

This column appeared in Isthmus on June 3, 2005

Opinion/Bill Lueders

Seeking justice for Penny Brummer

New book identifies ample reason for public concern

I'll come right out and say it: I think Penny Brummer is quite likely innocent of the 1994 Madison murder for which she was sentenced to serve at least 50 years in prison. And I think something should be done about it.

Brummer was convicted of killing Sarah Gonstead, her lesbian ex-lover's best friend, after a night of barhopping. Brummer had no criminal past; no physical evidence linked her to the crime; there were no eyewitnesses; and she has consistently denied involvement. All are hallmarks of wrongful convictions -- which, we now know, happen all the time.

In early 1999, shortly after I wrote an article about the case (see www.truthinjustice.org/penny.htm), I visited Brummer in prison at Taycheedah. She didn't proclaim her innocence so much as quietly exude it. But I never wrote about that encounter. There was no news hook, nothing new about her case.

Now there is.

A new book, *Who Killed Sarah?*, by Sheila and Doug Berry, has at long last been published. The subtitle, *Shedding New Light on a Questionable Conviction*, pretty much sums up its content. The book, available through Amazon.com, provides a detailed overview of the case, poking holes in the evidence brought to bear against Brummer, and plausibly speculating that Gonstead was killed by members of a local motorcycle gang.

Recounting all of the reasons to doubt Brummer's guilt would take, well, a book, but here are a few:

- Police clearly had "tunnel vision" in building a case against Brummer, another common feature in wrongful convictions. A witness who reported seeing a suspicious man standing by the open passenger door of a parked pickup truck exactly where Gonstead's body was later found was purportedly told by a Dane County Sheriff's Deputy, "what you saw is all very interesting, but we have a suspect and it doesn't fit." (The man, by the way, matched the

description of the person Brummer said she saw Gonstead talking to after she dropped her off that night.)

- The blood alcohol level in Gonstead's liver suggests a time of death several hours after Brummer was back at her Spring Green home, watching TV.

- Gonstead's murder -- a bullet to the back of the head -- is consistent with a biker execution, and the shattering of the bullet into fragments may indicate it was a .22 Magnum of the sort bikers prefer. Significantly, this type of ammo cannot be fired from the gun, never found, that the prosecution held to be the murder weapon.

According to the Berrys' book, when a post-conviction effort was made to submit these fragments for testing by a Kentucky State Police firearms expert, one of Brummer's prosecutors, Dane County Deputy District Attorney Judy Schwaemle, refused to allow it, saying, "Over my dead body." (Schwaemle did not respond to my written requests to discuss this and other aspects of the Brummer case.)

- The prosecution got a major boost from Madison resident James Foseid, who emerged midtrial claiming he heard Brummer at a bar vowing to kill her lover's friend, whom she called "a fat, ugly bitch." After the trial, a private eye located a woman who looked almost exactly like Brummer but who, unlike Brummer, frequented this bar. When I asked Foseid about this several years ago, he insisted he could not possibly have been mistaken, since the woman making death threats had said her name was Penny -- a highly pertinent detail he never mentioned at trial. The DA's office used this make-it-up-as-he-goes witness to help put Brummer behind bars for the rest of her life.

"It's clear this case was built on thin evidence, very circumstantial evidence," says John Pray, co-director of the Wisconsin Innocence Project, which has in recent years helped overturn four wrongful convictions. He notes how when police in an interrogation accused Brummer of the crime, she allegedly nodded her head slightly. This thin gesture was "interpreted as an admission that she was involved in the murder" and used against Brummer at trial. Pray calls this "symbolic of the whole case." Lots of conjecture, no solid evidence.

The Innocence Project has not actively investigated Brummer's case for several years, but Pray would support a polygraph test, if the necessary funds -- about \$500 -- are raised. (Donations can be made to the Penny Brummer Legal Defense Fund, Community Bank, P.O. Box 369, Spring Green, WI 53588.) Pray is also interested in additional testing of the

bullet fragments, if the DA's office will allow it, and in pursuing new leads.

In an e-mail, Dane County District Attorney Brian Blanchard, who was first elected after Brummer exhausted her appeals, acknowledges "horrible cases in recent years revealing convictions of innocent persons." He says prosecutors are ethically bound to "take a hard look at new evidence" that raises "genuine doubts" about a conviction, and expresses his utmost confidence that the prosecutors in this case -- Schwaemle and Assistant District Attorney Ann Sayles -- would "make it the highest priority to investigate and evaluate" any such evidence. (For this e-mail, see Document Feed at *thedailypage.com*.)

But Blanchard, in an interview, seems notably resistant to the notion that such evidence exists here. He won't commit to allowing additional ballistic testing, saying any such request must come from the Innocence Project. Even if Brummer took and passed a polygraph test, which is considered a useful gauge of truthfulness, though not admissible in court, "that alone isn't really going to make a difference." Blanchard even contends that Foseid's unreliability may be no big whoop, since "Judy [Schwaemle]'s conclusion is that this testimony was not critical in the case."

Well, his prosecutors certainly considered it critical at the time. As the Berrys' book recounts, Sayles, in her closing argument, stressed Foseid's credibility and used his testimony to gut-punch the defendant: "Could somebody think that Sarah Gonstead was a fat, ugly bitch? There's only one person in the whole world that could think that. Sarah was a nice young woman. A quiet young woman. The only person who could possibly think that is Penny Brummer."

A recurring theme in stories about miscarriages of justice is the reticence of people in the system to admit their own capacity for error. This is true even for highly ethical and honorable players like Schwaemle, who not long ago spoke of prosecutors' "need to nurture a culture in which error can be acknowledged and corrected without recrimination" and who is currently serving on a state task force aimed at reducing wrongful convictions. (One suggestion: Don't block efforts that could help show they've occurred.)

The Brummer case will not get the fresh look it deserves on the initiative of the office that convicted her. This will happen only if the community demands it. If one person reading this column is moved to get the Berrys' book and start conveying concern about this case, that could make

a huge difference. If there were as many as five or six, that's a movement. The question is whether people in this community, including public officials and law enforcement officers, have the courage to take this step in the interest of justice.

Sheila Berry, whose plans to promote her book have been forestalled by husband Doug's sudden heart attack, says getting Brummer freed from prison is only half the battle: "I would like to see the person responsible for Sarah's death brought to justice."

But for Penny Brummer, it's a pretty important half. "Something's got to happen," she told me during our visit, more than six years ago. "God's not going to let me sit here for something I didn't do. I feel he's guiding somebody out there to help me."

Are you that somebody?

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Pull quote:

Brummer (1999 photo): Not guilty?