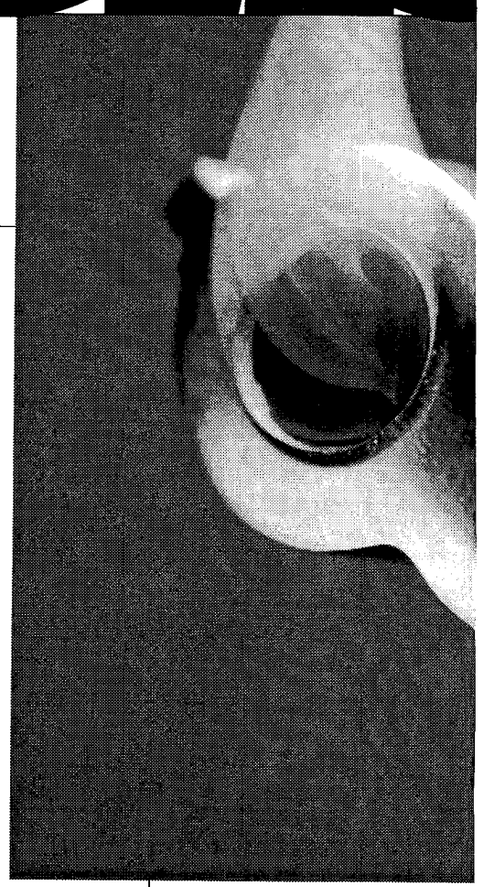
Exhuming EGGLES

Appeal in "Cop Killer" Case Raises Troubling Issues

By Frank Driscoll



Hard cases make bad law. The aphorism is as true as it is old. But its truth has never been more strikingly illustrated, perhaps, than in the remarkable case argued last month by attorneys for Brian Eggleston. The appeal is under consideration by a panel of judges from Division Two of the state Court of Appeals, and a decision in the closely-watched case is expected by year's end.

A Bit of History

Eggleston's home, located at 902 E. 52nd St., Tacoma, was raided by Pierce County Sheriff's deputies in the early morning hours of Oct. 16, 1995. They were there to serve a search warrant that had been issued after an informant told one of his handlers, Deputy Ben Benson, that Eggleston had sold marijuana to him on several occasions. The raid was conducted by the Sheriff's Department (and not the Tacoma Police Department) because Eggleston's older brother, Brent, was believed to live there. The organizers of the raid suspected Brent Eggleston, who was and is a Pierce County deputy, might be involved in the drug dealing. Unbeknownst to the raiding party, however, Brent Eggleston had moved out of the house months before.

The raid, of course, went horribly wrong. Eggleston emerged from his bedroom, pistol in hand. A brief but intense firefight ensued and, by the time the cordite started to dissipate, Deputy John Bananola lay dying. Eggleston, wounded five times, was writhing on the floor, screaming in agony. His mother, half out of her mind with terror, had to be dragged away from his bleeding form.

If Eggleston had bled to death that morning, as virtually everyone on the scene must have expected and some no doubt hoped, there would have been a brief flurry of publicity and that would have been the end of the matter. After all, he lay bleeding for almost 20 minutes before being transported to the hospital. But death wasn't in the cards for Brian Eggleston. He pulled through and, when he awoke in the hospital, he found himself being excoriated by county officials and a compliant press corps as a brutal cop-killer.

Brian Eggleston was tried twice for first-degree aggravated murder. There is nothing quite as electrifying as the story of a slain law officer, unless it's the trial of his alleged murderer, and both trials were conducted in the harsh glare of publicity. Eggleston's two trials generated more newspaper coverage than any local story in memory. He was vilified as a drug-dealing cop-killer by some and defended as a victim of police and prosecutorial excess by others. But whether he was a victim of circumstance or the embodiment of evil, Brian Eggleston was certainly good copy.

Story after story appeared in the papers back in 1997 and 1998, when two Pierce County juries held the then-young man's fate in their hands. The first panel couldn't decide the murder charge, which had the effect of postponing a decision on whether Eggleston deliberately shot the deputy to death in a fit of rage.

If the prosecution's theory of the case was correct, Eggleston knowingly fired three bullets into the officer's head in an effort to protect his stash of marijuana and drug money. Eggleston, everyone seems to agree, smoked pot. As the case unfolded, he was exposed as both a consumer and occasional purveyor of marijuana—that is, he now and then sold small quantities of green bud to people he believed to be friends. But no one ever accused him of being Mr. Big.

And that was precisely the

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point, from the defense's perspective. An exhaustive search of Eggleston's home conducted with all the meticulousness attendant upon a homicide investigation turned up just $100 worth of cannabis. True, a hefty chunk of cash was found as well, but it's not unheard of for people to keep that kind of money—some $1600—tucked under the mattress. There is certainly no law against it.

In any case, he didn't know the people he opened fire on were police officers, Eggleston's attorneys maintained. Why would anyone, drug dealer or no, kill a cop to protect a couple of grams of weed and a few hundred dollars? It didn't make sense.

After a two-and-a-half-month trial, the first jury told visiting Thurston County Superior Court Judge Thomas McPhee it couldn't reach a verdict on the murder charge. Eggleston was found guilty of first-degree assault with a firearm and possession of marijuana with intent to deliver, however, and was later sentenced to nearly 20 years for those crimes.

But the first jury had punted the question of whether Eggleston should either be executed or spend the rest of his life in prison without possibility of parole. The prosecution promptly announced that Eggleston would once again be tried for his life.

In May 1998, the second jury, after hearing pretty much the same evidence and arguments, convicted Eggleston of murder, but only in the second degree. Visiting Kitsap County Superior Court Judge Leonard Kruse sentenced him to an additional 29 years, to run consecutive to the 20-year term. (In both trials, visiting judges presided because Deputy Bananola had worked security in the County-City building and was well known amongst Pierce County judges.)

When the verdict was announced, it was as if the community breathed a huge sigh of relief. The second-degree murder conviction was widely viewed as a compromise by a jury that couldn't quite buy the notion that Eggleston had deliberately executed Bananola.

Eggleston went off to prison and the case pretty much dropped off the radar screen, except when Bananola's ex-wife filed a $6 million lawsuit against the ››

>> county, alleging that the raid's planning was faulty and that Deputy Bananola hadn't been provided with adequate safety gear.

The case was reprised again when Eggleston's mother sued the county, alleging that her home was destroyed by homicide investigators who literally dismantled the interior of her house, carting off sections of the structure for evidence.

Then a long-delayed independent review of Sheriff's Department drug raid procedures was released in late September 1998. The report resulted in major changes in the way such raids are conducted, even though county officials said the Eggleston raid was not reviewed because of concerns about lawsuits.

"Unfortunateiy, in our current litigious situation, we just have to be very cautious in how we approach it," then County Executive Doug Sutherland told the *News Tribune*.

Then-Sheriff Mark French said at the time that he "didn't see a lot of value in pulling it all apart again."

And so, five-and-a-half years after Deputy Bananola was killed, we can be sure of only a couple of things: Eggleston shot Bananola to death, and he was convicted of second-degree murder in his homicide. Beyond that, Eggleston is doing 49 years at McNeil Island and will spend most, if not all, of the rest of his life behind bars if the state has its way.

What's New In The Case?

So, what can possibly be said about the Eggleston case that hasn't already been said? Quite a bit, as it turns out.

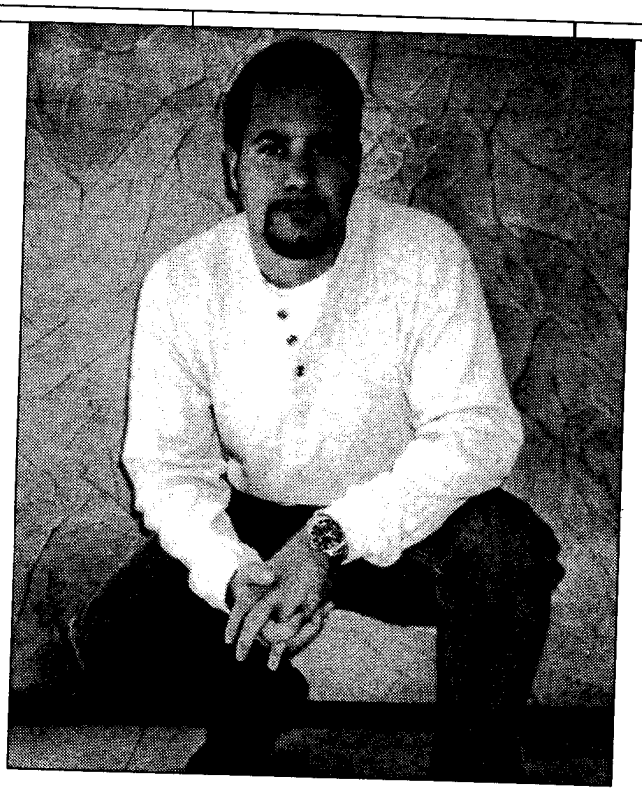
Events unfold sequentially, and now that the trials are over and the posturing of trial lawyers is history, it is time for the next phase of the legal process: Eggleston's appeal of his convictions.

Ironically, even though much more is known now about the circumstances of the fatal raid, news coverage of Eggleston's appeal focused on deficiencies in a search warrant, irregularities by jurors on the panel which decided his second trial, and erroneous jury instructions. In short, Eggleston was portrayed as a convicted killer whose lawyers are looking for a loophole—a technicality, if you will—to "beat the rap" for him.

But if the allegations made in Eggleston's appeal are true, there never was a murder rap to beat. Eggleston was caught up in a process so tainted by prejudice and passion, so poisoned by county officials' effort to cover up shoddy police work, that he never had a chance at the trial court level. In sum, the allegations constitute a sweeping indictment of the criminal justice system.

Appellate courts are charged with ensuring that people convicted

in criminal cases were fairly treated. The difference between a jury trial and an appellate hearing is like the difference between a barroom brawl and a debate. In the former, the attorneys use every trick in the book to persuade jurors—many if not most of whom haven't a clue about the law—of the rightness of their cause. In the latter, they are restricted to a review of the record, for the most part. Only in very exceptional cases will an appellate court review underlying facts; those have already been determined by the "triers of fact"—in this case, the two juries which convicted Eggleston. That is, the Court of Appeals will soon decide whether Eggleston got a fair shake, based upon the record.



Brian Eggleston

It is worth mentioning that the record in this case is an imposing stack of documents that will probably take weeks, if not months, for the judges to review in their entirety. But it's all there, chapter and verse, complete with citations to the transcripts of testimony and other documents generated by this case.

And these are the issues his attorneys have raised, based upon that record:

Prior to his first trial, Eggleston argued two evidence suppression motions before Judge McPhee. One was a motion to suppress all the ballistic evidence, blood spatter, videos, photographs, drugs, guns, cash and other objects gathered at the home because the police violated the so-called knock-and-announce rule. The second motion sought to suppress the same evidence because the police failed to obtain a search warrant before conducting their homicide investigation. Judge McPhee denied both motions.

Before his second trial, Eggleston requested new suppression hearings before Judge Kruse so he could independently assess witness credibility, among other things. The prosecution urged Judge Kruse to adopt Judge McPhee's earlier rulings, which he did.

The questions: did Judge McPhee err in denying the motions and did Judge Kruse compound the error by adopting McPhee's rulings?

As Eggleston was being transported to the hospital, one of the paramedics asked him what happened. The paramedic testified that Eggleston replied ››

» "something to the effect of hearing shots, or possibly . . . possibly his father being shot and the next thing he knew he was shot."

The court admitted most of Eggleston's statement under an exception to the hearsay rule, but excised the words "or possibly his father being shot," reasoning that the phrase had "no basis for medical diagnosis."

The question: was Eggleston's defense team wrongly prevented from introducing evidence of his mental state at the time of the gun battle?

A videotape was made by a state's witness who recorded the statements of each and every officer involved in the raid while they were still in the Eggleston home. The court prohibited Eggleston from showing the videotape to the jury because of the dim lighting.

The question: was Eggleston erroneously prevented from showing that one of the witnesses testified in a manner inconsistent with what he said on the tape?

Over defense objections, the court allowed Eggleston's driver's license photograph to be introduced as evidence, even though it depicted him unfavorably, with long, scraggly hair. Eggleston, of course, never denied he shot Bananola and testified he acted in self-defense.

The question: was the photograph relevant to establishing Eggleston's identity and, if not, why would the court permit such a prejudicial photo to be introduced?

During cross-examination of a defense expert, one of the prosecutors insinuated that critical measurements were in error. Later, outside the presence of the jury, the state retracted its statement. The court refused Eggleston's request to inform the jury of this, however.

The question: did the court's ruling wrongly permit the jury to conclude that the defense witness was mistaken about critical measurements?

Eggleston's defense team wanted to introduce a video of a semiautomatic weapon being fired in order to refute the prosecution's assertion that he had enough time during the gun battle to form intent to kill. The court denied the request, even though testimony from state's witnesses on "every imaginable detail" on the operation of semiautomatic handguns was permitted.

The question: was Eggleston erroneously denied the opportunity to present a defense?

When jury misconduct led to a defense motion for a mistrial, the trial judge told Eggleston's lawyer "Your job is to want a mistrial and that would be perfect. It's my job to try to have this case resolved."

Moreover, on four separate occasions, the court excused the

jury and assisted the prosecution in presenting its case. First, the court reminded the prosecution they neglected to present evidence on cause of death. Second, the court reminded one of the prosecutors she had failed to ask a crime scene reconstructionist his opinion about where Eggleston was when he fired. Third, during a demonstration of bullet trajectories into a Styrofoam model of a head, the court reminded the prosecution there were three, not two, bullet trajectories. Fourth, after a defense witness testified that certain bullets were low velocity (which ran counter to the state's theory of the case, the court advised the prosecutor, "I'm sure (the state's expert) can tell us that a bullet has to have a certain velocity in order to operate the automatic mechanism."

Afterwards, the prosecutor did elicit testimony that if a bullet were of such low velocity, the gun would not have been able to operate.

The question: did the court's demeanor and actions create the impression of judicial bias?

Eggleston wanted to introduce expert evidence that certain physiological and psychological changes, including loss of memory, may occur in human beings under the stress of a gunfight. The condition has been described scientifically and is known as "hypervigilance." The court did not allow the evidence to be presented, however, reasoning that although the concept of hypervigilance has scientific validity, "the presentation before the jury of what some persons may do when in a hypervigilant or panic state is not relevant. . ."

The question: was Eggleston improperly denied an opportunity to explain how he could have failed to recognize the intruders in his home as police officers?

At trial, the court questioned the relevance of cash found in a bedroom Eggleston shared with his fiancée because it was never proved to be related to drug transactions. As a result, it was never admitted into evidence. In closing arguments, however, one of the prosecutors "testified" the police found $1,600 in the bedroom.

The state also hammered away at Eggleston's inability to remember precisely what happened immediately after being shot in the testicles, knowing that the court had barred him from presenting evidence relating to hypervigilance.

The question: did the prosecutors' mischaracterization of evidence and arguing of facts not in evidence amount to prosecutorial misconduct and thus require reversal of his convictions?

During jury instructions, the court submitted an aggressor instruction, even though there was no evidence contradicting Eggleston's assertion that he fired only in self-defense.

Another jury instruction told the jury, in part, "The service of a search warrant is a legal duty lawfully performed by a law enforcement officer."

Although the court expressed some concern that this sentence constituted a comment on the evidence, the instruction was submitted anyway.

Finally, the court refused to submit Eggleston's proposed instruction that he had a statutory and constitutional right to display a gun in his own home.

The question: did jury instructions tilt the scales of justice so far in the prosecution's favor that Eggleston couldn't have received a fair trial?

But here's the real question: was Brian Eggleston railroaded into prison for a crime that he never committed? TR