

IN THE SUPREME COURT FOR THE STATE OF MICHIGAN

PEOPLE OF THE STATE OF MICHIGAN,

Supreme Court No. _____

Plaintiff-Appellee,

Court of Appeals No. 314579
(Leave blank.)

v Numar Antonit Durks
(Print the name you were convicted under on this line.)

Trial Court No. 11-565FC
(From Court of Appeals decision.)

Defendant-Appellant.

(See Court of Appeals brief or Presentence Investigation Report.)

INSTRUCTIONS: Answer each question. Add more pages if you need more space. **NOTE:** If you are appealing a Court of Appeals decision involving an administrative agency or a civil action, you will have to replace this page with one containing the relevant information for that case.

PRO PER APPLICATION FOR LEAVE TO APPEAL

1. I was found guilty on (Date of Plea or Verdict) September 25 2012

2. I was convicted of (Name of offense) MCL 750.316 Felony murder

MCL 750.136b(2) First degree child abuse

3. I had a guilty plea; no contest plea; jury trial; trial by judge. (Mark one that applies.)

4. I was sentenced by Judge CLINTON CANADY III on October 24 2012
(Print or type name of judge) (Print or type date you were sentenced)

in the Ingham County Circuit Court to 15 years 180 months
(Name of county where you were sentenced) (Put minimum sentence here)

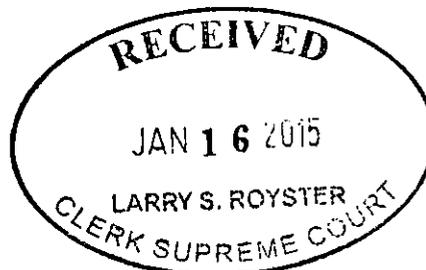
to Life years W/O months, and to _____ years _____ months to _____ years _____ months.
(Print or type maximum sentence) (Minimum sentence) (Maximum sentence)

I am in prison at the Macomb Correctional Facility in New Haven, Michigan.
(Print or type name of prison) (Print or type city where prison is located.)

5. The Court of Appeals affirmed my conviction on December 2, 2014
(Print or type date stamped on Court of Appeals decision)

in case number 11-565FC. A copy of that decision is attached.
(Print or type number on Court of Appeals decision)

6. This application is filed within 56 days of the Court of Appeals decision. (It MUST be received by the Court within 56 days of date on Court of Appeals decision in criminal cases and 42 days in civil cases. Delayed applications are NOT permitted, effective September 1, 2003.)



PRO PER APPLICATION FOR LEAVE TO APPEAL (cont.)

YUMAR ANTONIO BUCKS, Defendant-Appellant:

CA No. 314579

INSTRUCTIONS: In the part below, only bring up issues that were in your Court of Appeals brief. Attach a copy of your Court of Appeals brief if possible. If you prepared a supplemental brief which was filed in the Court of Appeals, those issues go in this part also. You should attach a copy of that brief, too, if you can. New issues go in question 8, on page 7.

ISSUE II:

A. (Copy the headnote, the title of the issue, from your Court of Appeals brief.)

DEFENDANT - APPELLANT IS ENTITLED TO A NEW TRIAL WHERE THERE WAS INSUFFICIENT EVIDENCE TO FIND FOR THE OFFENSE OF FIRST DEGREE CHILD ABUSE AND THEREFORE FELONY MURDER

B. The Court should review the Court of Appeals decision on this issue because: (Check all the ones you think apply to this issue, but you must check at least one.)

- 1. The issue raises a serious question about the legality of a law passed by the legislature.
- 2. The issue raises a legal principle which is very important to Michigan law.
- 3. The Court of Appeals decision is clearly wrong and will cause an important injustice to me.
- 4. The decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.

C. (Explain why you think the choices you checked in B apply to this issue. List any cases that you want the Supreme Court to consider. State any facts which you want the Court to consider. If you think the Court of Appeals mixed up any facts about this issue, explain here. If you need more space, you can add more pages.)

The issue raises a legal principle which is very important to Michigan law. In order to find for first-degree child abuse the prosecution is required to establish. Beyond a reasonable doubt not only that defendant intended to commit the charged act... But that he intended to cause serious physical or mental harm to the child or knew that serious physical or serious mental harm would be caused by the act... people v Maynor, 470 Mich 289, 295, 603 N.W.2d 565 (2004). Although the blows were violent, Defendant submits there was no evidence to show he had caused the injuries intentionally, or that he knew

PRO PER APPLICATION FOR LEAVE TO APPEAL (cont.)

2/11/00.

"Continued" page 3 of 9

his actions would result in serious harm to his son Antonio. While defendant admitted he made same bad decision's "Nothing" was submitted to even suggest he made those decision's with the intent or knowledge that his son Antonio would die. The prosecutor has to prove this beyond a reasonable doubt. See people v Mayhen 236 Mich App 112, 124, 600, NWad 370 (1999) Although the autopsy report and testimony revealed the "extent" of the injuries, there was "Nothing" to indicate that defendant intended to cause his son Antonio serious injury. JURY TRIAL transcript testimony Doctor Bechinski page 240 2-3. Question. Is it possible that a child could sustain these injuries from administered adult CPR. Answer There was know way to rule out the possibility that isolated injury occurred from "adult CPR" people v ARON 843 (1976). The defendant upon reconsideration was granted leave to Appeal on the grounds that the jury was not instructed on the elements of intent, required for Second-degree Murder. In Support to defendant case First-Degree child abuse, MCL 75B.136 b or Felony Murder. Instead the trial court relied on the felony-murder doctrine, which "ALLOW'S" the element of "Malice" to be supplied by the intent to commit the underlying Felony. TO Convict a defendant of felony-murder, first-Degree child abuse. It "must" be shown

that the defendant "Acted" with the intent to kill or inflict great bodily harm, Willful disregarding that, the natural tendency of his behavior would cause the death. Defendant testified that, He did not know how hard He struck his son Antonio. He was only trying to get his son to breathe. C IV 163-172 Page 15 Appel BRIEF.) (Court of Appeals BRIEF) Defendant did deny that he had intended to hurt or harm his son Antonio, or that he knew his actions would harm or seriously impair his son Antonio page -3- Defendant did not deliberate or "Intentionally" struck his son Antonio to do harm to him. Defendant did not think that striking his son Antonio would hurt him. ~~He~~ Defendant admitted his actions were Reckless and showed per-judgment. Defendant acknowledge his per-judgment and should have called 911, frustration and stress does not show that Defendant Intentionally killed his son Antonio. But it can show per-judgment and some very, very bad decisions, you have to look at Defendant state of Mind.

People v Maynor, 470 Mich. 289, 291, 683 N.W.2d 565 (2004)

CJI2d 4.16 INTENT

The defendant's intent may be proved by what he said, what he did, how he did it, or by any other facts and circumstances in evidence.

11565 ✓

**Child Abuse, First Degree
CJI2d 17.18**

(1) The Defendant is charged with the crime of first-degree child abuse. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that Yumar Burks is the parent of Antonio Burks.

(3) Second, that the defendant either knowingly or intentionally caused serious physical harm to Antonio Burks.

a. By serious physical harm I mean any physical injury to a child that seriously impairs the child's health or physical well-being, including, but not limited to, brain damage, a skull or bone fracture, subdural hemorrhage or hematoma, dislocation, sprain, internal injury, poisoning, burn or scald, or severe cut.

↑
INTENT
Their
is
know

(4) Third, that Antonio Burks was at the time under the age of 18 years old.

PIRE BRAYTON
CLERK OF THE 30TH
JUDICIAL CIRCUIT COURT
INGRAM COUNTY CLERK

2017 SEP 26 P 12:36

FILED

PRO PER APPLICATION FOR LEAVE TO APPEAL cont.

YUMOS ANTONIO BURKS, Defendant-Appellant

CA No. 314579

INSTRUCTIONS: In the part below, only bring up issues that were in your Court of Appeals brief. Attach a copy of your Court of Appeals brief if possible. If you prepared a supplemental brief which was filed in the Court of Appeals, those issues go in this part also. You should attach a copy of that brief, too, if you can. New issues go in question 8 on page 7.

ISSUE III:

A. (Copy the headnote, the title of the issue, from your Court of Appeals brief.)

Defendant-Appellant Is ENTITLED TO A NEW TRIAL WHERE THE TRIAL COURT DECLINED TO INSTRUCT THE JURY AS TO SECOND-DEGREE CHILD ABUSE AS REQUESTED BY THE DEFENSE WHERE THERE WAS EVIDENCE TO SUPPORT SUCH INSTRUCTION.

B. The Court should review the Court of Appeals decision on this issue because: (Check all the ones you think apply to this issue, but you must check at least one.)

- 1. The issue raises a serious question about the legality of a law passed by the legislature.
- 2. The issue raises a legal principle which is very important to Michigan law.
- 3. The Court of Appeals decision is clearly wrong and will cause an important injustice to me.
- 4. The decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.

C. (Explain why you think the choices you checked in B apply to this issue. List any cases that you want the Supreme Court to consider. State any facts which you want the Court to consider. If you think the Court of Appeals mixed up any facts about this issue, explain here. If you need more space, you can add more pages.)

The Court of Appeals decision is clearly wrong and will cause an important injustice to me. In general, the court of Appeals stated, That while the trial court "Erred" in failing to instruct the jury regarding Second-Degree CHILD ABUSE MCL 750.136b(2). The Error was Harmless. Defendant disagrees. The instructions should fairly and adequately protect the defendant's rights, fairly present the basic and controlling issues in this case, and lead to a miscarriage of justice people v. Mison

PRO PER APPLICATION FOR LEAVE TO APPEAL cont.

"Continued" page 4 of 9

December 17 2014

People v. Mison 170 Mich. App 508, 517, 518, 429 NW2d 197 (1988). The instruction should be given if all of the elements of a lesser crime match all of the elements of the greater crime, with which the defendant is being charged. The Court must instruct the jury on all essential elements of the charged offense, without stipulation by the defense. The court may not inform the jury that an element of the charged crime has been established, as a matter of law. U.S. v. Gaudin 515, U.S. 506 (1995). When a defendant requests a jury instruction on a theory or defense that is supported by the evidence, the trial court must give the instruction. People v. Riddle 467 Mich. App 116, 124, 649 NW2d 30 (2002). As stated in the Appeals Brief on page 24, it was clear the child died while in the custody of the defendant. It was equally clear that the defendant's actions appeared to result in the child's death. However, they were precluded by the trial court from considering whether or not the defendant "intentionally" caused the death of his son Antonio. While the defendant's actions led to his son Antonio's death, it was "obviously" equally clear that he did not "intentionally" want to cause harm or the death of his son Antonio. In general, "without" the proper "instruction" the jury was left with knowledge but to find the defendant guilty of first degree child abuse and then for felony murder. This "failure" is not to be deemed as a harmless error. This error was clearly a plain error. U.S. v. Davis, 974 F.2d 182 CD C Cir (1992). Plain errors are those errors

that are obvious and have an impact on the substantial rights of a party in a legal case. In addition, the plain error seriously affected the fairness and justice of the judicial proceeding. Jury instructions are reviewed de novo, in their entirety, to determine if error requiring reversal occurred. No error will be found where the instructions as a whole fairly presented the issues to be tried and adequately protected the defendant's rights. *People v Kurr*, 253 Mich App 317, 327, 654 NW2d 651 (2002); *People v Marion*, 250 Mich App 446, 448, 647, NW2d 321 (2002); *People v Brown*, 239 Mich App 735, 746-747, 749, 610 NW2d 234 (2002); *People v Moldenhauer*, 210 Mich App ~~158~~ 158, 533 NW2d 9 (1995),

"

continued" page 4079

In Keeble v. United States, 412 U.S. 205 (1973). the Supreme Court stated;

"Although the lesser included offense doctrine developed at common law to assist the prosecution in cases where the evidence failed to establish some element of the offense originally charged, it is now beyond dispute that the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater. The Federal Rules³¹ of Criminal Procedure deal with instruction has been recognized in numerous decisions of this

Court. See e.g. Sansone v. United States, 380 U.S. 343, 349, (1965); Berra v. United States, 351 U.S. 131, 134, (1956); Stevenson v. United States, 162 U.S. 313 (1896);

The court may not refuse a jury instruction on a defense theory for which there is evidentiary foundation, and which, if believed by the jury would be legally sufficient to render the accused innocent U.S. v Lewis 592 F.2d 1202, (1979) U.S. v BUCHANAN 70 F.3d 818 C^{3rd} Cir. 1995. plain errors are errors which are both obvious and which affect the defendant's right. →

Over →

US. V DAVIS, 974 F.2d 182 CD.C Cir 1992

"for appellate court to overturn a
"Conviction" under (plain error standard)

the error complained of must meet at
least three requirements, it must be a
plain one, so obvious that the judge
should have recognized it, it cannot be
merely harmless, it must be one that

Seriously affects the Fairness, and
Integrity. see U.S v. Young, 476 U.S
/ 105 S.Ct. 1038. 84 L.Ed.2d. 1 1985

"Continued" page 40F9

On the Appels decision BRIEF. MARKE-1, JJ statement was that he concurs with the majority's conclusion that the trial court erred by refusing to instruct the jury on the lesser included offense of second-degree child abuse, MCL 750.136b(3). Statement, I do however respectfully disagree that the error was harmless on the facts of this case. The only difference between first and second-degree child abuse, MCL 750.136b(3) was defendant's state of mind. See people v Maynor, 470 Mich 289, 291; 683 NW2d 565 (2004) (A conviction for first-degree child abuse requires "proof" not only that defendant "intended" to commit the act, but also that defendant intended to cause serious physical harm or knew that serious physical harm would be caused by the act") Defendant testified at trial that he acted without the requisite state of mind.



RELIEF REQUESTED

9. For the above reasons I request that this Court GRANT leave to appeal, APPOINT a lawyer to represent me, and GRANT any other relief it decides I am entitled to receive.

12/23/14
(Date)

Dunks #88502
(Print your name and number here.)

Yunus Octavio Smith
(Sign your name here.)

34625 36 Mile Rd.
(Print your address here.)

New Haven MI 48048

IN THE SUPREME COURT FOR THE STATE OF MICHIGAN

People of the State of Michigan
(Print the name of the opposing party, e.g., "People of the State of Michigan.")

Plaintiff-Appellee,

v
Yumar Antonio Burks
(Print the name you were convicted under on this line.)

Defendant-Appellant.

Supreme Court No. _____
(Leave blank.)

Court of Appeals No. 314579
(From Court of Appeals decision.)

Trial Court No. 11-565 FC
(See Court of Appeals brief or Presentence Investigation Report.)

MOTION FOR WAIVER OF FEES AND COSTS

Appellant, pursuant to MCR 7.319(7)(h) and MCL 600.2963, for the reasons stated in the attached affidavit of indigency, requests that this Court: (Check the ones that apply to you.)

GRANT a waiver pursuant to MCR 7.319(7)(h) of all fees required for filing the attached pleadings because the provisions of MCL 600.2963, requiring prisoners to pay filing fees do not apply to appeals from a decision involving a criminal conviction or appeals from a decision of an administrative agency. The statute applies *exclusively* to prisoners filing civil cases and appeals in civil cases.

GRANT a waiver pursuant to MCR 7.319(7)(h) of all fees required for filing the attached pleadings because the provisions of MCL 600.2963, requiring only indigent prisoners to pay court filing fees violates the equal protection provision of the Michigan Constitution, Art I, Sec 2.

Temporarily waive the initial partial payment of filing fees for the attached pleadings and order the Michigan Department of Correction to collect and pay the money to this Court at a later date in accordance with MCL 600.2963, when the money becomes available in appellant's prison account. If the Court does not allow this, I will be prevented from filing the attached pleading in a timely manner.

Allow an initial partial payment of \$ _____ of the fee for filing the attached pleadings and order the Michigan Department of Correction to collect the remaining money and pay it to this Court at a later date in accordance with MCL 600.2963, as additional money becomes available in my prison account. If the Court does not allow this, I will be prevented from filing the attached pleading in a timely manner.

12/23/14
(Date)

Yumar Antonio Burks
(Sign your name here.)

Yumar Burks #854503
(Print your name and number here.)

34625 26 Mile Rd
(Print your address here.)
New Haven MI 48048

IN THE SUPREME COURT FOR THE STATE OF MICHIGAN

People of the State of Michigan
(Print the name of the opposing party, e.g. "People of the State of Michigan.")

Plaintiff-Appellee,

v
Jumar Antonio Burt
(Print the name you were convicted under on this line.)

Defendant-Appellant.

Supreme Court No. _____
(Leave blank.)

Court of Appeals No. 314579
(From Court of Appeals decision.)

Trial Court No. 11-565FC
(See Court of Appeals brief or Presentence Investigation Report.)

AFFIDAVIT OF INDIGENCY

1. My name is Jumar Burt. I am in prison at Macomb Correctional in New Haven MI.
(Type or print your name here.) (Name of prison) (City where prison is located)
My prison number is #854509. My income and assets are: (Check the ones that apply to you.)
(Your prison number.)

- My only source of income is from my prison job and I make \$~~154~~¹¹⁴ per day.
- I have no income.
- I have no assets that can be converted to cash.
- I can not pay the filing fees for the attached application.

I ask this Court to waive the filing fee in this matter.

I declare that the statements above are true to the best of my knowledge, information and belief.

12/23/14
(Date)

Jumar Antonio Burt
(Sign your name here.)

Jumar Antonio Burt
(Print your name here.)

PROOF OF SERVICE

On _____, 20014, I mailed by U.S. mail one copy of the documents checked below: (Put a check mark by the ones you mailed.)

- Affidavit of Indigency and Proof of Service
- Motion to Waive Fees and Costs
- Statement of Prisoner Account (this is not necessary in criminal appeals)
- Pro Per Application for Leave to Appeal with a copy of Court of Appeals Decision
- Court of Appeals Brief
- Supplemental Court of Appeals Brief

TO: Ingham County Prosecutor, 313 W Kalamazoo, at
(Name of county where you were sentenced) (Address)
Lansing, Grady Parker Building MI 48933.
(City) (Zip Code)

I declare that the statements above are true to the best of my knowledge, information and belief.

12/23/14
(Date)

Jumar Antonio Burt
(Sign your name here.)

Jumar Antonio Burt
(Print your name here.)

COVER LETTER

12/23/14
(Put Today's Date)

Clerk
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

RE: People of the State of Michigan v Yumar Antonio Burks
(Print the name of the opposing party, e.g., "People of the State of Michigan.") (Print the name you were convicted under here.)

Supreme Court No. _____ (Leave blank - the Clerk will assign a number for you.)
Court of Appeals No. 314579 (Get this number from the Court of Appeals decision.)
Trial Court No. 11-565FC (Get this number from Court of Appeals brief or Presentence Investigation Report.)

Dear Clerk:

Enclosed please find the original of the pleadings checked below. (Put a check mark by the items you are sending.) I am indigent and can not provide seven copies. Please file them.

- Affidavit of Indigency/Proof of Service
- Motion to Waive Fees and Costs
- Statement of Prisoner Account (this is not necessary in criminal appeals)
- Pro Per Application for Leave to Appeal
- Court of Appeals Decision (You must enclose a copy of the Court of Appeals decision.)
- Court of Appeals Brief (This is not necessary, but it is a good idea.)
- Supplemental Court of Appeals Brief (This is not necessary, but it is a good idea.)
- Other _____

Thank you.

Sincerely,

Yumar Antonio Burks
(Sign your name here.)

Yumar Antonio Burks
(Print or type your name here.)

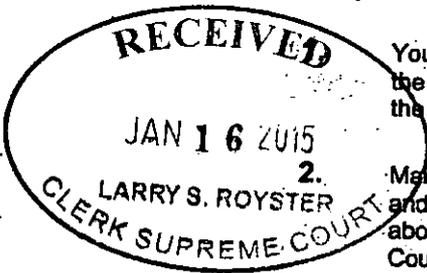
854 502
(Print or type your prisoner number here.)

Macomb Correctional Facility
(Print or type your address here.)

34625 26 Mile New Haven MI 48048
(Print or type your City, State, and Zip Code here.)

Copy sent to:
Ingham County Prosecutor
(Fill in the county where you were convicted.)

INSTRUCTIONS



You will need 2 copies and the original of this letter and the pleadings listed above.

2. Mail the original of this letter and all the pleadings listed above to the Supreme Court Court Clerk.

3. Mail 1 copy of letter and pleadings to the prosecutor in the county where you were convicted.

4. Keep 1 copy of letter and pleadings for your file.