

October 18, 2007

Hon. Terrance P. Flynn, US Attorney
Western District of New York
Department of Justice
138 Delaware Avenue
Buffalo, NY 14202

Re: Prosecution of Dr. Robert Ferrell, INDICTMENT: 04-CR-155E, Violations: Title 18, United States Code, Sections 1341 and 1343

Dear Sir:

I am writing with grave concerns about your office's prosecution of Dr. Robert Ferrell and Steven Kurtz, and the ethics of the attorneys in your office.

First, please allow me to establish my bona fides. I discovered the viral cause of three different cancers and I am in the process of describing the infectious cause of a fourth cancer. I am a full professor at the University of Pittsburgh and have published over 100 scientific papers. My work has been recognized by the Mott Prize and the Koch Prize, the two highest international scientific honors in cancer and infectious disease research, respectively. Prior to working on cancer viruses, I worked on the control of bacterial meningitis epidemics and hemorrhagic fever virus epidemics in Africa for the US Centers for Disease Control and Prevention. Parts of this work were also honored with the Langmuir Prize. Altogether, my research has been cited over 11,000 times since 1992, an achievement well into the top 1% of scientists. I serve on the editorial boards of several major infectious disease research journals.

I have also known and worked with Dr. Ferrell for the past several years. As you must already know, you will not find a more gracious and personable individual, as well as a gifted and conscientious scientist. He has always shown nothing but the highest standards of ethical and professional conduct in my many interactions with him. I sincerely value his expertise as does his colleagues. He was honored with chairmanship of the Department of Human Genetics, a position that he would only hold if he surpassed most of his colleagues in his scientific skills, knowledge and judgment. In short, he is an outstanding scientist.

You also are aware that Dr. Ferrell suffers from an incurable lymphoma for which he has undergone bone marrow transplantation during the course of your prosecution. He has suffered several strokes, no doubt worsened if not brought on by your prosecution of this case.

Dr. Ferrell was charged with committing wire and mail fraud for sending samples of *Serratia marcescens* and *Bacillus subtilis* var. Niger--reclassified as *B. atrophaeus*, a substrain of *B. subtilis* that produces a harmless pigment on some culture media--to Steven Kurtz for use in his artwork. Both bacteria are safe demonstration bacteria used by high school students because of their colors, which is the reason why these bacteria were chosen. Like almost all microorganisms, both can cause disease in humans under unusual circumstances but under normal handling conditions are considered so safe that they are cultured on open lab benches and used in public education. *B. subtilis* is actually licensed as an agricultural spray. You have more dangerous organisms likely growing on soft-cheeses in your refrigerator. Both bacteria are commonly grown from the local environment and we are exposed to them and their relatives on a daily basis.

The basic facts of the case are well-known. Local and Federal law-enforcement officials grossly over-reacted to fears that Kurtz was a bioterrorist because of his use of these common demonstration bacteria in his artwork. This was discovered at the death of Kurtz' wife, Hope, from entirely unrelated causes, and confusion about the nature of the situation can easily be excused. Initial investigation of the facts of the case to determine whether US laws were broken and the severity of this event were also appropriate.

Once, however, it was clear that neither Kurtz nor Ferrell were engaged in illicit behavior, it then became inexcusable for your office to threaten prosecution for wire and mail fraud since it lacked any legal basis for charging these two professors with criminal wrong-doing related to their use of the bacteria as opposed to civil proceedings for violation of Dr. Ferrell's contractual agreement with ATCC. The obvious reason for this prosecution is the embarrassment faced by your office and law enforcement officials in over-reacting to the circumstances Steven Kurtz' wife's death.

Scientists who are aware of this case have purposely kept quiet about publicly denouncing this malicious prosecution for the simple reason that we assumed cool heads would prevail in your office. This has not been the case and in fact the opposite is true. Because of sheer exhaustion from his life-threatening medical conditions, Dr. Ferrell pleaded guilty to lesser charges of "mailing an injurious material" according to news reports and faces up to a year in jail. His plea has been coerced: he is in extreme poor health and his family admits that he physically can no longer fight your prosecution (see http://caedefensefund.org/press/10_11_07.html). Prof. Kurtz still faces charges that could lead to 20 years in prison.

What are the consequences of this prosecution besides the unwise waste of taxpayer's dollars? First, for you directly, it cheapens and sullies all prosecutions performed by your office whether they are reasonable or not. Given the outlandish behavior by attorneys in your office, the public can no longer trust that your office competently administers justice fairly. Other appropriate prosecutions performed by your office are tainted from the Ferrell-Kurtz case.

Second, you've needlessly destroyed the career of an outstanding scientist who has contributed tremendously toward societal good works. He has published over 200 papers on research to find the fundamental causes of diseases such as schizophrenia, muscular dystrophy and diabetes. I cannot comment on the esthetics of Prof. Kurtz' art but it sounds fascinating and at no time was anyone endangered by it. At the practical level of protecting society, the prosecution was wrong.

Third, your prosecution embarrasses American scientists in the eyes of our international colleagues. Your prosecution adds one more rock on the pile to bury excellence in American science. Does this sound extreme? Hardly. Foreign colleagues have described to me their befuddlement over the Ferrell-Kurtz case. They give me their sympathy that the general scientific knowledge is so low in American society. We rely almost entirely on recruiting foreign scientists to work in our labs and they will only do so if they believe we provide the best and most nurturing environment for them to pursue science. Together with other well-known legal cases that can only be described as part of an anti-scientific crusade (e.g., the Thomas Butler prosecution comes to mind), this case marks a low-tide for American scientists. Sadly, it is not surprising that no native-born Americans received science prizes in this year's Nobel announcements. On a practical level, all scientists at Pittsburgh have had their shipments from the American Type Culture Collection delayed and secondarily scrutinized because of your

office's prosecution of this case. Let me be blunt: you are interfering with my work on finding the cause of a cancer because of your prosecution.

Fourth, this prosecution inspires fear in scientists. I have been told by colleagues not to publicly protest the injustice of this case, that it will result in unjustified audits of my own laboratory as a form of revenge. Other scientists have voiced fears about speaking up, that their licensing from other Federal agencies to legitimately perform research on select agents or funding from Federal agencies will be affected. Regardless of whether or not these fears are fanciful, they are inspired by your prosecution of this case and other instances of abuse by Federal officers. They are real fears voiced by real scientists. Is this truly the type of American society that you want to live in?

The solution is simple. Your office immediately should withdraw all charges against Steven Kurtz and Robert Ferrell. If news reports are accurate, you should also investigate ethics violations by attorneys in the Western New York Division. According to an October 11 Newsday article, Assistant US Attorney William Hochul is quoted: "Federal prosecutors have said the prosecution is based on public safety concerns surrounding the illegal transfer of controlled bacteria. One of the organisms "is used in biological warfare experiments" to "determine what anthrax would do," Hochul said."

If this report is accurate, it is so inflammatory and misleading a public statement that it bends truth to the point of being a lie. This clearly violates the New York Lawyer's Code of Professional Responsibility regarding trial publicity (DR 7-107 [1200.38] which forbids an "extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in that matter." This statement is clearly prejudicial for both Dr. Ferrell's sentencing and for Mr. Kurtz' trial dealing with fraud charges--not illegal possession of "controlled" bacteria.

Cornstarch has also been used as a tracer to see dispersion patterns of potential biowarfare agents. *Bacillus subtilis* and *Serratia marcescens* are no more biowarfare weapons than cornstarch, and neither Kurtz nor Ferrell have ever been accused of using these agents to model anthrax. The only conceivable reason for Hochul to say this is to emotionally sway public opinion, not to pursue the facts in this case. It is the equivalent of yelling fire in the theatre of public opinion. Both the sentiment and the actions smack of unethical behavior on the part of Mr. Hochul. I trust that you are honorable but simply misguided in this prosecution, and that you will turn your attention to Mr. Hochul's statements and actions to see if they warrant closer scrutiny as indicated in the US Attorney's Manual 1-4.100 regarding Allegations of Misconduct by Department of Justice Employees—Reporting Misconduct Allegations.

Please do not just take my word on the inanity of this case. Ask Ms. Erika Freeman, a 10th grader at South Burlington Vermont High School who won a science fair award in 2004 when your office began its prosecution of Dr. Ferrell and Mr. Kurtz. She examined response of *Serratia marcescens* to ultraviolet light. Similarly, Mr. Shawn Davis, an 11th grader at Woodbridge High School in Irvine California is investigating how *Bacillus subtilis* evolves. You can find thousands of similar examples from a Google search using the terms; "Serratia", "Subtilis" and "High School". Or, perhaps you should contact AgraQuest, Inc, 1530 Drew Ave., Davis, CA 95616. They have an approved license from the EPA to spray *B. subtilis* on cherries that you and your family eat. The same bacteria that Mr. Hochul implies is a biowarfare agent endangering our public health in order to prejudice public opinion, and worth imprisoning a desperately ill scientist.

Administration of justice requires thoughtful interpretation of the law and judgment about the propriety of enforcing it. If prosecutions are capricious, malicious or otherwise without basis, respect for the law is lost and the societal contract that binds us together as American citizens is torn.

Sincerely yours,

Patrick S. Moore, MD MPH
Professor, Department of Molecular Genetics and Biochemistry
University of Pittsburgh

cc: Sen. Patrick Leahy, Senate Judiciary Committee Chairman, U.S. Senate, Washington, D.C. 20510
Sen. Arlen Specter, Ranking Member, Senate Judiciary Committee, U.S. Senate, Washington, D.C. 20510
Dr. Henry Kelly, President, Federation of American Scientists, 1725 DeSales St., NW 6th Floor, Washington, DC 20036
Grievance Committee for the Eighth Judicial District, 438 Main St. Suite 800, Buffalo, NY 14202-3212