

## **Rogue Cops Raid Atlanta Gay Bar and Attempt Cover Up of Abuses**

*Calhoun v. Pennington*, Court File No. 1:09-CV-03286 (N.D. Ga. Dec. 8, 2010)

### **Introduction**

To Serve and Protect: this motto, emblazoned on police vehicles across the country, would lead one to expect the highest levels of integrity from the officers occupying them. One case from Atlanta involving a group of officers who violated court orders by destroying evidence in a civil case, presumably to protect themselves from liability, demonstrates that this axiom is not always the most appropriate description of police behavior.

The Atlanta Police Department (APD) raided the Atlanta Eagle bar on September 10, 2009, after citizen complaints and an undercover investigation into activities at the establishment. The raid produced eight employee arrests on permit violations. Employees and patrons present at the time later reported police abuses during the raid. A civil rights lawsuit filed by patrons, two businesses and an employee alleged Fourth Amendment violations (illegal search and seizure), false imprisonment, anti-gay prejudice and bias, assault and other torts. The discovery process in the case revealed widespread, deliberate destruction of cell phone evidence by the officers participating in the raid on the Eagle bar. A spoliation of evidence argument was presented to the court, supported by an affidavit from John Carney, Chief Technology Officer of Carney Forensics. Less than two months later, on December 8, 2010, the Honorable Timothy C. Batten, Sr. of the United States District Court for the Northern District of Georgia approved a Settlement Agreement resolving the case.

The complexity and number of claims involved and the number of actors, including 24 plaintiffs and 34 officers named individually as defendants, necessitates a brief look at the background of the case in order to better understand this result. After reviewing the background

facts, this synopsis will focus on the cell phone evidence spoliation claims and how that component of the litigation drove the outcome of *Calhoun*.

Much of the background information summarized here was gathered from a formal report prepared by the law firm of Greenberg Traurig, LLP. On March 7, 2011, pursuant to settlement terms reached in the *Calhoun* litigation, the City of Atlanta hired Greenberg Traurig to conduct an investigation into the Eagle raid and the conduct of involved officers. The investigation produced a nearly three hundred fifty page report. The Greenberg Traurig Report is considered the premier resource on the Atlanta Eagle raid.<sup>1</sup>

### **The Initial Investigation of the Eagle Bar**

Citizen complaints to the mayor about illicit activities at the Atlanta Eagle bar in early 2009 drew attention from the Atlanta Police Department Special Enforcement Section (SES), an umbrella department with oversight of the Vice, Gangs, Licensing, Homeland Security, and Narcotics Units, as well as others. Operating under the command of Major Debra Williams, SES assigned the investigation of the activities at the Eagle bar to the APD Vice Unit for an undercover investigation into allegations of public sex and drug sales. Lieutenant Tony Crawford of the Vice Unit authorized Vice Sergeants John Brock and Kelley Collier to begin undercover operations in May of 2009. (GT15-17).

During three undercover trips to the bar in May, June and September of 2009, Sergeants Brock and Collier, at times accompanied by other officers, reportedly witnessed club employees dancing for tips and exposing themselves, and patrons engaging in public sex acts. No arrests or citations were made during or immediately after these undercover investigations. After the first visit by undercover officers, Vice investigator Bennie Bridges consulted with city prosecutor

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<sup>1</sup> Citations in this report will refer to pages of the Report using the following citation form: (GT#). The entire Greenberg Traurig Report is available here: <http://www.scribd.com/doc/58976920/76/Officer-James-Menzoian>

Larry Gardener, and concluded that the dancing reported by the Vice officers was a violation of the Eagle's liquor license. Attorney Gardener also told Investigator Bridges that a search warrant for the bar would not be necessary because the Eagle was a public establishment. (GT17, 18, 20).

### **Police Raid the Eagle Bar**

After the three undercover visits, Sergeants Brock and Collier determined that they had enough evidence to establish a pattern of illegal activity at the Eagle, but realized that their small detachment of Vice officers would need assistance to conduct a raid. The decision to utilize the Red Dog Unit of SES was generated by the unavailability of the Gangs Unit, another component of SES. Formed in 1989 to address street-level drug crime, the Red Dog Unit specialized in SWAT-type operations involving high-risk search warrant entry. (GT7). Lieutenant Scott Pautsch, Commander of the Red Dog Unit, assigned Sergeant Willie Adams III from Red Dog to coordinate with Sergeant Brock and provide assistance for the Vice Unit. (GT20, 21).

A pre-raid briefing was convened at 9:30 p.m. on September 10, 2009, and included officers from the Vice and Red Dog Units. Notably, no search warrant was obtained for the Eagle, and according to officer statements, the need for a warrant was not addressed at the pre-raid briefing. The background of the investigation into the Eagle was discussed during this briefing, and individual assignments were given according to the Tactical Plan for the raid. During these instructions, officers were directed to put everyone on the floor, even those not suspected of any crime, while names were gathered and checked against a police computer database. The decision about how to treat patrons not suspected of illegal activity was based on Sergeant Brock's concerns about weapons, violence, and the large crowd at the bar. (GT22-23, 148-149).

Following the Tactical Plan for the raid, undercover Vice officers entered the Eagle first on the night of September 10, 2009, to “go into the location and spot illegal activities, and upon seeing the illegal activities call in awaiting [R]ed [D]og units to detain, [and] lock down the location.” (GT22) After the undercover officers reported back about sex acts and illegal adult entertainment occurring in the bar, the Red Dog Unit entered the bar. During the course of the raid, police made eight arrests of employees, and the employees were later cited for dancing without a permit or operating an adult entertainment business without a permit. No other charges were filed against these employees. One employee arrested was an off-duty manager living in a private upstairs apartment in the same building. Not surprisingly, the accounts of the raid given by citizens and police diverge.

### **Eagle Customers Claim Police Misconduct**

Patrons and employees of the Eagle bar reported that the police did not announce themselves as police officers, and that they forced everyone to the beer soaked and broken-glass covered bar floor, frisked them and searched their pockets, hurled anti-gay epithets, confiscated and ran their IDs through a police computer, and threatened them with physical abuse and/or firearms. Additionally, according to some of those present during the raid, officers kicked in a door, forced employees to open cash registers, entered a private upstairs residence without a warrant, falsely imprisoned patrons for an hour or more, and blocked released patrons’ vehicles. (GT30-33, 35).

### **Police Claim Safety Issues, Standard Procedures, and Memory Lapses**

Officers who were present during the raid denied using abusive language and excessive force with patrons and employees. Several officers did admit to frisking or searching detained patrons. (GT 41). Officers denied that anyone used abusive or anti-gay language, and supported

their account with the fact that a well-respected member of the team was a lesbian. (GT 41). Officers were not able to identify who kicked in and searched a locked storage room door, and were also unclear as to whether they actually entered the private upstairs apartment. (GT 46-48).

### **Investigations into Alleged Misconduct**

Following the raid, in accordance with Atlanta police complaint protocol, thirteen customers and employees filed a citizen complaint with the Atlanta Office of Professional Standards (OPS). On the same day Chief Pennington from the APD made a public statement of support of the officers and the raid.<sup>2</sup> The citizen complaint, later combined with other related complaints, resulted in an Internal Affairs Unit investigation. On October 17, 2009, the above-mentioned complaint was brought before the Atlanta Citizen Review Board (ACRB), an organization established by an Atlanta city ordinance to provide citizen oversight of misconduct allegations directed at the APD.

On November 24, 2009 a civil rights lawsuit, premised on 42 U.S.C. § 1983,<sup>3</sup> was filed in United States District Court for the Northern District of Georgia.<sup>4</sup> The suit named as defendants APD Chief Pennington, the City of Atlanta, the Atlanta Police Department, and three individual police officers. Plaintiffs included David Shepard, the off-duty Eagle manager living upstairs from the bar, several patrons present during the raid, and the corporation that owned and operated the Eagle bar.

On December 17, 2009, one of the attorneys for the Plaintiffs, Graham Lee of Lambda Legal, sent a Preservation Letter to multiple officials from the City of Atlanta and the APD. On December 21, 2009, Attorney Jerry DeLoach of the City of Atlanta Law Department issued a

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<sup>2</sup> Local news coverage can be found here: <http://www.ajc.com/news/news/local/chief-vice-cops-saw-sex-at-gay-bar/nQR89/>.

<sup>3</sup> 42 U.S.C. § 1983 provides monetary relief for individuals whose constitutional rights are violated by a state actor.

<sup>4</sup> *Calhoun v. Pennington*, Court File Number 1:09-CV-03286.

"Litigation Hold - Eagle Incident of September 10-11, 2009" to multiple officials from the city and the APD. A second Litigation Hold was circulated by Attorney Dennis M. Young of the Atlanta Law Department in early January of 2010. (GT 65). Generally, these documents required all involved parties to retain all evidence related to the raid on the Eagle bar.

Meanwhile, by March 11, 2010, seven of the eight Eagle employees arrested the night of the raid were acquitted of the ordinance charges or had their cases otherwise dismissed in court. The last member of the "Eagle 8" did not appear for trial, prompting a bench warrant.

An amended complaint was filed in the *Calhoun* matter on March 17, 2010, adding 31 more police officers as named defendants and increasing the number of plaintiffs to 24. The discovery process in *Calhoun* began the first week of April, 2010.

### **Electronic Discovery Issues**

Cell phone use has now recently reached over 100% market saturation nationally, which means that many people own and use more than one device. Many of the APD officers who participated in the Eagle raid did have access to one or more mobile devices on the night of the raid. The APD issued Blackberry smartphones to officers. Some officers also carried a personal cell phone on the night of the raid.

In late August of 2010, the City of Atlanta Law Department held a meeting with all officers who participated in the Eagle raid, and followed up with a memorandum to officers advising of an agreement that had been reached with Plaintiff's counsel regarding preservation of cell phone data from the night of the raid. Twenty-six phones from twenty-two officers were submitted for examination by the Homeland Security Unit of the APD on September 3, 2010. Later that month, nine more phones from eight different officers were also submitted for review. (GT 67).

Notably, not all phones were available for examination. Several officers claimed to have replaced the phones in their possession on the night of the raid. Other officers left the police force and their phones were not made available during discovery.

As noted above, the cell phones collected for discovery were initially examined by a unit of the Atlanta Police Department. Reports compiled from six inspections by the Homeland Security Unit were given to Plaintiffs' attorney for evaluation and discussion with an expert of Plaintiff's choosing. Not surprisingly, Plaintiffs were concerned about the conflict in interest inherent in allowing an APD Unit to conduct the initial examination of the devices. These concerns would later prove to be justified as the deficiencies in the superficial examinations by the Homeland Security Unit were uncovered.

Even the judge on the case was skeptical as to whether the Defendants were being forthcoming with responsive evidence. Federal Judge Timothy C. Batten, Sr. was reported as observing during an August 20, 2010 conference call that “[t]here’s no way that there’s no data relevant to this case on all those electronic devices...That’s just not the way the world works today.”<sup>5</sup> This observation was made in connection with Judge Batten's order that all phones be surrendered for testing.

### **Spoliation Uncovered by an Independent Mobile Forensics Examination**

Smartphones can contain many forms of digital evidence, which can be stored on multiple gigabytes of memory. Call logs, contacts, text messages, GPS locations, photos, videos, emails, voice messages and other artifacts may be stored on the phone itself or on removable memory cards. Cell phone companies cannot provide access to most of this data. Only data mining the device’s physical memory will reveal its evidentiary treasures.

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<sup>5</sup> Read the entire article at: <http://www.ajc.com/news/news/local/lawsuit-police-erased-evidence-in-atlanta-eagle-ra/nQmF2/>

In the *Calhoun* case, the Homeland Security Unit's forensic examiner utilized the Cellebrite Universal Forensic Examination Device (UFED) for testing of the devices turned over by APD officers. Even from a layperson's perspective, it can be understood that a tool dubbed "Universal" may not properly apply to the thousands of different phone models, multiple operating systems, and millions of apps in use today.

With the ever expanding choices of cell phones and other mobile devices, an investigator or attorney wishing to recover digital evidence must consider a digital forensic expert willing and able to use more than a cursory search with a UFED. Certain phones require specific tools to properly extract necessary evidence.

Recognizing these facts, Plaintiffs' attorney brought in a digital forensic expert, John J. Carney, Chief Technology Officer of Carney Forensics in Minneapolis, to review the Homeland Security Unit's investigation results. Mr. Carney's review of the reports revealed that the Homeland Security Unit's forensics expert failed to go beyond a surface examination of active data on the phones. No other instruments or forensic tools were used. No suspected deleted messages were recovered or produced.

Despite this handicap, Mr. Carney was able to recover certain text messages sent on the night of the raid by looking for uneven deletion of messages by the involved APD officers. Mr. Carney also looked for gaps in date and time stamps from phone memory, which indicated missing (deleted) photographs taken during the raid. Mr. Carney noted that even the perfunctory UFED examination by the Homeland Security Unit revealed call log discrepancies not compatible with the normal usage of the phone owner.

Mr. Carney was also able to uncover discrepancies between officer testimony and the data present on the recovered devices. For example, Officer Jeremy Edwards claimed he did not

use mobile communications, yet his phone contained the lone surviving photograph taken during the raid. (GT 184, 300). The photograph depicted an Eagle employee next to a police vehicle. Other officers' claims of not sending or receiving text messages failed under scrutiny due to Mr. Carney's expertise in digital forensics and his ability to link timelines and messages across multiple devices.

Based on Mr. Carney's findings, Plaintiffs' attorney prepared a motion describing massive spoliation of evidence in violation of court orders and moving for sanctions against the Defendants.<sup>6</sup> This motion was supported by a detailed affidavit from Carney highlighting the shortcomings of the Homeland Security Unit's inspections and describing the possibilities for recovering further evidence, including that which was deleted. Mr. Carney's affidavit outlined the possibility of recovering the full text of deleted messages and pictures or video recorded during the raid.

After Plaintiffs' motion was filed, news sources in Atlanta spread word of the apparent violations of court orders by the APD. "The APD examination reports given to the plaintiff's expert [Carney] showed all the records from before Aug. 24 on many phones had been erased. Yet cell phones that were not wiped clean contained text messages or logs of phone calls that were sent or received from the phones with no records of communications."<sup>7</sup>

Accounts of the APD's tactics in the media were unforgiving. "[B]oth the Atlanta Police Department and the City of Atlanta have routinely missed court-imposed deadlines, failed to maintain evidence, failed to hand over evidence as required by law, and in some cases, even willfully destroyed evidence. One example involves officers' cell phones. The court ordered APD officers to hand over the phones to check for relevant pictures, text messages, or calls made

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<sup>6</sup> Plaintiffs' motion can be found here: <http://www.clearinghouse.net/chDocs/public/PN-GA-0003-0002.pdf>

<sup>7</sup> See note 4, supra.

during the September, 2009 raid on the Eagle. A forensics expert [Carney] found officers had deleted text messages and pictures. And they did it *after* the Court order, according to the motion.” (emphasis added).<sup>8</sup> News reports of the APD officers' actions compounded, and pressure on the City of Atlanta to resolve the matter grew.

### **Million Dollar-plus Settlement Also Brings APD Policy Reforms**

Before the end of 2010, and only eight weeks after the Plaintiffs' motion was filed, the parties announced a settlement. The December 8, 2010 agreement set a damage award in excess of one million dollars. It also included APD policy reforms to be overseen by Judge Timothy Batten. Such measures are rarely achieved outside of Department of Justice interventions.

Pursuant to the Settlement Agreement, the City of Atlanta agreed to review and redraft the APDs' Standard Operating Procedures (SOPs) to state clearly, and in compliance with constitutional principles, when individuals may be detained and searched. Additional training on Fourth Amendment issues and diversity were implemented, and additional GLBT community liaisons were established.

Reports compiled by the Atlanta Citizen Review Board separately confirmed a factual basis for claims of false imprisonment, anti-gay abuse and lack of proper supervision of APD officers. The ACRB investigations led to a January 20, 2011 letter from the ACRB to APD Chief Turner recommending various forms of discipline for all officers involved in the Eagle raid. These recommendations were rejected by Chief Turner, however, pending completion of the IAU investigation.

The Greenburg Traurig Report ultimately found that (1) inadequate planning and training, (2) a failure in command staff oversight and involvement, (3) a breakdown in communication

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<sup>8</sup> Read the entire article at: <http://www.wabe.org/post/federal-court-motion-claims-city-atlantaapd-withholding-destroying-evidence-eagle-raid-case>

between the command staff and the officers, (4) potential prejudice and bias, (5) inappropriate decision-making by the command staff on the scene, and (6) lack of effective coordination between the City Law Department and the APD, all contributed to the commission of Fourth Amendment and APD Standard Operating Procedure violations against the employees and patrons of the Eagle on the night of September 10, 2009. After these results were presented, six APD officers were fired, and others received reprimands or suspensions without pay.

The officers' dishonesty was the primary basis cited for disciplinary action. "Honesty goes to the very heart of a police officer's credibility," said APD Chief George Turner. "The public must be able to trust its police officers and expects them to tell the truth at all times." In addition, "[a]ny time an officer's credibility is at issue ... that can be raised in court," said Christine Koehler, a past president of the Georgia Association of Criminal Defense Lawyers.<sup>9</sup>

The *Calhoun* case demonstrates how digital forensic expertise can be used to uncover important evidence with the potential to drastically change the result of a lawsuit. In *Calhoun*, the result included a monetary settlement for the Plaintiffs, as well as policy changes that arguably restored some of the public trust in the Atlanta Police Department.

[Tags: civil rights violations, police reforms, Atlanta Eagle raid, mobile forensics, cell phone evidence]

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<sup>9</sup> Read the entire article at: <http://www.ajc.com/news/news/local/6-atlanta-officers-fired-over-atlanta-eagle-raid/nQJNw/>