

COMMONWEALTH'S ATTORNEY'S REPORT ON
THE SHOOTING OF OFFICER GARY L. HILBER
McCausland Ridge Apartments
April 10, 2013

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City of Lynchburg
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INVESTIGATIVE PROCESS

Around 10:40 p.m. on April 10, 2013, Lynchburg Police Officer Gary L. Hilber was shot once by a fellow officer during the execution of a search warrant for drugs. Within a very short period of time, the Criminal Investigations Division (CID) of Lynchburg Police Department (LPD) began an investigation into this shooting.

A few hours later, Deputy Commonwealth's Attorney Chuck Felmlee was contacted and immediately assisted in the investigation. I was on a flight that night for a family vacation and could not be reached by phone. Mr. Felmlee sent me an e-mail the next morning and gave me the details that he knew. Unfortunately, it was not until I arrived at my destination that I realized that my mobile phone service provider had given me bad information and I did not, in fact, have phone service during my trip. However, when I was connected to the Internet, I could send and receive e-mails for the duration of my trip.

While I did have some initial concerns about the public appearance of LPD investigating one of its own, at no time did I doubt the ability of CID to investigate the matter fully and fairly. I have worked closely with LPD for 29 years and have full confidence in their abilities. Ultimately, I agreed to review the results of the final LPD investigation. If I was satisfied that the final LPD report gave all the information I needed to make an informed decision, it would suffice. If I was not so satisfied, I reserved the right to demand a Virginia State Police investigation.

I have read the entire final LPD report. I have asked for, and received, a few additional facts. I have gone out to the scene myself at a time when the lighting conditions would have been very similar to those on the night of April 10. And I personally have talked to Officer Hilber. With that I am satisfied that I have been provided the information needed to make an informed decision.

One of the additional pieces of information I asked for was a copy of the radio traffic that night. Unfortunately, the LPD Vice & Narcotics Unit was "off the air" after they marked out on the search warrant (9:37 pm). This was noted at that time in the LPD CAD System. This is not unusual, especially if the Vice officers are doing a surveillance so they don't have their radios making noise. Then they communicate by mobile phone with each other or use their encrypted channel which is not monitored or recorded by Lyn-Com. There is no recorded radio traffic from Vice until 10:38 pm when Lt. Dan Riley tells Lyn-Com that an officer has been shot.

THE ISSUE OF RECUSAL

I have decided not to request the appointment of a special prosecutor. While I work daily with LPD, I do not know and am not friends with the officers directly involved and therefore have no personal bias for or against them.

As far as the possibility of some professional bias in favor of police officers, any other special prosecutor appointed could be accused of the same thing. 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.

I know that deciding whether to place criminal charges in this matter could be tough. Regardless of what I decide, there may be a segment of the community who will disagree with my call. However, I was elected by the people of Lynchburg to make these tough decisions. Like any umpire or referee, I have to screen out the shouts of those vocal spectators, exercise my personal integrity and call it the way I see it. Being aware of the possible appearance of professional bias will just make me more guarded to decide this matter on the facts, and not on bias.

THE FOCUS OF THIS REPORT

It is important to discuss at the outset what this report is and what it is not.

This report is concerned solely with whether state criminal charges should be placed against the officer who shot Officer Hilber. That determination must be based on a cold, balanced examination of the facts.

This report is not concerned with any civil culpability. It is not concerned with the rationality of LPD administrative policies, procedures or practices; nor whether this incident on April 10, 2013 could have been handled differently or better. I am not a sworn police officer. I have not been through law enforcement basic training and I have never patrolled the streets. My training and experience have been with the Constitution, the criminal laws and the court procedures in Virginia. Therefore, I limit my professional opinion to whether there have been any violations of these state criminal laws.

The conclusions I have reached in this matter have been based on standards I have practiced daily in 29 years as a prosecuting attorney in Lynchburg. As stated above, any criminal charge, whether in this matter or any other case, must be based on facts. Those facts must be of sufficient cumulative weight that they will probably convince a judge or jury beyond a reasonable doubt that the defendant has engaged in conduct which violates the criminal laws of Virginia. Anything less is not enough.

THE EVENTS OF APRIL 10, 2013

During the evening of April 10, 2013, Detective J. P. Hinkley of the LPD Vice & Narcotics Unit received information from a confidential reliable informant that there was a large quantity of marijuana in Apartment 27 of the McCausland Ridge Apartments. As a result, Hinkley and other Vice officers began to conduct a surveillance of the outside of the apartment. Included was

Officer G. A. Hilber. Hilber, who normally is assigned to Field Operations, was on temporary assignment with Vice. Hilber is African-American; the other officers involved are white.



In order to confirm that someone was in the apartment, Detective Hinkley went to the door and knocked. When a voice inside responded, Hinkley made up a name and asked if that person was there. The voice said inside no and Hinkley left to return to the police department to write a search warrant affidavit. Vice commander Lt. D. J. Riley, Detective B. K. Smith, Detective D. M. Bailey and Officer Hilber remained at the apartments to continue the surveillance. During this surveillance, they saw a car pull up and park. Two young men got out of the car and entered Apartment 27.

While Hinkley was obtaining the search warrant for Apartment 27 and all its occupants, members of the Street Crimes Unit had assembled at a gas station not far from the apartments. Lt. Riley, in command of the Vice Unit, radioed Acting Lt. J. T. Campbell, in charge of Street Crimes, and told Campbell to have his men come down to McCausland Ridge in case the two young men left the apartment. Riley wanted Street Crimes to detain anyone leaving the apartment. Campbell and Officer D. W. Stump began driving down in one car; Officers T. M. Clark and C. M. Booth began driving down in another car.

Hinkley obtained the search warrant from the magistrate and radioed to the other Vice officers that the warrant had been secured. He then started to return to the apartment complex.

Detectives Smith and Bailey were staged in the breezeway of the building with a clear view of the door to Apartment 27. Lt. Riley and Officer Hilber were staged in front of the building in a position where they could see Smith and Bailey. Lt. Riley directed that if anyone tried to leave

the apartment before Street Crimes arrived that they were going to detain that person or persons and immediately move in to secure the apartment.

Detectives Smith and Bailey were in plain clothes but wearing their police tactical vests. These vests are black but have a badge embroidered and have the word POLICE written in large white letters. Officer Hilber also was in plain clothes. He was not wearing a tactical vest however. He was wearing a black jacket with white lettering running vertically on the front saying ECKOUNLTD. Officer Hilber's metal badge was pinned to the front of his jacket. There was no writing on the back of the jacket. Underneath his jacket, Hilber was wearing his bullet proof vest. The investigative reports do not list what Lt. Riley was wearing.



In the meantime, the Street Crimes officers had parked their cars a short distance from the apartment so they could not be seen by any occupants looking out of a window. They began walking up towards the apartment where the Vice officers were stationed. None of the Street Crimes officers were directed to or had time to be stationed to the rear of Apartment 27. The Street Crimes officers were wearing their LPD uniform BDU's.

Officer Stump had just approached Lt. Riley and Officer Hilber. At this point, the door to Apartment 27 opened and one of the occupants, later identified as Dylan Pickett, came out. Pickett later told officers that he had forgotten his cigarettes in the car and was going out to get them. Detective Bailey announced that they were police officers and that they had a search warrant for the apartment. Pickett stepped back into the apartment followed by Bailey, Smith, Riley, Hilber and Stump. Detective Bailey got Pickett down to the kitchen floor. Detective Smith then took over securing Pickett while Bailey continued through the apartment. Bailey came into the living room where he saw two men sitting on the couch and a third man, later identified as David Gaines, running out the open back door onto a balcony. Bailey handcuffed the two men on the couch.

Detective Bailey told Lt. Riley that a black male had just fled out the back door of the apartment. Riley radioed to the Street Crimes officers outside that a black male had just run out the back. Officers Stump and Hilber went out onto the balcony but found that Gaines had jumped the railing to the ground below. In the dark, Stump and Hilber could hear somebody crashing through the brush going down a hill behind the apartment. In the dim light, they could

see a figure running away from the apartment. At the time, there was one high pressure sodium spotlight and several more white light spotlights at the back of the building.

Officer Stump considered jumping the rail to pursue but realized that the drop was too far and he risked injuring himself. The drop from the 2nd floor balcony railing to the ground was later measured to be 12 feet. He decided that if he went out the front door in pursuit, Gaines would make enough noise going through the brush that they could catch him. Stump saw Hilber looking down over the rail and saying "damn." Stump then turned and ran out the front door, assuming Hilber was behind him. As Stump was running out, he ran into Acting Lt. Campbell. Stump told Campbell to follow him and turn left when they got out of the door. Before they could get to the corner, they heard a gunshot.



Apartment 27



12 ft.

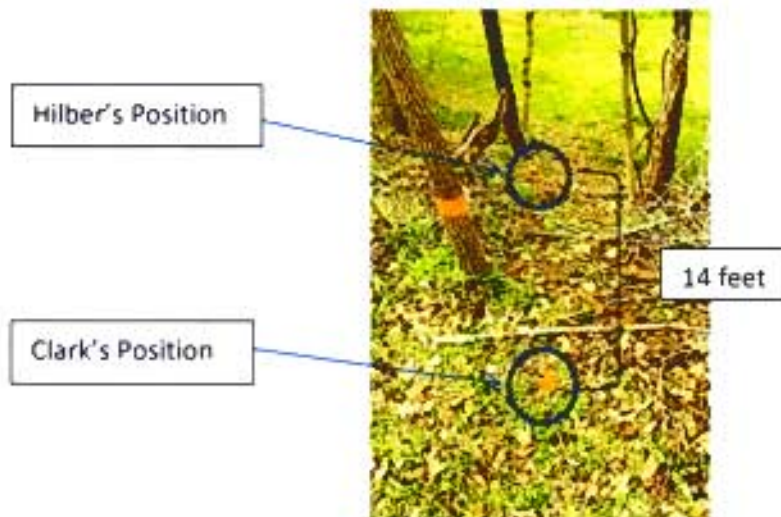
After Officer Stump turned and ran out the front door, Officer Hilber made the decision to jump the railing and go after Gaines. He was able to do so without injuring himself. Once he was on the ground, Hilber unholstered his service handgun. He also was carrying extra ammunition in a small camera bag but he did not have a police radio. As he started down the dark hillside into the brush, he heard a voice behind him and to the right say, "Drop the gun, drop the gun, drop the gun." Based on my observations from when I went to the scene at a comparable time of night, the photo below right best illustrates the level of darkness past the treeline and down the hillside.



Shooter Location



Officer Hilber turned towards the voice and said "Hey, it's me, it's me." He was still holding his service weapon in his right hand down around his right hip. From the top of the hill at the treeline and at a distance later measured to be 14 feet, Officer Clark then fired one round which struck Hilber. Although Clark's weapon was equipped with a functioning weapon light, the light was not turned on. Hilber was wearing his bullet proof vest but the round missed the vest and struck him in the right upper chest. The bullet exited near Hilber's right armpit. Fortunately, the bullet stuck no organs or bones. From the bullet path, it is apparent that Hilber' left shoulder was closer to Clark when the shot was fired.



In his statement, Officer Hilber recalled that he turned towards his right to say "Hey, it's me, it's me." However, in the statement provided to me from Officer Clark, Clark said he saw a person entering the woods and slowing down with a weapon in his right hand. When Clark yelled out for the person to drop the gun, he recalled the person turning towards the left with his right elbow bent. After Clark fired one shot, the subject completed his turn and faced him. Clark recognized the subject as Hilber and did not fire a second time.

Given the wound path in Officer Hilber's chest, Officer Clark's recollection that Hilber turned towards his left makes more sense. The wound path is more consistent with Hilber being shot as he was still turning. Otherwise, had Hilber turned towards his right, he would have turned through squarely facing Clark to a point where he was 90 degrees past. However, it also is possible that Hilber turned to his right as he recalled and turned 90 degrees past squarely facing Clark because he was trying to locate the source of the voice. Ultimately, this discrepancy in recollections does not impact my decision.

Officer Clark asked Officer Hilber if he was hit and at first Hilber said no. Clark then told Hilber he was bleeding. Hilber reached under his vest and felt blood.

When they heard the gunshot, Acting Lt. Campbell and Officer Stump slowed down before going around the corner of the building. When they did clear the corner, they could see Officer Booth crouched down. They then noticed Officers Clark and Hilber just over the crest of the hill walking back up the hill together. Hilber told them, "Taylor (Clark) just shot me." Campbell asked if he had been tazed or shot with a gun and Hilber repeated "Taylor just shot me." Campbell noticed that Clark looked visibly distraught. Campbell also noticed that Clark and Booth had holstered their weapons but Hilber still had his gun in his right hand.

Officer Clark told Acting Lt. Campbell that he fired one round. Campbell obtained both Clark's and Officer Hilber's handguns and kept them in his possession until turning them over to one of the assigned evidence technicians. A later examination of both weapons showed that all of Hilber's rounds were accounted for but that Clark's gun was missing one round.

Detective Smith was still inside the apartment when he heard one gunshot outside. He then heard Lt. Riley say over the radio that an officer had been shot. Smith, who is a trained EMT, went to the rear of the building where Officer Hilber was standing. After removing the front panel of Hilber's bullet proof vest, Smith saw blood on Hilber's shirt. Smith had Hilber come to the front of the building where there was more light and treated Hilber until medics with the Lynchburg Fire Department arrived. The medics transported Hilber to the Lynchburg General Hospital where he was treated.

Before Officer Hilber was released from the hospital early the next morning, Officer Clark came to visit him. Clark told Hilber that he had forgotten that Hilber was on temporary assignment with Vice.

FIREARMS & TACTICAL TRAINING

I asked Investigator A. L. Vest of this office a number of questions concerning the firearms and tactical training LPD members receive. Investigator Vest is both a military veteran and a retired major with LPD. He continues to conduct firearms training for LPD.

Double Tap - During the course of this investigation, one question I heard asked was that if Officer Clark perceived a deadly threat, why didn't he "double tap" – i.e. fire twice. Investigator Vest told me that "double tap" is a shooting technique during which two well-aimed shots are fired at the same target with very little time between shots. This firearm training technique has been used at LPD for many years. It has been used by law enforcement and the military since the 1970's with some sources crediting the technique to the U.S. Army Delta Force. Some reasons for utilizing the technique include:

- **Accuracy in a Deadly Force Situation** – Improves accuracy as shooters often do not have the gun fully extended or in some cases over-extended on the first shot, meaning the second shot of a “double-tap” is usually the more accurate.
- **Effectiveness of Handgun Ammunition** – A handgun has minimal power compared to a rifle or shotgun. The threat could be under the influence of drugs or alcohol, in which case the threat will not know or care if he is wounded. The theory is that two shots double the hydrostatic shock, trauma and potential to stop the attack.
- In Investigator Vest’s opinion, the most important reason is the training received allows an officer time to re-assess the situation after the initial shots are fired to determine whether the threat continues to exist. If the threat has diminished (suspect is down, suspect has given up) then no more shots need be fired. If the threat continues, then good law enforcement techniques of cover/concealment and deadly force firearms training should be continued. All too often we read reports of many shots fired without the re-assessment phase (emptying one’s gun as fast as possible in a panic) to allow for de-escalation as needed.

Investigator Vest also opined that being trained to “double tap” is no excuse to not constantly re-assess the situation as it unfolds. In other words, if after firing the first shot the officer perceives the threat is gone, then there is no need to fire the second shot. Given the circumstances of that night and Officer Clark’s statement, it appears that Clark’s recognition of Hilber after firing the first round is the reason he did not fire a second round.

Low Light Tactical Concerns – According to Investigator Vest, when setting a perimeter or attempting to lock down a fleeing suspect, officers may need to use darkness to their tactical advantage. Standing around with a light on full time may be beneficial if the officers are absolutely certain the perimeter was set up in time. In that case the light should lock the suspect down or at least identify the route he is using for escape.

If the officers are not sure, or are dealing with a potentially armed suspect, then setting up a perimeter in darkness may be more appropriate. Movement across open areas is a particular concern for officers. Officers could intermittently light up an area for the purpose identifying obstacles, then under the concealment of darkness move across the area in a reasonably safe manner.

The gun-mounted light system enhances an officer’s ability to identify and engage a threat only if the officer has justification to have his gun drawn in the first place. A gun mounted light system is not just an illumination tool. It should be considered an element of a law enforcement weapons system.

Communications with other officers is critical in that they do not want to back-light another officer or have his movement be mistaken for the suspect’s. Investigator Vest was particularly concerned by the fact that Officer Hilber, displaying his firearm and dressed in civilian clothes,

jumped over the balcony railing without notifying the other officers in the apartment that he was in pursuit. In addition, Hilber was without a radio.

Locating the Suspect and Verbal Commands – According to Investigator Vest, officers should use surroundings to their tactical advantage to allow for cover or concealment whenever possible. Verbal commands to the suspect should identify the officer ("POLICE OFFICER") and give clear, concise, commands to the suspect ("Let Me See Your Hands, Get on the Ground"). If a weapon is observed, identify the weapon verbally ("GUN, KNIFE"). This allows for the following:

- The suspect now knows that you have seen the threat.
- Other responding officers know that there is potentially a deadly force threat as they approach.
- Innocent civilians are made aware of potential deadly force threats so they can stay out of the area.

LEGAL ANALYSIS

The ultimate issue for this report is this: at the time he fired the shot which hit Officer Hilber, did Officer Clark commit a crime in taking that potentially deadly action or did he act in self-defense?

The best legal guidance in Virginia I can find comes from the case Couture v. Commonwealth, 51 Va. App. 239, 656 S.E.2d 425 (2008). While the Court in Couture noted that the quote below came from a jury instruction agreed upon by both parties, based on my 29 years experience I believe that jury instruction is a correct statement of the law of self-defense 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).

There are two important principles to be gleaned from the above language. First, the threat must be reasonably perceived by the actor as an imminent danger, by some overt act, of death or serious bodily injury. The question is not whether the threat was an actual danger. The question is whether the actor reasonably perceived an immediate threat to his safety or the safety of others at the time he acted. Second, the response to the threat must, at the time of the response, be proportionate to the threat itself.

So, is it reasonable to conclude that Officer Clark perceived some overt act that led him to believe that he was in danger of death or serious bodily injury? The answer is yes.

Officer Clark was responding to the execution of a search warrant for drugs. Suspicion of narcotics possession and distribution is a circumstance which, standing alone, gives rise to an inference of dangerousness. Williams v. Commonwealth, 4 Va. App. 53, 55, 354 S.E.2d 79, ____ (1987).

Officer Clark arrived at the apartment complex moments before the drug search warrant was executed. There was only a limited briefing over the radio as to what to do when the Street Crimes Unit did arrive. No instructions were given over the radio to set up a perimeter around the apartment. A radio message then went out that a black male fled out the back door of the target apartment. Clark and his partner Officer Booth went around the corner to the back side of the building. While there was some lighting on that side of the building, visibility was greatly reduced beginning at the treeline at the top of the hill going down away from the building.

No one knew that Officer Hilber went over the balcony railing in pursuit of the fleeing subject. No one saw him jump the railing and he told no one in the apartment. He did not have a police radio to notify anyone after he jumped the railing.

Officer Hilber was not wearing a police uniform. Nor was he provided with a police raid jacket or vest. Instead he was wearing a black civilian jacket. While his badge was pinned to the front of his jacket, the badge could not be seen from behind. In fact, when I showed Investigator Vest the picture on page 5 of this report, Vest did not notice the badge on the front until I mentioned it to him.

Officer Hilber pursued the fleeing subject past the treeline and down the hill into the dark. He had his service weapon in his right hand at hip level. While Officer Clark could see a person walking away from him going down the hillside in the wooded area, he could not identify from the rear who it was. Clark could see that the person had a gun in his right hand.

Several times Officer Clark told the armed individual to drop the gun. Instead the person turned towards him with gun still in hand. The person did not identify himself as a fellow police officer but instead said, "It's me. It's me." Clark then fired one round at the turning person. When Officer Hilber completed his turn, Clark immediately recognized him and did not fire the second shot.

The issue is not whether in hindsight Officer Hilber was a real threat to Officer Clark. He was not. Hilber realized that the person telling him to drop the gun was a fellow officer. But Clark did not realize the reciprocal.

The issue is whether Clark perceived an overt act of imminent danger of death or serious bodily harm. What he perceived was an unknown individual armed with a potentially lethal handgun turning in the dark to face him from a distance of 14 feet. With that he fired one shot to neutralize the danger. Officer Clark's perception of the danger was reasonable.

Second, was Officer Clark's response to the perceived threat proportionate to that threat? Again the answer is yes. Officer Clark used a handgun to respond to the threat from a handgun. As soon as he recognized that the "threat" was a fellow police officer, he discontinued using deadly force since the necessity to use that deadly force had ended.

I therefore conclude that at the time he fired the shot which hit Officer Hilber, Officer Clark was acting in reasonable self-defense.

CONCLUSION

For the foregoing reasons, I will not be seeking any criminal charge against Officer Clark.