



INTEROFFICE MEMORANDUM

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TO: Kathleen Hoague  
Chief Assistant State Attorney

DATE: 1/25/2017

FROM: GAIL LEVINE  
Assistant State Attorney  
Senior Trial Counsel

RE: State v. Bailey  
State v. Lenard  
F1625626 & F1625627  
Deceased: Fernando Duarte

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After careful review of the evidence, witness testimony, the police statement of Mikey Lenard, video surveillance and proffers by both Defendants Bailey and Lenard, it is determined that the evidence shows a justifiable shooting by Bailey (the shooter) who shot Fernando Duarte in self-defense and no sustainable charges against Lenard (the driver). Kenny Estevez, victim family members and Miccosukee Police personnel were notified on January 24, 2017 of the State intention to no action the case. This case was no actioned on January 25, 2017. The facts are as follows:

On December 25, 2016, both Fernando Duarte and Kenneth Estevez went to Miccosukee Resort and Gaming, hereon referred to as the casino. Duarte arrived earlier and can be seen drinking alcohol on video surveillance provided by Miccosukee Police. After a time, Estevez arrives and meets him. Estevez has been interviewed by the undersigned and has given a statement to police. Estevez has explained that Duarte called him and asked him to meet him at the casino. Estevez had stated that he arrived around 1 P.M. He believed that Duarte was there at least an hour earlier. They were drinking alcohol at the bar together. Estevez stated that he did not witness but believed Duarte was using other illegal drugs on that date.

They played some slots then decided to participate in a poker tournament in the Poker Room. Duarte explained that he is an inexperienced poker player but was willing to try the game. Both he and Estevez got seats at the same poker table and began playing. After

only a few hands Estevez was losing and opted out of his position at the table. While playing, Estevez stated they began having "poker talk with two black men also playing at the table. These individuals are later identified as Mikey Lenard and Kenin Bailey. Estevez and Duarte did begin to speak to Lenard and Bailey about their betting and admittedly did use the "nigger" referring to them. Estevez stated that he and Duarte use that term regularly and know that it is wrong. Estevez left the table to get another drink and Duarte continued playing and engaging Lenard and Bailey during the betting and play.

According to the statement of a dealer, Duarte continued the use of derogatory terms and was cursing. There is a "no cursing" rule in the poker room and there are signs notating this rule. Fearing that the language would escalate into a fight, a dealer called security to have Duarte and Estevez removed from the casino.

Once security arrived, Duarte initially hesitated about leaving. After a few moments he agreed. Surveillance video obtained from the Miccosukee Security personnel depicts the next series of events. It should be noted that surveillance video cameras are manually directed and the cameras focus almost solely on Duarte in a telescoping action. Duarte can be seen clearly as well as his surrounding area.

The surveillance shows that Duarte and Estevez spent almost twenty (20) minutes leaving the casino. They are at all times accompanied by security personnel after being asked to leave the poker room. They can be seen speaking with security, cashing out and for a period of time Duarte uses the restroom. (It should be noted that there are no cameras in the restroom, but Estevez can be seen waiting near the restrooms for Duarte with security personnel.) Estevez stated that during the conversations with security personnel both Estevez and Duarte were polite but objected to being asked to leave while the two other men (Lenard and Bailey) were not.

The surveillance video shows that Lenard and Bailey left the poker table not long after Duarte was removed from the poker table. Lenard and Bailey can be seen moving to a slot machine and playing the machine for a short period of time. This slot machine is in view of one of the areas where Duarte and Estevez are seen still talking to security personnel.

Duarte and Estevez left the casino on good terms with security personnel because they can be seen hugging the security personnel as they leave.

Duarte and Estevez began walking to the parking lot area toward their cars. They both stopped at Duarte's car which was parked close to the casino in a handicap spot. (Further investigation revealed that Duarte is a disabled United States Army Veteran diagnosed with PTSD as well as a leg injury. Estevez stated he is also a United States Army Veteran diagnosed with PTSD and disabled as well. Both receive full disability benefits.)

The video surveillance in the parking continues following Duarte and Estevez. The camera remains focused on them. Other surveillance camera angles shows that about 50 seconds after Duarte and Estevez leave the casino Lenard and Bailey leave the casino as well. Lenard and Bailey coincidentally are parked approximately 4 spaces away from Duarte's car. (Duarte's car is facing east and Lenard's car is facing west in the same line of parking spaces.)

Duarte can be seen getting into the driver's seat of his white car. He does not start the car, but sits in the driver's seat. The video shows him moving around the front seat of the car. It is unclear what exactly he is doing. When asked, Estevez has no recollection of the events at Duarte's car or thereafter until the shooting.

Duarte can be seen exiting his car after thirty (30) seconds and immediately engaging Lenard and Bailey. Duarte can be seen moving his hands to his waist area and to his stomach. Words are exchanged but it is unclear what Duarte is saying.

Thereafter, Duarte gets back into the driver's seat of his car and starts the engine. Estevez can be seen running to his car parked to the east in the next row of cars.

Duarte then drives south out of the parking space although the main exit is north. As Duarte approached the stop sign to the roadway, in the front of the casino, a black car driven by Lenard with Bailey in the passenger seat (hereon after referred to as the black car) stopped just to the west of Duarte's car. Lenard does stop the black car with enough space for Duarte to move around the rear of the black car allowing room for Duarte to turn onto the roadway. Duarte does not attempt to turn onto the roadway, but immediately gets out of his car and engages Lenard and Bailey from his driver's side doorway. Neither

Lenard nor Bailey get out of the black car. Once Duarte is out of his car, Estevez is seen driving toward the black car preventing the black car from moving forward. It should be noted that if the black car was not blocked Lenard could have continued to drive west to a further exit in the parking lot. Estevez can be seen getting out of his car. Duarte can be seen gesturing and what appears to be angrily speaking. He makes a hand gesture with his fingers simulating a gun. This encounter shall be referred to as the "First Encounter."

At the time of Lenard's arrest, he gives a post Miranda statement about this event and states that after he and Bailey see Duarte get out of his car from the parking space and yell toward them, Lenard does drive toward his car in order to engage him by asking what was wrong and what did they do to Duarte to anger him. Lenard states that he sees Duarte gets out of his car in a threatening manner began yelling at them "I am going to fuck you up and kill you." Lenard could see the hand gesture of a gun made by Duarte.

Lenard does not give information after that, invokes his rights and the questioning stops.

The video surveillance from the parking lot shows after this encounter, Lenard puts his car in reverse and makes an immediate right to go toward the exit to the north since he is blocked from moving forward to the exit toward the west. Duarte pulls in front of Estevez and begins momentarily to follow Lenard's car up the same parking aisle. However, Duarte appears to change course and turns into a parking aisle next to and parallel to the one used by Lenard. Estevez follows closely behind Duarte. Duarte's car can be seen braking and appearing to slow down while Lenard's car appears to be moving ahead.

Both of these aisle's lead to an roadway to north to a main exit of the casino. The roadway runs perpendicular to the aisles. At the end of each aisle is stop sign requiring the car in the aisle to stop to the right of way to the cars in the roadway toward the exit.

According the Bailey's proffer as they drive up the aisle to the roadway both he and Lenard become frightened for their life and Bailey takes out his gun which he has purchased legally.

Duarte is seen on the video surveillance slowing down toward the end of the aisle. A car is seen easily driving west on the roadway and Duarte allows that car to move properly westbound toward the exit. Duarte then begins to roll his car into the roadway without making a

full stop at the sign, cutting off Lenard's car. Both vehicles stop and Duarte narrowly escapes hitting the black car. Lenard then attempts to move forward around Duarte; however Duarte again moves forward further cutting Lenard's car off and not allowing him to pass. Lenard immediately puts his car in reverse and moves back allowing Duarte get onto the roadway toward the exit. Duarte does not pull forward and does not begin driving toward the exit. Instead, Duarte kept his car in the same position for approximately fifteen (15) seconds. After fifteen (15) seconds, Lenard can be seen opening his driver's door. The proffer provided by Bailey's attorney explains that Lenard yells for Duarte to go forward encouraging him to leave. Duarte immediately responds by getting out of his car and moving toward Lenard's car.

Lenard puts the black car in reverse and begins to drive backwards quickly. Duarte can be seen running toward black car, Duarte's hands are down in front and not readily seen. The area is not well lit. Watched in slow motion, it appears Duarte is very close to black car, almost touching the black car if not actually touching it. At this point Estevez has exited his car as well. It is at this moment that Bailey fires his semi- automatic pistol. He fires 13 times both at Duarte and Estevez. This shall be referred to as the "Second Encounter."

Duarte is shot and subsequently dies of two gunshot wounds. The Miami Dade Medical Examiner's office has ruled that the gunshot wounds were the cause of death. Additionally, preliminary toxicology results show two separate alcohol readings of Duarte, .196 and .174. Also present in his blood is cocaine.

After a full review of Florida law involving self-defense and stand your ground pursuant to Fla. Stat. §776.012 it appears that Bailey fired in self-defense. The evidence shows that Duarte used aggressive action at least three times during the two encounters, the last aggressive action involved him getting out of his car and running toward the black car after the black car backed up to allow Duarte's car to move into the roadway toward the exit.

Further, Bailey could have reasonably believed based upon Duarte's statements and hand gestures during the First Encounter as well as the continued aggressive behavior and time lapse while Duarte is in his car before exiting, that Bailey could have reasonably

believed that he and Lenard's life was in danger and that a firearm may be used against them against during the third aggressive action.

After careful review of all the facts, together with Duarte's toxicology results, it is the opinion of the undersigned that Bailey acted in self- defense and cannot be charged. The facts and circumstances do not support any charges for Lenard, the driver.

Accordingly, this case no-actioned in the shooting death of Fernando Duarte.