is alleged to have ordered and shipped the bacteria to Kurtz, using the university of Pittsburgh's account with American Type Culture Collection (ATCC), a non-for-profit laboratory that makes or procures, houses and ships many different biological agents used in academic, government, and hospital labs across the country.

According to the indictment, one or more ATCC employees affirmed the placement of orders for both *serratia marcescens*, and *bacillus atrophaeus* by Ferrell. The indictment also claims that shipping forms, and other papers produced by ATCC in accordance with their policies for shipping samples, were found in Kurtz's home.

The indictment also includes citations from an email allegedly sent from Kurtz to Ferrell. One of those seems to suggest that the bacteria are not as harmless as CAE advocates

claim.

"Hi Bob, Well it looks like my bacteria is not as harmless as I previously thought," reads the portion of the indictment attributed to Kurtz's email. "While not wildly dangerous, it is associated with pneumonia and urinary tract infections, and seems to be around other infections as well. Seems to be hardest on kids and people with compromised immune systems. Do you know what kind of strain we are getting, and how toxic it is?"

But Donald A. Henderson, dean emeritus of the Johns Hopkins University School of Hygiene and Public Health, doesn't feel any of the three bacteria are dangerous, in any combination. Henderson recently joined the University of Pittsburgh as a professor of Medicine and Public Health, and is resident scholar at the Center for Biosecurity of the University of Pittsburgh Medical Center

"I am absolutely astonished by what I have read," Henderson told *The New Standard*. "There may be elements that have not appeared in the press but, based on what I have read and understand, Professor Kurtz has been working with totally innocuous organisms."

"Evidently," continued Henderson, "[Kurtz] has been using these and working with others to discuss something of the risks and threats of biological weapons -- more power to him, as those of us in this field are likewise concerned about their potential use and the threat of bio-terrorism."

Henderson notes that the organisms involved, *E. Coli*, *serratia marcescens*, and *bacillus atrophaeus*, the last two of which were allegedly obtained illegally, are not dangerous and do not appear on the lists of substances that could be used in biological terrorism. And he said mixing them would not create dangerous organisms either. "Can one combine the three organisms to make something virulent?" said Henderson. "The chances of doing so make the lottery a good investment."

He did say, however, that in relatively rare cases, people with special susceptibility to infections have been known to become infected with the bacteria.

Henderson even challenged the assertion that the regulations for handling these specific bacteria are stricter since the September 11 attacks, stating, "none of the organisms noted to be present in this case, are covered, nor should they be, by the post-9/11 provisions."

While Henderson's statements may appear to fly in the face of other reports, as well as the press release issued by the US Attorney's office, University of California at San Diego professor and CAE supporter Natalie Jeremijenko said scientists ship materials to each other all the time.

"They're going to have to indict the entire scientific community," said Jeremijenko, a

design engineer whose work and research explores the intersection of science, engineering and art. "I do it, my lab students do it. It's a basis of academic collaboration."

Kurtz and Ferrell are to be arraigned on July 8, according to Ferrell's attorney, Efreim Grail. The maximum sentence for the combined charges of mail and wire fraud is 20 years. Kurtz's attorney, Paul Cambria, Jr., calls the charges "petty larceny." He said: "There was obviously no criminal intent. If the University of Pittsburgh feels there was a contract breach, then their remedy is to sue Steve for \$256 in a civil court."

For his part, Ferrell is not speaking with the press. Grail said he was "surprised and upset" by the indictment and offered a short statement defending his client's reputation, honesty, and integrity.

Ferrell's employer issued a similar statement in a press release attributed to Robert Hill, vice-president for public affairs with the University of Pittsburgh, calling Ferrell a "distinguished scientist," assuring people that he remains on the faculty, and calling for "a swift and favorable resolution."

"The consequences for CAE have been extreme," Bordowitz said from his home in Chicago the evening before the grand jury finished deliberations. "They're effectively shut down. That's their work, their livelihood. The burning question is why is this still going on? The government, in this instance, has gone too far."

Bordowitz and other members of the CAE Legal Defense Fund say the toll this has taken on Kurtz is extraordinary. He can't work, isn't speaking to the media, and has to limit his conversations about the entire issue, even to close friends. Worse yet, he hasn't had the time to grieve for his dead wife.

With the indictment delivered and the worst seemingly over -- Kurtz has not been charged with any terror-related offenses, as group members had initially feared, and no other CAE members are known to be under investigation -- the arts and activist community that emerged around the case was able to breathe a short sigh of relief. Then it was back to work.

True to their performance-based background, the artists' Defense Fund is organizing flyering and pamphleteering campaigns, as well as benefits, education and fund-raising events all across the country, with many planned for the upcoming weeks in Chicago. There is also at least one overseas benefit planned, in London on July 9, the day after Kurtz will be arraigned.

The Fund is not alone in making new preparations. A Critical Arts Ensemble project housed at Kurtz's home, "Free Range Grains," was slated for exhibition at the Massachusetts Museum of Contemporary Art (Mass MOCA) prior to the government's exhaustive investigation. Today the exhibit is in federal custody, according to Nato

Thompson, an associate curator with the museum. In place of the exhibit, Mass MOCA now features a growing display of news-items related to the case.

"We've been updating the story in our galleries as it evolves, or devolves," said Thompson. "We're using the issue as a speech platform."

"Free Range Grains" explores the genetic modification of food by utilizing a common laboratory setup and everyday food, Thompson explained. The performance involves using a DNA amplifier to demonstrate traces of genes from other organisms inserted into the genetic makeup of food provided by audience members, he said.

The museum has experienced an uptick of interest in CAE work, something Thompson attributes to the case and the museum's ongoing exhibit dealing with it. He said that is part of the reason Mass MOCA and spaces like it are unlikely to allow this incident to curtail future exhibition of shows like "Free Range Grains," though he has no idea when that particular installation will ever be seen.

"I have my doubts about whether we'll ever get the exhibit back," Thompson said.

There are also signs that the investigation may not be over.

On June 22, the grand jury subpoenaed the records of Autonomedia, a small publishing house that works with CAE, an order the group did not immediately comply with. After the grand jury issued its indictment, lawyers from both the New York Civil Liberties Union and the Booksellers Committee for Free Expression told Autonomedia that the book house's obligation to turn over the records ended, according to an email message sent to supporters by Autonomedia publisher Jim Fleming, the evening the indictment was handed down.

However, according to an email from Fleming circulated among the Defense Fund the following day, Assistant United States Attorney William Hochul telephoned to inform the publishing house of a new deadline, July 13, for the publisher to deliver all correspondence and records relating to the CAE. According to Fleming's email, Hochul also suggested that they get legal representation as soon as possible.

Hochul's office is not presently commenting on the matter.

Stephen Halpern, a SUNY Buffalo law professor who specializes in Constitutional law, said he isn't surprised that Hochul still wants the publisher to comply with the subpoena.

"Although it strikes me as being some sort of fishing expedition," he said, "this isn't odd for a prosecutor to do. A prosecutor will look for any probative evidence. And they can cast a very wide net."

Halpern says it is unlikely Autonomedia will be able to successfully fight the subpoena.

Unlike Nato Thompson, the Mass MOCA curator, Halpern also worries about the effect the investigation and prosecution of Kurtz will have on free speech.

"It's really going to have a chilling impact on the type of work people are going to do in this arena, and other arenas as well," Halpern said. "This is critical but protected work."

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