

Missing Evidence: Program Brings DNA Testing to South America

By Pat Broderick
Daily Journal Staff Writer

SAN DIEGO — An impoverished young man in Chile, after a night of partying, is accused of raping and robbing an 80-year-old neighbor who is in an advanced stage of dementia.

He is so poor he can't afford a proper colostomy bag to cover the hole in his intestinal wall, so he usually gets by with a shopping bag and masking tape. On this day in December 2006, he wears only a bandage.

The man is tried, convicted, and sentenced to 15 years in prison, despite the absence of physical evidence at the victim's home — no semen, no blood and no excrement from a body whose bowel functions its owner cannot control. There is suspicion from defense attorneys the man's clothing was mixed with the victim's, contaminating the evidence.

Now languishing in a prison for almost four years without proper medical care, the man might have one hope: Audrey McGinn.

A recent graduate of California Western School of Law in San Diego, McGinn has been assigned to bring the Innocence Project in South America — Inocente! — as its first fellow. The key element of the program in Chile will be DNA evidence that has been an invaluable tool of the U.S. justice system for years, but is rarely used in South America because of the cost and lack of testing centers.

"I've learned that sometimes they destroy it before the trials are over," McGinn said, "which is outrageous."

The idea for an Innocence Project in Chile was spawned by California Western professors Justin Brooks, director of the California Innocence Project, and James M. Cooper, director of Proyecto ACCESO, a program promoting the rule of law in Latin America. The men hope to use Chile as a stepping stone to expand the program throughout the continent.

"Chile has been such a model," said Cooper, who has spent years working with lawyers and others in the judicial system there. "We have operations there constantly. This really builds on the work of the law school."

McGinn, who is fluent in Spanish and Portuguese, spent four months in Concepción, Chile, lecturing lawyers and law students about DNA evidence and how it can be used in wrongful imprisonment cases.

With desk space in the Concepción public defender's office, she



Audrey McGinn, first Inocente! fellow

pored over dozens of cases, hoping to find one that could spur those in the judicial system to consider DNA evidence. The young man now imprisoned, McGinn says, is that case.

an e-mail translated by McGinn. "As the standards to convict are very low, the judges don't demand material evidence, and that prevents us from improving."

"There is no shortage of these cases in Latin America that can be pursued," he said. "Once there is a win for one of these, the floodgates will open."

The courts are resisting attempts by Chilean lawyers to access the evidence for retesting.

"The Court of Appeals denied us access to the material evidence that still remains in the power of the prosecutor's office," Schubert said. "The arguments that the court made, essentially, is that the case was already adjudicated, which makes little sense."

For the past decade, Chile has been in the process of overhauling its legal system, including adopting an adversarial system, long used in the U.S. and other developed countries.

Consequently, attempts by outsiders to further tweak the system can be met with resistance. While Chilean defense attorneys have been enthusiastic about an Innocence Project there, and have provided assistance, prosecutors are wary, McGinn said.

"I have met a little opposition to it from prosecutors who are saying, 'This is a brand new system. We've created it and it's perfect, and there

is no error,' which I think is a little bit shocking," she said. "A human-created system is inherently going to have flaws, because that's the nature of the beast."

Schubert agreed. "It's easier to deny the reality and the evidence so that you don't have to change the manner in which people do things."

Working with Chilean defense attorneys, McGinn drafted a proposed statute, designed to ensure the preservation of DNA evidence. She hopes to meet with Chilean lawmakers before the end of the year to fine-tune the document.

"I think there are a lot of people open to it," she said. "With any new idea, sometimes there is a bit of opposition, especially since their criminal system has just undergone a serious transformation."

Cooper said it's important to recognize that judicial systems are "a living, breathing organism that needs constant fueling and new kinds of science to be used in an enlightened way to achieve justice."

Come January, McGinn will be back in South America, this time to Santiago, where she plans to work for

at least six months on the Inocente! Project, and maybe longer if grant money comes through.

The larger plan, also contingent on money, is to expand the program to other countries, including Paraguay, Argentina, Uruguay, Bolivia and Brazil.

"They are very open to us in every country we've worked with," Brooks said. "As long as we don't jam the 'American Way' of doing it down their throats."

Expanding the program is a necessary part of what Cooper calls the "next generation" of judicial reform in South America.

Brooks, who provided legal training in Bolivia last year, wants to establish a pipeline that would permit U.S. DNA experts to process physical evidence and testify in court telephonically, greatly aiding small towns with no access to modern forensic tools.

"Some jurisdictions don't even use fingerprinting or any scientific methods," Brooks said. "This would be a way of exporting criminal expertise and forensics."

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GEORGY SCHUBERT
INOCENTE! PROJECT
CONCEPCIÓN, CHILE

"If we come up with hard evidence and find someone we can absolutely prove was innocent, I'm hoping that will change a lot of people's minds," she said.

It will be a challenge, according to regional public defender Georgy Schubert, who heads up the Inocente! project in Concepción, and who helped McGinn get it started.

"The great majority of the cases are based on witnesses and confessions, and usually there is not material evidence to do expert testing," he said in

Even witness statements and confessions in criminal cases are not recorded, Schubert said.

"But if the judges continue to not demand a rigorous investigation, a great part of this data won't ever be used," he said. "Chile improved their justice system, starting in the year 2000, but there is so much to advance in order to be at the level of the more developed countries, and we can't aspire to be something less than that."

No matter how significant this case might be, for Cooper it is the tip of the iceberg.

Weak Biotechnology Initial Public Offerings Continue

By Mandy Jackson
Daily Journal Staff Writer

Anacor Pharmaceuticals Inc.'s initial public offering Wednesday marked a continued downward trend for biotechnology IPOs.

Palo Alto-based Anacor raised \$60 million through the sale of 12 million shares priced at \$5, but the company had said in a Nov. 2 Securities and Exchange Commission filing that it planned to raise as much as \$97.3 million by selling up to 5.4 million shares at \$16 to \$18.

Cooley lawyers Mark B. Weeks and Michael E. Tenta in Palo Alto represented Anacor. Patrick A. Pohlen and Gregory Chin of Latham & Watkins in Menlo Park represented the underwriters, Citibank and Deutsche Bank Securities Inc.

Anacor, which makes antifungal, anti-inflammatory and antibiotic therapies, was the third California life science company whose IPO fell short of expectations this month.

San Diego-based Zogenix Inc. raised \$56 million on Monday when it sold 14 million shares at \$4 after an earlier announcement that it planned to raise up to \$96.6 million with a stock price of \$12 to \$14.

Complete Genomics Inc. of Mountain View expected to raise as much as \$96.6 million with a stock price from \$12 to \$14, but its Nov. 11 IPO brought in \$54 million from the sale of 6 million shares priced at \$9.

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Harris Wins Race to Be State Attorney General

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opponent."

This approach, Levine added, is in line with how Brown approached the office.

Cooley had a vast wealth of support from district attorneys around the state, including Yolo County District Attorney Jeff Reisig.

Reisig said while he was "disappointed Steve didn't pull through," he was optimistic about Harris because she has a background as a district attorney, unlike many of her predecessors.

"This is a race where if you ask all my colleagues, it's a no-lose situation because you're going to end up with an AG who understands what it means to be a DA," said Reisig. "I am very happy about that."

Political consultants had largely expected Cooley to win the attorney general's race, given his advantage as district attorney of the largest county in the state and the negative publicity for Harris' personal stance against the death penalty.

Although Cooley won more votes than any other Republican running for statewide office, he could not withstand the huge Democratic turnout, particularly among Demo-



Associated Press

Steve Cooley

cratic-leaning Latinos and African-Americans.

"At the end of the day, did he lose because he was a Republican? Ultimately, yes," said Kevin Spillane, a spokesperson for the Cooley campaign.

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FTC Severely Restricts Mortgage Modification Work

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The FTC's new rule is much more strict than a California law adopted in October 2009. Under that statute, only licensed real estate brokers and lawyers may offer modification services, and they may not collect advance fees until having "fully performed each and every service ... contracted to perform."

The FTC's ban on advance fees, which goes into effect Jan. 31, completely exempts lawyers who keep fees in client trust accounts and who "are complying with state laws and regulations governing attorney conduct related to the rule," according to the agency.

California lawyers cannot take advantage of that exemption, however, because of the "comply-

ing with state laws" provision of the federal rule, according to Greenfield.

The ABA objected to the initial version of the FTC's rule soon after it was proposed in February, arguing it would interfere with attorney-client relations and would prevent desperate homeowners from hiring lawyers to help them. That first version only allowed lawyers to collect advance fees for preparing bankruptcy and other court documents, not for dealing with lenders.

In a statement Monday, ABA President Stephen N. Zack said the FTC's final rule "will allow lawyers to continue to provide the critical legal services and expertise homeowners in crisis need."

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