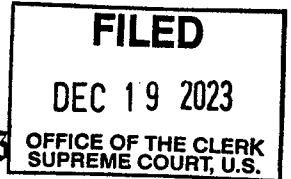


ORIGINAL

23<sup>No.</sup>-6544

In the  
Supreme Court of the United States



In re Mo Savoy Hicks,

*Petitioner,*

v.

Guy Bosch, Warden, Minnesota Correctional

Facility, Stillwater,

*Respondent.*

28 U. S. C. § 2254

PETITION FOR WRIT OF HABEAS CORPUS

Mo Savoy Hicks  
#201228  
Petitioner/*Pro Se*  
*Counsel of Record*  
Minnesota Correctional Facility  
Stillwater  
970 Pickett St. N.  
Bayport, MN 55003

## QUESTIONS PRESENTED

1. DOES THE MINNESOTA SENTENCING GUIDELINES ENHANCEMENT FACTOR *'PARTICULAR CRUELTY'* IN RELYING ON EMOTIONAL HARM TO THIRD PARTIES INSTEAD OF CONDUCT EXACTED ON THE VICTIM BY THE ACCUSED, TRIGGER A MISCARRIAGE OF JUSTICE THROUGH A PREJUDICIALLY FATAL VARIANCE?

## **PARTIES TO THE PROCEEDING**

**Petitioner** is, Mo Savoy Hicks, Pro Se,  
Counsel of Record, who is Constrained  
at the Minnesota Correctional Facility  
Stillwater.

**Respondent** for the State of Minnesota,  
Guy Bosch, Warden, Minnesota  
Correctional Facility, Stillwater.  
970 Pickett St. N., Bayport, MN 55003

### **Attorney for Respondent**

Anthony Palumbo  
Anoka County Attorney  
Anoka County Government Center  
2100 Third Avenue, Suite 720  
Anoka, MN 55303-5025  
(763) 324 - 5550

## PROCEEDINGS IN STATE AND APPELLATE COURTS

1. **Anoka County District Court**, Case File No.: 02-CR-11-3045,  
*State of Minnesota v. Mo Savoy Hicks*; Convicted: February 10, 2012;  
Sentenced: April 3, 2012.

## TABLE OF CONTENTS

QUESTIONS PRESENTED.....	i
PARTIES TO THE PROCEEDING .....	ii
PROCEEDINGS IN STATE AND APPELLATE COURTS.....	iii
TABLE OF CONTENTS .....	iv
TABLE OF AUTHORITIES.....	vi
CITATIONS OF REPORTS OPINIONS AND ORDERS.....	1
JURISDICTION .....	2
CONSTITUTIONAL PROVISIONS.....	2
STATEMENT OF THE CASE.....	2
Writ will be in Aid of Court's Appellate Jurisdiction.....	3
Exceptional Circumstances Warrant	
the Exercise of the Court's Discretionary Powers.....	4
Adequate Relief Cannot be Obtained in any other Form	
or From Any Other Court.....	4
REASONS FOR NOT MAKING APPLICATION TO THE DISTRICT COURT OF THE DISTRICT IN WHICH THE APPLICANT IS HELD.....	4
REASONS FOR GRANTING THE PETITION.....	5
I. This Court Should Grant Review to Determine if the Unprecedented Decision by the Minnesota Supreme Court to Affirm an Upward Departure Based on the Emotion of Non-Victims Violates Substantial Due Process Rights.....	6
A. The Court Needs to Resolve if Third Party Emotional Harm is an Unconstitutional Basis for Sentencing Departure.....	6

1. Divided Courts and the Lack of Sentencing Predictability and Rationality.....7
2. This is the Perfect Case to Address a Prejudicial Variance, if it's fatal, and a Miscarriage of Justice in Sentencing.....7

CONCLUSION.....8

APPENDIX

## TABLE OF AUTHORITIES

### Cases

<i>State v. Hicks</i> , 837 N.W.2d 51 (Minn. Ct. App., 2013).....	1
<i>State v. Hicks</i> , 864 N.W.2d 153 (2015).....	1,5,6,7,8
<i>State v. Leja</i> , 684 N.W.2d 442 (Minn. 2004).....	1,3,7
<i>State v. Ming Shiue</i> , 326 N.W.2d 648 (Minn. 1982).....	7
<i>Marbury v. Madison</i> , 5 U.S. 137, 175 (1803).....	3
<i>Johnson v. United States</i> , 576 U.S. 591 (2015).....	5
<i>Kolender v. Lawson</i> , 461 U.S. 352, 357-358 (1983).....	5

### Minnesota Rules

<i>Minnesota Sentencing Guidelines</i> .....	5,7,8
<i>Minn. Sent. Guidelines</i> 2.D.3.b.(2).....	5
<i>Minn. Sent. Guidelines cmt.</i> 2.D.301.....	8
<i>Minn. Stat.</i> §244.09. <i>Subd.</i> 5 (2014).....	5
<i>Minn. Stat.</i> 609.19 <i>Subd.</i> (2).....	3

### Federal Rules

28 U.S.C. §1651.....	2
28 U.S.C. §2241(b).....	2
28 U.S.C. §2254 (a) & (b).....	2

### Constitutional

<i>Article III</i> , § 2, Cl. 2.....	2, Appendix
<i>Fifth Amendment</i> .....	2, Appendix
<i>Fourteenth Amendment</i> .....	2, Appendix

## CITATIONS OF REPORTS OPINIONS AND ORDERS

The Anoka County District Court, the Honorable James A. Cunningham Jr., after a Court trial in the city of Anoka, Minnesota, file number: 02-CR-11-3045, after a plea of not guilty, in a conviction on February 10, 2012 on one count of Second-Degree Unintentional Murder, Hicks was sentenced on April 3, 2012 to 420 months in prison. This sentence was a double durational upward departure from the Minnesota Sentencing Guidelines. Hicks' sentence was enhanced on the ground of particular cruelty (concealment of a dead body, causing emotional harm to the victim's family). Hicks did not testify at any of the pre or post-trial proceedings. Hicks appealed his conviction.

Hicks appealed his conviction and sentence to the Minnesota Court of Appeals on February 1, 2013. On September 3, 2013 the Court of Appeals affirmed Hicks' conviction and sentence. Case Number: A12-1107. *State v. Hicks*, 837 N.W.2d 51 (Minn. Ct. App., 2013). Hicks appealed to the Minnesota Supreme Court. On November 13, 2013 the Minnesota Supreme Court granted review, in part. Case Number: A12-1107. On June 3, 2015, the Minnesota Supreme Court affirmed Hicks' durational departure for particular cruelty overturning *State v. Leja*, 684 N.W.2d 442 (Minn. 2004) which held the same decision unconstitutional. Case No: A12-1107, *State v. Hicks*, 864 N.W.2d 153 (2015).



## JURISDICTION

This is an original Habeas Corpus action challenging an April 3, 2012 Minnesota state conviction sentencing departure. This Court has appellate and original habeas Jurisdiction under 28 U.S.C. §1651, §2241(b), and §2254 (a) & (b) because Hicks is in custody in violation of the Constitution of the United States.

## CONSTITUTIONAL PROVISIONS

The United States Constitutions *Article III*, § 2, Cl. 2, *Fifth Amendment*, *Fourteenth Amendment*; Section 1, are reproduced in the appendix.

## STATEMENT OF THE CASE

Mo Savoy Hicks was convicted of the unintentional murder of Judy Rush. He was sentenced to 420 months (35 years), a double durational departure, in prison and is presently serving that sentence at Minnesota Correctional Facility Stillwater.

On April 8, 2011, the remains of Judy Rush were discovered by a group of high school students at a park in Hennepin County, in the city of Brooklyn Park, Minnesota. After an examination of the remains it was determined Judy died as a result of "blunt force cranial injury." *T*<sup>1</sup>. 977. At Judy's apartment in Anoka County, in the City of Columbia Heights, the owner and the caretaker both went into Judy's apartment and saw blood. *T*. 496. Columbia Heights police later entered the apartment and discovered blood on the floor of the bedroom and walls and notified

---

<sup>1</sup> T.; Refers to the criminal trial transcript.

Anoka County investigators. *T.* 181. Almost a year later on July 21, 2008, after hearing testimony from Dr. Janice Amatuzio, who did an examination of Judy's mattress and the bloodstains on it, Anoka County Judge Thomas D. Hayes issued a legal declaration of death. *T.* 368. Almost three years later on April 25, 2011, Hicks was arrested for the murder of Judy Rush.

On April 3, 2012, Hicks was sentenced to 210 months, the court after a Blakley hearing, doubled Hicks' sentence to 420 months. The court based this departure on concealment of a dead body (emotional harm)<sup>2</sup>, which is under the enhancement factor particular cruelty in the Minnesota Sentencing Guidelines.

#### B. State Court Proceedings

Hicks was convicted in the State of Minnesota, County of Anoka, of Second-Degree murder (Unintentional) *Minn. Stat.* 609.19 *Subd.* (2). This original habeas corpus for appellate review follows.

#### C. Writ Will be in Aid of Court's Appellate Jurisdiction

"To enable this court then to issue a [writ], it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction." *Marbury v. Madison*, 5 U.S. 137, 175 (1803). The cause presented here is of an appellate nature that needs to be addressed by this Court due to the nature

---

<sup>2</sup> The District Court ignored the established precedent of *State v. Leja*, 684 N.W.2d 442 (Minn. 2004), which held sentencing departures for concealment of a dead body were unconstitutional on two grounds. First, without bargaining for the location of the dead body, an upward departure was unwarranted. *State v. Schmit*, 329 N.W.2d 56, 58 n.1 (Minn. 1983). Second, since the departure factor is the same as "Interference with a Dead Body," *Minn. Stat.* 609.502, Subd. 1 (2006), the departure is illegal because the state can't upward depart on an uncharged offense. *Leja*, at 452.

and circumstances of the case. Specifically, the basis of the sentence enhancement, which is unprecedented in its nature and application.

D. Exceptional Circumstances Warrant the Exercise of the Court's Discretionary Powers

The factors of this case are unprecedented and the approach taken by the Minnesota Supreme Court, caused confusion and unpredictability, in affirming an upward departure based not on conduct of the petitioner but on the victim's family being saddened by their loss. This is unconstitutional because no one can defend against emotions.

E. Adequate Relief Cannot be Obtained in any other Form or From Any Other Court

On different grounds, Minnesota courts have addressed this issue on the basis of upward departing on an uncharged offense. This issue changed twice with the composition of the Court. Every time the justices change, so will the law. There is no other avenue for relief, (*pardon, commutation*), for this particular claim because it's a sentencing issue of mixed fact and law.

**REASONS FOR NOT MAKING APPLICATION TO THE DISTRICT COURT  
OF THE DISTRICT IN WHICH THE APPLICANT IS HELD**

Hicks' appellate public defender failed to preserve any issue on any grounds for federal review. Hicks' sentence is a miscarriage of justice because he is actually innocent of the sentence enhancement.

## REASONS FOR GRANTING THE PETITION

“The Minnesota Sentencing Guidelines embody the ‘state public policy to maintain uniformity, proportionality, rationality, and predictability in sentencing.’”

*Minn. Stat.* §244.09. subd. 5 (2014). *State v. Hicks*, 864 N.W.2d 153, 164. (dissent)

“The Minnesota Sentencing Guidelines Commission expressly ‘rejects factors that are general in nature and that could apply to large numbers of cases.’” *Id.* The United States Supreme Court held “[t]he government violates the Due Process clause when it takes away someone’s life, liberty, or property under a criminal law [...] so standardless that it invites arbitrary enforcement.” *Johnson v. United States*, 576 U.S. 591 (2015) citing, *Kolender v. Lawson*, 461 U.S. 352, 357-358 (1983).

The Minnesota courts have done this with the enhancement factor “particular cruelty.” Sentence enhancements exist in order to punish those who have committed their crime in a way that society deems extra-reprehensible. This sentiment is embodied in *Minn. Sent. Guidelines* 2.D.3.b.(2). “The *victim* was treated with particular cruelty for which the individual offender should be held responsible.” (emphasis added). Minnesota courts have expanded this to include emotional harm to third parties who were not present or put in danger during the crime.

First, this Court should grant review in order to bring order and clarity to the confusion brought by the Minnesota Supreme Courts decision to uphold the district courts decision to double Hicks’ sentence on the basis of emotional harm to the victim’s family. This decision introduced great uncertainty to the enhancement law

in the state. The accused no longer has a reasonable, reliable predictor of what to expect at sentencing nor how to defend against it. The Court should grant review to harmonize the law and how it may be applied.

Second, this Court should grant review in order to determine if a miscarriage of justice exception is applicable to sentence enhancement factors and the punishment brought or, in other words, is the petitioner actually innocent of the sentence enhancement because of a Due Process violation because the enhancement factor relies on emotional impact versus a particularly cruel factual basis.

**I. This Court Should Grant Review to Determine if the Unprecedented Decision by the Minnesota Supreme Court to Affirm an Upward Departure Based on the Emotion of Non-Victims Violates Substantial Due Process Rights**

**A. The Court Needs to Resolve if Third Party Emotional Harm is an Unconstitutional Basis for Sentencing Departure**

The courts in Minnesota have taken this “[u]nprecedented and ill-advised,” *State v. Hicks*, 864 N.W.2d 153, 167 (2015) (Justice Wright) (dissenting), approach, overturning established precedent having not “articulated a compelling reason,” *Hicks*, at 170, to do so. This Court needs to grant review to establish that such a basis for an upward departure cannot stand.

This Court needs to establish that such a burden placed on the defendant, having to defend against third-party emotion, is not only unconstitutional, but fundamentally unfair because someone’s feelings can’t be defended against.

## 1. Divided Courts and the Lack of Sentencing Predictability and Rationality

The Minnesota Supreme Court in *State v. Leja*, 684 N.W.2d 442 (Minn. 2004) established that an upward departure could *not* be based on concealment of a body without additional facts. The state court established this upon *State v. Ming Shiue*, 326 N.W.2d 648 (Minn. 1982). *Shiue* concealed the body and used the whereabouts to bargain with prosecutors for a lighter charge. In 2015 the state supreme court overturned *Leja* and established concealment of a body, causing third-party emotional harm, was a valid departure basis.

The only thing that changed between the years of *Leja* and *Hicks* is the composition of the supreme court. This Court should grant review to examine if the previous state court rulings were erroneous because the *Minnesota Sentencing Guidelines* clearly state it has to be the “*victim*” that was treated with particular cruelty. *Supra*, p. 5. This Court should examine if the *Hicks* ruling destabilized sentencing reliability and predictability, making it possible for anyone who commits a crime and causes third-party emotional harm, to have their sentence enhanced.

## 2. This is the Perfect Case to Address a Prejudicial Variance, if it's Fatal, and a Miscarriage of Justice in Sentencing

This is the ideal case for review to decide whether a fata variance triggers a miscarriage of justice in a sentence enhancement factual basis. This case alone will allow this Court to address a completely novel factual basis that is unprecedented and brings an intangible factual aspect that has the potential to impact every American citizen. This Court needs to grant review in order to affirm that factors

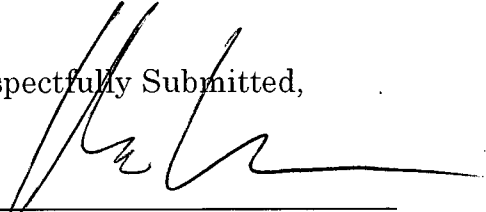
justifying a departure “are intended to describe specific situations involving a small number of cases.” *Hicks*, 864 at 164, citing, *Minn. Sent. Guidelines cmt.* 2.D.301. The Minnesota courts have opened a pandora’s box which can only be corrected once this Court examines the factual basis upon granting the petition.

This Court should grant review to determine if Hicks is actually innocent of the sentence enhancement and if it impacted his substantial rights by injecting into the proceedings unconstitutional emotional prejudice. Ultimately, this Court should grant review to determine if the state courts need solid and clear direction on constitutional sentence enhancement.

### CONCLUSION

This Court should grant review.

Respectfully Submitted,



Mo Savoy Hicks  
MCF-STW  
970 Pickett St. N.  
Bayport, MN 55003

12.16.23