



Death Investigation of Joshua Hathaway November 19, 2013

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Investigative Process, Questions of Bias, Time Frame

In the early morning hours of November 19, 2013, a Liberty University security officer shot and killed Joshua Hathaway, a 19-year-old student of the university. The incident occurred at Liberty University Residential Annex II on Albert Lankford Drive in Lynchburg, a former hotel converted into a women's dormitory. Lynchburg Police were notified immediately and responded to the scene.

The Commonwealth's Attorney's Office was notified and Commonwealth's Attorney Michael Doucette and Deputy Commonwealth's Attorney Charles Felmlee also responded to the scene early on the morning of November 19th. Since that time, our office has worked closely with the LPD's Criminal Investigations Division in their investigation of Hathaway's death.

In mid-December 2013, I was asked by Commonwealth's Attorney Michael Doucette to investigate the death and evaluate whether criminal charges against the officer were warranted.

I do not know the security officer who shot Hathaway. To the best of my knowledge I have never met him nor worked with him. I have occasionally worked with officers from the Liberty University Police Department on various cases over the years. While I know a handful of officers in the LUPD in a professional capacity, my contact with them is minimal. I would estimate that on average, I work with LUPD officers on one to three cases per year. I do not know any officers with LUPD or Liberty University Security in a personal or social capacity; I have no bias toward or against any of them. I am not a current or former student or employee of Liberty University. My only contact with the school is in my professional capacity as a criminal prosecutor. Accordingly, I have no bias toward or against Liberty University.

The Commonwealth's Attorney previously commented on the possibility of professional bias in favor of law enforcement officers by prosecutors. Regarding the appointment of a special prosecutor in the Hilber Investigation (in which one LPD officer shot a fellow officer during a search warrant earlier in 2013), Doucette stated:

"Any other special prosecutor appointed could be accused of [pro law enforcement] bias. Therefore, there is no advantage to such an appointment. To the contrary, it could be a disadvantage to have such an appointment. Any special prosecutor would most likely be from a jurisdiction far removed from Lynchburg. Such an individual could come from their home jurisdiction, simply make the decision whether to place charges and go home again without being answerable to the citizens of Lynchburg."

That same analysis applies in this situation; a special prosecutor from outside of Lynchburg is not warranted. We are well-suited to make this decision, and as our Commonwealth's Attorney has said, this office is directly accountable to the citizens of Lynchburg for its decisions.

I received the complete case file from the Lynchburg Police Department on February 12, 2014. Their file could not be finalized and provided to me until all the forensic testing results were received. The last of those results was the finalized autopsy report, which arrived on January 20, 2014.

There is often public speculation on why death investigations take so long. The investigation of any death takes significant time to complete in a thorough and exhaustive manner. We strive to make decisions and release information as quickly as reasonably possible. That said, we will not trade our obligation to conduct complete and thorough investigations in favor of hasty decisions, rushed judgments, or incomplete information.

Complete autopsies, including toxicology tests, routinely take weeks to months to be finalized. DNA testing routinely takes weeks to months to complete. Additional forensic testing (in this case, testing of a firearm and examination of bullets, cartridges, and clothing) is the same – typically taking weeks to months. This is not unusual; television shows like CSI and Law & Order provide a grossly false picture of how forensic testing works. The nature of the testing combined with significant caseloads creates lengthy time frames in the real world; it is simply the daily reality of forensic lab work.

The Purpose of this Report

This report is concerned solely with whether state criminal charges should be placed against the officer who shot Joshua Hathaway. That determination is based on an examination of the facts.

This report is not concerned with civil culpability. It is not concerned with policies or procedures of Liberty University or Liberty University law enforcement/security. It is not concerned with whether this incident could have been handled differently or better. I offer only my professional opinion as a criminal prosecutor as to whether or not criminal charges are appropriate. The facts must be of sufficient cumulative weight as to probably convince a judge or jury beyond a reasonable doubt that the defendant has engaged in criminal conduct. That is the standard; anything less is insufficient.

The Events of November 19th



Residential Annex II

The security officer, A. S. Mulberry, recounts being seated at the front desk of the LU Residential Annex II eating his lunch in the early hours of the morning when Hathaway entered the building.

Hathaway entered the lobby holding his head; Mulberry noted he had blood running down his face from a cut. Hathaway approached the desk and asked Mulberry if he was a “cop.” Mulberry replied he was a security officer with LUPD, at which point Hathaway said in a



Front desk where Mulberry was seated on Hathaway's entry



Mulberry's security vehicle parked outside the lobby entrance



View of front door from behind desk

"shaky voice" that he was mugged in the parking lot and his car was stolen.¹ Mulberry immediately radioed for a medic and a police officer to respond.

Mulberry had a first aid kit in his security vehicle parked outside. He asked Hathaway to sit down on a couch in the lobby while he retrieved his kit. Mulberry left the front desk and was putting on gloves as he walked into the lobby. He was still trying to persuade Hathaway to sit down and they both ended up walking toward the front door together. As they reached the front door, Mulberry recalled saying to Hathaway again, "Sir, you really need to sit down, you have a head injury." At this point, Mulberry estimated Hathaway was "maybe a pace away" from him when his demeanor changed entirely and he said, "Sir, I have a problem." As he said this, Hathaway produced a yellow-handled mallet from under his shirt and raised it.

Mulberry initially reached for his firearm, but then realized he needed to "create space" between himself and Hathaway. He began backing up across the lobby when he tripped and fell; as he got back to his feet, Hathaway was closing in with the mallet raised to strike. At this point Mulberry tried to get in close to Hathaway to deflect any blows from the mallet. They grappled with one another and fell against the desk countertop; at some point here Mulberry managed to force Hathaway to drop the mallet. Hathaway continued to attack. Mulberry felt Hathaway "starting to claw at [his] neck," and again attempted to put space between himself and Hathaway. Mulberry was also attempting to use his

radio at this point. He was unable to get the radio to work, and would later realize it had bumped off of the police channel at some point during the struggle.

¹ This would prove untrue; Hathaway's car was in the parking lot a short distance from the lobby, and there was no evidence suggesting that he had been mugged or assaulted by another person.

Hathaway then began grabbing at Mulberry's gun on his belt, which was facing away from Hathaway. Mulberry grabbed Hathaway's throat and was able to get away from the counter area. They then went to the ground with Hathaway on top of Mulberry.



Metal sledge hammer recovered from the scene

Mulberry began bucking to get Hathaway off of him; he would later recall, "I knew if I did not get him off me I was dead" He managed to shove Hathaway off and get to his feet and Hathaway was "right back on [him] again." At this point, Mulberry said he was out of air and "sucking wind." He drew his firearm and attempted to fire; the gun clicked but did not discharge.²

Mulberry then "bull rushed" Hathaway and tried to shove him back while attempting to rack the slide on his weapon. As Hathaway came back at him again, he fired the first shot and did

not know if it hit Hathaway. Hathaway paused for a second and Mulberry quickly fired a second round, at which point Hathaway went to the floor toward the mailboxes. Mulberry then "assessed if [Hathaway] was going to continue fighting or if he had stopped."

As Hathaway stumbled to the ground he said, "Alright, I'm done, I'm done." Hathaway initially tried to get back to his feet again and Mulberry began shouting at him to stay on the ground. Mulberry continued to try and call with his radio but got no response. He realized his radio was on the wrong channel and then managed to call for help, announcing over the radio "shots fired" and "officer needs help." Other officers would estimate about 2-3 minutes elapsed between the first (calm) call for assistance, and the second (more frantic) call after shots were fired.³

The next person to arrive was an LUPD officer. He entered the lobby and drew his firearm on Hathaway. Mulberry told the second officer he was going to be sick, stepped outside and vomited in the parking lot. Officers began arriving quickly and initially handcuffed Hathaway because he was still breathing and face-down; they did not know if he had any weapons under him or remained a threat. As they quickly determined that Hathaway was no longer a threat, they immediately began first aid. Hathaway was initially breathing but stopped after being turned over face-up. They attempted to stop the bleeding and began CPR at the scene. His care was turned over to EMTs from Lynchburg

² The officer stated that his weapon had recently been serviced and to the best of his knowledge was loaded and chambered with a full sixteen (16) rounds; the servicing was confirmed through LUPD records and all sixteen (16) rounds were accounted for during the investigation.

³ There were no recordings of the radio traffic that morning although numerous officers reported hearing both calls; an LUPD officer would later write, after attempting to retrieve the radio traffic, that recordings were not operating due to "fiber optic issues with the LUPD's RIOS computer" and that the Virginia State Police were working on fixing the system.

Fire as soon as they arrived on scene, approximately six (6) minutes after the officers began to arrive. CPR efforts continued for approximately twenty-four (24) minutes before LFD reported Hathaway deceased. The medical implements used to treat Hathaway were left behind intentionally by LFD so as not to disturb the scene any further than necessary.⁴

Mulberry was transported to Lynchburg General Hospital with minor injuries. Other officers noted he had a bleeding lip as well as abrasions and contusions on his face and hands. He was examined by a forensic nurse examiner who photographed and documented his injuries, all of which were consistent with a physical fight as he described.

Despite some public speculation to the contrary, there were no cameras in the lobby of Residential Annex II where the shooting occurred, thus there is no video, still photo, or any other audio or visual recording of the incident.

The Subsequent Investigation, Autopsy and Forensics



Hathaway's car in the parking lot near the lobby

LPD officers executed six (6) search warrants in the wake of the shooting to include the shooting scene itself, Hathaway's vehicle, Hathaway's dorm room, LU records pertaining to Hathaway (including academic and financial records), video surveillance footage from other areas on campus, network logs, and card access records. The warrants and investigation resulted in the collection of about sixty (60) items of evidence, currently stored at the Lynchburg Police Department (not including individual documents obtained from LU and other sources). Police also collected cellular phones (from Hathaway and

Mulberry), a desktop computer, an iPod, hard drives from the last LU computers that Hathaway accessed, and multiple flash drives. Several of these items were examined by LPD's Digital Evidence Recovery Unit. Officers also collected bus schedules and checked surveillance footage from busses running in the area.

A total of thirteen (13) items of evidence, to include Mulberry's duty firearm, two (2) cartridge casings, one (1) unspent cartridge, clothing items, swabs of biological material, recovered bullets, a knife, and DNA samples were all submitted to the Virginia Department of Forensic Science in late November for various testing.

Items of particular interest included a knife recovered from Hathaway's pants pocket and small areas of red stain located on the pavement near the driver's door of Hathaway's car. The knife appeared to have blood on the blade. The stains near Hathaway's car were swabbed because they also appeared to an evidence technician to be blood. The lab

⁴ This appears to be the source of the "red-stained scissors" found at the scene, as reported by at least one media outlet in Lynchburg.



Knife with blood from Hathaway's pocket

developed a DNA profile from the blood on the knife blade and it was consistent with Hathaway. The small drops of blood near the car also produced a DNA profile which was again consistent with Hathaway.

Forensic testing of the officer's firearm showed it to be in proper working condition. A single unspent .40 caliber cartridge found at the scene corroborates that Mulberry's gun did not initially fire when he pulled the trigger. Forensic examination of the live round and the firearm indicated that the gun may have failed to fire due to being in an "out of

battery" position.⁵ This out-of-battery condition likely occurred during the struggle. The two (2) empty shell casings from the scene were determined to have been fired from Mulberry's gun. The two (2) bullets recovered from Hathaway's body during the autopsy were also forensically matched to Mulberry's firearm. Forensic examination of gunpowder around a hole in Hathaway's shirt indicated that a gunshot was fired at an approximate distance of "greater than contact and less than 4 feet."

The autopsy, performed by an Assistant Chief Medical Examiner in the presence of an LPD evidence technician, concluded that the cause of death was a gunshot wound to the chest and the manner of death was "homicide."⁶ The autopsy also noted "incised wounds of face" as well as several minor abrasions and contusions. The minor injuries would be consistent with the violent physical struggle described by the officer. A routine toxicology screen of Hathaway's blood was clean. His blood was tested for the presence of alcohol and twelve other fairly common substances and drugs of abuse such as marijuana, cocaine, opiates, PCP, etc. None were detected.

Officer Mulberry is licensed as an armed security officer through the Commonwealth (Virginia Department of Criminal Justice Services). This means he has received training to include a firearms endorsement on his license. His certification was up to date at the time of the shooting and remains valid through May 31, 2014. He has been fully cooperative with the investigation, agreeing to turn over evidence, submitting to multiple interviews, and providing both written and recorded statements about the event. There is no reason to doubt his veracity or recollection. The condition of the crime scene and the physical evidence are consistent with his recall of the morning's events.

⁵ With a semi-automatic pistol such as Mulberry's Smith & Wesson M&P, "out of battery" means the slide mechanism on the weapon is not fully forward in a ready-to-fire position. A light mark on the primer of the live round found at the scene indicated that the firing pin barely struck the primer, but that internal safety mechanisms in the firearm were functioning properly and prevented the round from firing because the slide was not properly positioned.

⁶ It is important to note in the context of an autopsy, *homicide* is used solely as a medical conclusion, meaning, literally, the killing of one human by another. While the autopsy concluded that Hathaway was killed by another, the use of the word *homicide* in the autopsy carries no legal significance; it does not address whether this was a *criminal* homicide, which is purely a question of law.

Joshua Hathaway

LPD officers examined numerous records and spoke with a number of witnesses about Hathaway's history and recent condition, including his physical, mental, and emotional states leading up to his death. Interviewees included friends, family members, roommates, a group leader, residential advisors, and LU instructors.

Hathaway, from Texas, was a freshman at Liberty University on scholarship following a remarkable high school career. He was honored as salutatorian of his 2013 graduating class and distinguished himself as an excellent student, graduating with honors and a 4.57 GPA.

Various witnesses labeled Hathaway as helpful, private, genuine, quiet, and different. No one was aware of any alcohol or substance abuse issues. No one was aware of any problems that Hathaway had with any specific individuals. There is no evidence that Hathaway and Officer Mulberry knew one another or had any encounters prior to the morning of the shooting.

Several people noted that Hathaway was interested in karate, or more specifically, Brazilian Ju-jitsu. He held a green belt in Brazilian Ju-jitsu and continued to train and work out since coming to Liberty.

Several people mentioned that Hathaway felt financial pressure. One witness said he was trying to find employment. He was apparently receiving scholarship money and help from his parents, but was worried about paying for room and board for the upcoming semester and repair work for his car. He also needed to maintain a good grade point average to keep his scholarships. He would sell blood plasma, sometimes twice a week, to make money. This was confirmed through records at a plasma center on Fort Avenue showing visits by Hathaway on eleven (11) days between October 12 and November 18. One person noted that Hathaway never had money and would often ask for it.

Two individuals noted he was having difficulty sleeping at night and that his sleep habits seemed unusual. One person said Hathaway would sleep in the day and stay up all night. Another person related that Hathaway could become almost delirious when he had not slept. The subject recounted a past incident where Hathaway began mumbling and talking to himself, lost sense of his surroundings, and later had no recall of the events.

Several people observed that he would frequently have cuts or injuries to his face; at least one person suggested these might be self-inflicted.⁷ Multiple people commented about Hathaway having issues with depression, both past and current, and noted that he was under significant stress. One person noted Hathaway may have had anger issues.

⁷ Recall the knife from Hathaway's pocket as well as the blood droplets near his car, both of which contained Hathaway's DNA profile. Taken together with statements by people who knew him, Mulberry's observations of Hathaway bleeding from the face when he entered the lobby, and Hathaway's (false) statement about his car being stolen, the cumulative evidence suggests that Hathaway's incised facial wound from the day of the incident was self-inflicted.

One professor indicated that Hathaway dropped her class in late October after missing several sessions. This was confirmed through academic records. Another professor indicated that Hathaway's attendance had dropped off in his class and Hathaway's grade was suffering. Several other professors did not have anything remarkable to report about his attendance or grades. One professor noted that Hathaway was doing very well in class and added that he had not noted any recent changes in Hathaway.

Of the last people to see him on or around November 18th, no one noted any remarkable or significant changes in his behavior or demeanor.

Legal Analysis

The ultimate issue is this: at the time the officer fired the two shots, one of which was fatal, did the officer commit a crime or did he act in self-defense?

The case of Couture v. Commonwealth, 51 Va. App. 239, 656 S.E.2d 425 (2008) speaks to the legal standard through a jury instruction. The instruction below is a correct statement of the law of self-defense in the Commonwealth when exercised by a police officer:

When a police officer has probable cause to believe that a suspect poses a threat of serious physical harm, either to that officer or others, it is legally permissible to use deadly force to prevent harm to one's self or others and to prevent escape.

However, the amount of force used to defend oneself and prevent escape must not be excessive and must be reasonable in relation to the perceived threat. The use of deadly force is an act of necessity and the necessity must be shown to exist or there must be shown such reasonable apprehension of imminent danger, by some overt act, as to amount to the creation of necessity. The right to kill in self-defense begins when the necessity begins and ends when the necessity ends.

In this context, 'imminent danger' is defined as an immediate and perceived threat to one's safety or the safety of others.

[The shooter] must reasonably fear death or serious bodily harm to himself at the hands of his victim. It is not essential that the danger should in fact exist. If it reasonably appears to [the shooter] that the danger exists, he has the right to defend himself against it to the same extent, and upon the same rules, as would obtain in case the danger is real. [The shooter] may always act upon reasonable appearance of danger, and whether the danger is reasonably apparent is always to be determined from the viewpoint of the [shooter] at the time he acted. Couture v. Commonwealth, 51 Va. App. 239, 244, 656 S.E.2d 425, ___ (2008).

The law presents two significant questions for determining whether Mulberry acted in self-defense. First, did Mulberry reasonably perceive an imminent danger of death or serious bodily injury? Significantly, the question is not whether the threat was actual; the question

is whether the officer *reasonably perceived* an immediate threat to his safety or the safety of others at the time he fired. Second, was Mulberry's response to the perceived threat proportionate to the perceived threat itself?

Based on the totality of the circumstances, Mulberry's belief that he was in imminent danger of death or serious harm was reasonable. In short, he was taken by surprise when Hathaway suddenly produced a deadly weapon and attacked him. Documents in the file indicate that Hathaway was roughly 3" taller and 30 lbs. heavier than the officer. Mulberry attempted to call for help and physically struggled with Hathaway until he was out of breath. During the struggle, Hathaway alternatively assaulted Mulberry with a mallet, clawed at his throat, struck blows at him, reached for his firearm, and even ended up on top of Mulberry on the ground at one point. Mulberry would later report he was exhausted and fearful that if he went to the ground a second time he would not live. Mulberry produced his firearm and attempted, unsuccessfully at first, to fire. Hathaway, it appears, remained undeterred by the introduction of the gun into the melee. The struggle continued until Mulberry was able to rack the slide on his weapon and fire. There is no question that the officer feared for his life when he shot. The threat to his life was not only reasonably perceived, but based on the evidence, quite real.

After chambering a round and firing a shot, the officer was unsure if the shot hit Hathaway, and he fired a quick second shot per his training.⁸ After Hathaway went down, the officer immediately ceased shooting and resumed efforts to call for help. Based on the totality of the circumstances, the officer's response to the threat by firing two rapid shots from his weapon, as he had been trained to do, was proportionate.

Conclusion

For the reasons stated in this report, I find that Officer Mulberry acted in self-defense when he shot Joshua Hathaway. No criminal charges will be brought against the Officer Mulberry.

⁸ Called a "double-tap," this shooting technique of firing of two rounds in rapid succession has been routinely taught to law enforcement officers for decades.