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## Righting Wrongs Through Posthumous Pardons: Max Mason, the Duluth Lynchings, and Lessons for the Future

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## ARTICLE

# RIGHTING WRONGS THROUGH POSTHUMOUS PARDONS: MAX MASON, THE DULUTH LYNCHINGS, AND LESSONS FOR THE FUTURE

COREY L. GORDON\*

## I. INTRODUCTION

On June 12, 2020, just three days shy of the 100th anniversary of the infamous lynchings of three African-Americans in Duluth, Minnesota, and less than three weeks after the brutal murder of George Floyd at the hands (and knees) of Minneapolis police officers, the Minnesota Board of Pardons granted the state's first-ever posthumous pardon. It went to the one individual convicted of the trumped-up charges of rape that had resulted in the lynchings a century earlier.<sup>1</sup>

In granting a posthumous pardon to Max Mason, Minnesota joined the growing list of jurisdictions that have turned to this historically-rare remedy as a means of redressing injustices—most commonly racial—of the past. This Article, based in large part on the petition submitted to the Minnesota Board of Pardons, explores the historical backdrop of the Duluth Lynchings and the wrongful conviction of Mr. Mason, the evolution of posthumous pardons, and discusses how posthumous pardons may in the future play a more prominent role in bending the arc of the moral universe towards justice.

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\* Mr. Gordon practices law in Minneapolis, Minnesota. He and Jerry W. Blackwell filed the petition for Max Mason's posthumous pardon on behalf of the then-chair of a committee organizing events to commemorate the 100th anniversary of the Duluth lynchings. Dana Ferguson, *A century later, Minnesota officials to weigh pardon for black man convicted of rape*, DULUTH NEWS TRIBUNE (Dec. 16, 2019, 9:33 PM), <https://www.duluthnewstribune.com/news/crime-and-courts/4822070-A-century-later-Minnesota-officials-to-weigh-pardon-for-black-man-convicted-of-rape>.

1. Dan Kraker, *Minn. grants state's first posthumous pardon to Max Mason, in case related to Duluth lynchings*, *Crime, Law and Justice*, MPR NEWS (June 12, 2020, 3:28 PM), <https://www.mprnews.org/story/2020/06/12/minn-grants-states-first-posthumous-pardon-to-max-mason>.

## II. BACKGROUND

In June of 1920, the city of Duluth, Minnesota experienced “the foulest blot upon the city ever known in its history.”<sup>2</sup> Three men accused of rape—African American workers in a traveling circus—were dragged by a mob from the Duluth jail and hung from a lamppost within a block of police headquarters.<sup>3</sup> These murders—these lynchings—were witnessed by an estimated ten thousand people, 20 percent of the population in Duluth at the time.<sup>4</sup> Photographs of the gruesome scene, with the proud, grinning faces of the all-white mob crowded around the dangling corpses, were made into postcards and sold as souvenirs.<sup>5</sup>

The lynchings were not only a foul blot on Duluth, but the entire state as well. They would, temporarily, shatter the myth of the “free north.”<sup>6</sup> Not surprisingly, few were eager to ensure that the history of the event remained in the public conscience, and memories quickly faded. It became a forgotten episode in Minnesota history. Thanks to recent historical research, particularly that of author, teacher, and Duluth native Michael Fedo, facts surrounding the incident and subsequent events were unearthed and the story once again placed in the public eye.

For many years, the three victims of the lynchings—Elias Clayton, Elmer Jackson, and Isaac McGhie—lay, like their story, buried in unmarked graves.<sup>7</sup> In 1991, when their bodies were discovered in Duluth’s Park Hill Cemetery, their graves were finally marked with granite headstones.<sup>8</sup> In 2003, the city of Duluth held ceremonies apologizing for the events, and a memorial in the men’s honor was dedicated at the intersection

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2. *Murnian Declared Unfit For His Job*, DULUTH HERALD (June 13, 1920), at 1, [https://www.mnhs.org/duluthlynchings/documents/Murnian\\_Declared\\_Unfit\\_For\\_His\\_Job-779.001.php](https://www.mnhs.org/duluthlynchings/documents/Murnian_Declared_Unfit_For_His_Job-779.001.php).

3. *Id.*

4. MICHAEL FEDO, *THE LYNCHINGS IN DULUTH 66* (Brasch & Brasch, Minn. Hist. Soc’y Press ed., 2d ed. 2016) (1979). Fedo’s book was originally published in 1979 by Brasch and Brasch under the title *They Was Just [Redacted]*. The Minnesota Historical Society republished the book under a new name, describing it as a “clear, sober” telling of the story, based on “newspaper accounts, court records, state files, and interviews with aging and often reluctant witnesses.” *The Lynchings in Duluth*, MINN. HIST. SOC’Y SHOP (Feb. 16, 2016), <https://shop.mnhs.org/products/lynchings-duluth>. Others have expanded on Fedo’s pioneering work, and there now exists a robust record of the tragic events in Duluth. *See, e.g.*, JOHN D. BESSLER, *LEGACY OF VIOLENCE: LYNCH MOBS AND EXECUTIONS IN MINNESOTA* (Univ. of Minn. Press ed., 2003). Bessler is currently a Professor at the University of Baltimore School of Law. His book was based on archival research in newspapers, private papers, and court and legislative records in addition to Fedo’s work. As indicated above, The University of St. Thomas Law Journal has a policy of redacting derogatory terms and phrases. Accordingly, any use of a derogatory term throughout this article will be replaced with [redacted].

5. FEDO, *supra* note 4, at 110.

6. Christy Clark-Pujara & Anna-Lisa Cox, *How the Myth of a Liberal North Erases a Long History of White Violence*, SMITHSONIAN MAG. (Aug. 27, 2020), <https://www.smithsonianmag.com/smithsonian-institution/how-myth-liberal-north-erases-long-history-white-violence-180975661>.

7. FEDO, *supra* note 4, at 176.

8. FEDO, *supra* note 4, at 176.

where they were lynched.<sup>9</sup> Duluth, and by extension all of Minnesota, had begun its process of healing.

But that healing could not be complete until one other wrong arising from the horrors of those events was recognized and righted: the posthumous pardon of the one man convicted of the alleged rape—Max Mason.

In January of 2021, the Minneapolis law firm of Blackwell Burke P.A., acting on behalf of the then-chair of the planning committee for events to commemorate the 100-year anniversary of the tragedy, submitted a Petition to Grant a Posthumous Pardon to Max Mason to the Minnesota Board of Pardons pursuant to Minn. Stat. § 638.02, subd. 2 (2019). After a powerful and compelling hearing, discussed *infra*, the Board voted unanimously to grant the pardon, the first time one had ever been granted in Minnesota.

### III. THE FACTS<sup>10</sup>

#### A. *The Events Leading up to the Lynchings and Max Mason's Arrest*

On June 14, 1920, John Robinson's Traveling Circus had performed before hundreds of Duluthians. Following the evening performance, roughly 1,500 circus workers began the arduous process of tearing down and packing up the circus trains in order to travel to the show's next venue, Virginia, Minnesota. A local Duluth woman, eighteen-year-old stenographer Irene Tusken, and her teenage boyfriend, James Sullivan, lingered on the circus grounds after the show.

It is unclear what happened a few minutes after the city's curfew whistle sounded at 9:00 P.M., but whatever it was—an aborted robbery or sexual escapade, a prostitution or whisky seller's transaction run amok, or perhaps nothing more than a petty slight—it soon put Duluth in the national spotlight. After the encounter, the teenage couple rode a streetcar to the girl's home and—at that point, at least to the outside world—nothing at all seemed to be the matter. The girl nonchalantly said goodnight to her father, and the girl's escort, a boat spotter, went home after dropping her off so he could change clothes for his midnight to 8:00 A.M. shift at the Duluth Mis-sabe and Northern Ore docks. Not until after 1:00 A.M. did the boy, a recent high school graduate, tell his father that a gun had been put to his head and that his girlfriend had been gang-raped. Patrick Sullivan, the boy's fa-

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9. Chris Julin, *Dedicating a memorial*, MINN. PUB. RADIO (Oct. 10, 2003), [http://news.minnesota.publicradio.org/features/2003/10/10\\_julinc\\_lynchingdedicati/](http://news.minnesota.publicradio.org/features/2003/10/10_julinc_lynchingdedicati/).

10. These facts are based primarily upon and drawn from the accounts in Fedo and Bessler, as well as the source materials maintained by the Minnesota Historical Society, which has compiled an extensive collection of records concerning the Duluth lynchings, including court documents and transcripts, newspaper articles, and other materials. These holdings include those specifically related to Max Mason, including his original trial transcript and subsequent incarceration and parole records. *Duluth Lynchings*, MINN. HIST. SOC'Y, <https://www.mnhs.org/duluthlynchings/lynchings> (last visited Nov. 30, 2021). The Minnesota Historical Society currently maintains Fedo's book files in its Reference Library. *Additional Resources*, MINN. HIST. SOC'Y, <https://www.mnhs.org/duluthlynchings/additional-resources>.

ther and a night superintendent at the ore docks, wasted no time in notifying the authorities. His son's life and the girl's reputation, he thought, would not be threatened and tarnished so easily, at least not without severe consequences.<sup>11</sup>

A call from Sullivan's father woke Duluth's police chief, John Murphy, at his home, prompting the chief to immediately speed to the docks to meet with Sullivan and his father.<sup>12</sup> There, the Sullivans told the chief that "some [redacted]" had raped Irene Tusken.<sup>13</sup> The younger Sullivan claimed that, around 10:00 P.M., six Black men had confronted him and Irene as they were leaving the circus grounds.<sup>14</sup> "One man grabbed his arm," another "placed a pistol to his head" and threatened him to be quiet. Sullivan claimed that while he was held hostage, the men dragged Irene "to a clump of bushes and 'ravished' her."<sup>15</sup> The police chief immediately telephoned the railroad yardmaster to hold up the circus train:

After assembling a group of Duluth police officers, a determined Murphy led his men to the train depot to investigate. The officers, convinced of the truth of the boy's story, angrily boarded the train at the Canadian Northern railroad yard and pulled all the blacks out of their sleeping cars. "Get out of here, you black son-of-a-bitch, you," an officer barked at Max Mason, a twenty-one-year-old, five-foot-four-inch laborer from Alabama. The police chief was equally blunt. "I want to talk to every [redacted] that was idle between about nine and ten o'clock last night," he commanded.<sup>16</sup>

When Sullivan was brought out to identify the alleged assailants, he became hesitant, telling the police chief, "They look pretty much alike to me. I don't know for sure."<sup>17</sup> Even after a police officer urged him to try again, the boy failed to identify anyone.<sup>18</sup> Irene Tusken similarly struggled to identify her purported assailants:

When Mason came up, the police asked him his name and his whereabouts between 9:00 and 10:00 P.M. the prior evening. "I was working," he said, at which point officer A.G. Fiskett asked the girl, "Is he the one?" She shook her head, indicating no, and Mason was told to get back on the train. Unable to pick out anyone by face, the girl picked out five men anyway based on their size and physique, with interrogation and suspected false answers to police questioning resulting in eight more arrests. The thirteen detainees were then driven to Duluth's downtown jail, where they were further interrogated as the circus train continued on to Vir-

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11. BESSLER, *supra* note 4, at 185.

12. BESSLER, *supra* note 4, at 185.

13. BESSLER, *supra* note 4, at 185.

14. BESSLER, *supra* note 4, at 185.

15. BESSLER, *supra* note 4, at 185.

16. BESSLER, *supra* note 4, at 185-86; *see also* FEDO, *supra* note 4, at 19-22.

17. FEDO, *supra* note 4, at 23.

18. FEDO, *supra* note 4, at 23.

ginia. Only when no incriminating statements were forthcoming were seven of the men set free.<sup>19</sup>

Six men remained in custody at the Duluth jail: the three men who would later be lynched, Elias Clayton, Elmer Jackson, and Isaac McGhie; and three other circus workers, Nate Green, Lonnie Williams, and John Thomas.<sup>20</sup> The police chief suspected that five of them had participated in the rape, but held McGhie only as a material witness.<sup>21</sup> The police chief then returned to Virginia to make more arrests:

Max Mason was arrested as he was serving oatmeal to a crew of circus workers. "I want you," an officer told him, refusing to say why Mason was under arrest. One officer even pointed a pistol at Mason, saying "Talk! Let's have the whole story." When Mason said he knew nothing, the officer replied, "You know plenty, all right. If you don't talk, I'll kill you!" Only after cocking the pistol and momentarily holding it to Mason's ear did the sheriff's deputy finally holster his weapon.<sup>22</sup>

The next morning, Irene Tusken was examined by the family physician, Dr. David Graham.<sup>23</sup> His gynecological exam revealed nothing abnormal. Afterwards, a skeptical detective asked Dr. Graham what signs of sexual assault he had found. Dr. Graham told the detective, "I don't think she was raped."<sup>24</sup> Word of the alleged rape and arrests of several Black circus workers spread like wildfire through the city.<sup>25</sup> By the evening of July 15, an angry mob had formed outside the jail demanding access to the prisoners.<sup>26</sup> The handful of police officers left to guard the jail that night struggled to keep the mob at bay.<sup>27</sup> The public safety commissioner, William Murnian, had issued an order that no guns or clubs could be used against the mob. "I don't want to see the blood of one white person spilled for six blacks," explained Murnian.<sup>28</sup>

The mob grew louder. Rocks and epithets were hurled at the police station.<sup>29</sup> Despite police efforts to repulse the mob with water from a fire hose, the police were overcome, the jail breached, and Clayton, Jackson, and McGhie were dragged out of the jail to an intersection a block away.<sup>30</sup> The mob hanged the three men from a lamppost.<sup>31</sup> Order was ultimately

19. BESSLER, *supra* note 4, at 185–86; *see also* FEDO, *supra* note 4, at 23–24.

20. BESSLER, *supra* note 4, at 187.

21. BESSLER, *supra* note 4, at 187.

22. BESSLER, *supra* note 4, at 187.

23. BESSLER, *supra* note 4, at 187.

24. BESSLER, *supra* note 4, at 187.

25. BESSLER, *supra* note 4, at 188.

26. BESSLER, *supra* note 4, at 188.

27. BESSLER, *supra* note 4, at 189.

28. BESSLER, *supra* note 4, at 191.

29. BESSLER, *supra* note 4, at 191.

30. BESSLER, *supra* note 4, at 191.

31. BESSLER, *supra* note 4, at 195–96.

restored in Duluth after the Governor called in the National Guard the next morning, but a sense of unease and discord hung over the city.<sup>32</sup> While some Duluthians were shocked at the lynchings, many others thought the three murdered men had gotten what they deserved—lamenting only the mob’s breach of law and order.<sup>33</sup> Few, if any, residents, however, questioned whether Irene Tusken had been raped. To do so, of course, would have meant that the lynch mob had not murdered rapists, but innocent men.

The city of Duluth had to have a scapegoat to exculpate the actions of the mob. That scapegoat was Max Mason.

### B. *Max Mason’s Trial*

Nearly a month after the alleged incident, recognizing the infirmities of his case, prosecutor Warren Green brought Mason and the other jailed men back to the area of the circus grounds and pressured Irene Tusken and James Sullivan to make a positive identification.

Lo and behold, at those mid-July late-night rendezvous Tusken and Sullivan both identified—by voice—Max Mason as the man holding the gun in the reported assault, as well as William Miller as an accomplice.<sup>34</sup>

At Mason’s trial, in late November, Dr. Graham, the family physician who had examined Tusken the morning after the alleged rape, opted not to acknowledge the doubt he had shared with a detective immediately after his examination. While conceding that his examination found a “normal condition” and no rupture of the young woman’s hymen, and that he found no tears, wounds, or abrasions, the doctor nonetheless retreated to equivocation when specifically asked “Doctor, in case a violent assault and rape were committed on a female about the age of eighteen years, would or would there not be physical evidence of the rape?”<sup>35</sup> To that, he replied, “That would be hard to answer,” noting that “evidence of assault was inconclusive.”<sup>36</sup>

In Mason’s trial, his attorneys appeared to be reluctant to challenge the veracity of Tusken and Sullivan as to whether a sexual assault had taken place, focusing instead on the frailty of their identification of Mason.<sup>37</sup> The

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32. BESSLER, *supra* note 4, at 197.

33. FEDO, *supra* note 4, at 118–19.

34. BESSLER, *supra* note 4, at 205.

35. BESSLER, *supra* note 4, at 210.

36. BESSLER, *supra* note 4, at 210–11; FEDO, *supra* note 4, at 159. Other evidence of discrepancies in the allegations was noted by the Duluth Rip-Saw newspaper, which noted that Tusken claimed that her assailants were leaving her as she regained consciousness, directly contrary to the claims of Mr. Sullivan: “The girl tells about the Negroes leaving her, yet the boy claims that they stood by and directed the departure from the scene of the outrage.” *Negroes Did Not Rape Girl*, THE DULUTH RIP-SAW, June 26, 1920, at 1, [https://www.mnhs.org/duluthlynchings/documents/Negroes\\_Did\\_Not\\_Rape\\_Girl-81.001.php](https://www.mnhs.org/duluthlynchings/documents/Negroes_Did_Not_Rape_Girl-81.001.php).

37. BESSLER, *supra* note 4, at 213.

strategy was not unreasonable given the all-white jurors' likely biases and prejudices about African Americans, including Max Mason and his attorneys.<sup>38</sup> In the only other trial of one of the circus workers, William Miller, his attorney was less reticent, and more aggressively questioned whether a rape had occurred at all. As a result, his questioning of Dr. Graham was more pointed, and elicited a far less ambiguous answer:

“Assuming the girl’s story is true, and that she had fainted at the time the assault took place, would not an attack by six Negroes upon the girl have left physical evidence of tears or lacerations?” Miller’s lawyer inquired. “I do not think I would have found her in a normal condition the next morning,” Dr. Graham replied, unable, in good conscience, to say anything else.<sup>39</sup>

Despite the inconsistencies in the accusers’ stories, the almost nonexistent identification testimony, and the guarded and equivocal answer of the family physician, the prosecutor did have one piece of circumstantial evidence that jurors would later say allowed them to render a guilty verdict: the doctor who had examined Max Mason in prison several months after the alleged attack found that he was infected with gonorrhea, and another doctor who had examined Irene Tusken testified that she, too, was infected with gonorrhea.<sup>40</sup>

While the circumstantial evidence that both Tusken and Mason were infected with gonorrhea was sufficiently compelling to the jury to return a guilty verdict, the significance of that evidence is decidedly less than it seems. The physician who examined Mason claimed that he had actually identified gonocci bacteria.<sup>41</sup> However, the testimony of the doctor who had examined Tusken indicated that his diagnosis of gonorrhea was based solely on finding that she had a “very profuse vaginal discharge,” almost a month after her alleged rape.<sup>42</sup> While such a condition could be consistent with gonorrhea, it could also have been consistent with other maladies.

More importantly, even if both Tusken and Mason had gonorrhea, that simply was not a remarkable coincidence at that time. In 1920, penicillin had not yet been invented, nor had an effective means for treating gonorrhea been developed. Sexually transmitted diseases were rampant:

Although the 1920s witnessed little progress in combatting sexually transmitted diseases, the staggering dimensions of the problem had nonetheless been clarified. Increased reticence, declining government commitment, and a continued insistence on solving the venereal problem through moral uplift rather than medical

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38. “Talk circulating around Duluth at that time was that no jury could acquit a man who had to get those outside [redacted] lawyers’ to defend himself; they were only asking for trouble.” FEDO, *supra* note 4, at 156.

39. BESSLER, *supra* note 4, at 215.

40. BESSLER, *supra* note 4, at 211.

41. BESSLER, *supra* note 4, at 211.

42. BESSLER, *supra* note 4, at 211.



means all combined to ensure that these diseases reached epidemic proportions.<sup>43</sup>

When the United States entered World War I, the military draft and the resultant physical examinations of conscripts revealed high rates of infection: 13 percent of the draftees were infected with either syphilis or gonorrhea.<sup>44</sup> In the United States, deaths from syphilis had soared nearly eightfold between 1900 and 1920.<sup>45</sup>

At most, the circumstances “proved” at trial were that Mason and Tusken both had gonorrhea. Given the prevalent nature of gonorrhea infections in 1920, that evidence is virtually meaningless.

At the close of Mason’s trial, Prosecutor Green made a less-than-subtle appeal to the emotions of the jury to overcome the apparent weakness of his evidence. In his final speech, Green implied the grievous shame that the jury, and by extension all of Duluth, would feel if they found Mason innocent:

In his closing argument, Warren Green told the jury that this case was the most important he’d ever brought into court. “Why do we have mobs?” he asked. “It is because people think the Negroes won’t be convicted. That’s why they take the law into their own hands. People of Duluth and St. Louis County want to know through your verdict that when a white girl is ravished by a black or white man, and the man is proven guilty, as in this case, the man is going to be found guilty.”<sup>46</sup>

The jury took less than one day to return a guilty verdict. Max Mason was sentenced to 30 years in prison.<sup>47</sup>

### C. *Max Mason’s Appeal*

Mason’s conviction was affirmed by the Minnesota Supreme Court in 1922.<sup>48</sup> Significantly, the majority pointed to the testimony that Mason and the alleged victim were suffering from the same disease as important, and dismissed the family physician’s equivocal testimony about Tusken’s condition the next morning as “not conclusive that penetration had not taken place. The doctor himself made that clear.”<sup>49</sup>

A dissent was authored by Duluth native Justice Homer Dibell, who had himself served as a district court judge in Duluth for twenty years

43. Wendy J. Wertheimer, *The Politics of STDs: Dwindling Resources for a Growing Problem*, 17 PRIMARY CARE 183, 193 (1990).

44. Allan M. Brandt, *The Syphilis Epidemic and Its Relation to AIDS*, 239 SCIENCE 375, 377 (1988).

45. Dep’t of Com., *Mortality Statistics 1920*, 21 BUREAU OF THE CENSUS 39, 39 (1922).

46. FEDO, *supra* note 4, at 160–61.

47. FEDO, *supra* note 4, at 160–61.

48. *State v. Mason*, 189 N.W. 452 (Minn. 1922) (concluding that the evidence was sufficient for the jury to find guilt).

49. *Id.* at 453.

before his election to the Court in 1918, just two years before the Duluth lynchings.<sup>50</sup> Dibell's dissent, which has been described as "blistering,"<sup>51</sup> is worthy of quotation in its entirety.<sup>52</sup>

The story upon which the conviction rests is a strange one. The young man and woman separated themselves from two other boys and girls. They wandered about. They, like others, watched the animals as they were taken from the menagerie. Suddenly they were alone. They were attacked by six negroes, taken unobserved by any one to a secluded spot a block away, and the girl was assaulted by the six successively, and ravished, as the opinion says, by five, the last two of the six quarreling over the right of precedence. One negro held a gun pointed at the young man. He was quiet throughout.

Continuing the story, it is proper to note that the young man and woman, when released and told not to return to the show grounds, walked a few blocks to the Merritt schoolhouse, sat there on the steps talking for a few minutes, walked back to the Grand avenue car line, took a car and rode west ten blocks, and then walked two or three blocks to the young woman's home. They sat on the porch for a while talking. The father was in the house reading. The mother had retired. The young man then left, took the street car home, going past the show grounds, and thence to the docks and to work. The young woman went upstairs, passing her father with the remark, "I am going to bed," stopped at her mother's room, saying, "Mama, I met Jimmie tonight and we went to the circus," received the kindly response, "All right, dear, go to bed now," went to her room, then to the bathroom, and then to bed and to sleep. She made no complaint.

"While the rule requiring immediate complaint is not inflexible, yet the unexplained failure to do so is a very important fact. It is so natural as to be almost inevitable that a female upon whom the crime has been committed will make immediate complaint, if she have a mother or other confidential friend to whom she can make it. The rule is founded upon the laws of human nature." *State v. Connelly*, 57 Minn. 482, 59 N.W. 479.

Some time between one and two she was awakened by her mother, and later went to the Canadian Northern yards to identify the negroes. The family physician called at ten. He knew the occasion of his call. He had the sympathy attendant upon the rela-

50. BESSLER, *supra* note 4, at 222.

51. BESSLER, *supra* note 4, at 222.

52. Justice Dibell's observation that it is "common knowledge that colored men are not easily distinguished" and that "[y]oung southern negroes, such as these, look much alike to the northerner" must be viewed in the context of the times. *Mason*, 189 N.W. at 454 (Dibble, J., dissenting). What is clearly a racist viewpoint today was, in 1921, simply a well-accepted "fact," and even Justice Dibell's otherwise thoughtful dissent advocating for reversal of Max Mason's conviction nonetheless reflected the prevailing white attitudes and backdrop of accepted racist views of that era.

tion of family physician and patient. He "found a normal condition," though "she seemed slightly nervous; the physical condition was good." His examination was thorough. There were no abrasions nor bruises nor inflammation nor evidence of soreness or tenderness. He did not call again. Some of the best evidence of a crime, if there was one of this kind, was not preserved. *State v. Cowing*, 99 Minn. 123, 134, 108 N.W. 851, 9 Ann. Cas. 566. There is other testimony that the girl was "very hysterical and nervous" for several days. So were other Duluth people in the days following June 14. Mason denied that he was guilty, claimed that he was at work, and was corroborated by some of his negro fellow workers. There is perhaps a possibility that six negroes committed the crime just as charged. Convictions are not rested on possibilities. The story in its entirety is unusual and strikingly improbable.

Now pass to the identification. Mason was brought before the young man and woman at the yards about 5 in the morning of June 15. They did not identify him. There is testimony that the girl shook her head when Mason was presented. He was discharged and went to Virginia with the show. The boy and girl assumed to identify some, partially at least, and they and the officers selected from the 100 or 120 negroes following the show thirteen as likely suspects. They were taken to the city jail. Seven were released before noon. That left six. Three were hung that night. That left three. The three who escaped hanging were spirited to Superior and brought to the county jail the next day. Ten were brought down from Virginia later, Max Mason among them, and taken to the county jail, so there were thirteen in the jail for the grand jury.

It is common knowledge that colored men are not easily distinguished in daytime and less readily in the dark or in the twilight. Young southern negroes, such as these, look much alike to the northerner. The proof is in the case. Mason and nine others were arrested at Virginia on the 15th. Two officers who were active in the work of identification at the yards in the morning went there and apprehended them. They started to Duluth by auto with four of them. They were stopped a few miles back of Duluth because of the lynching in progress, and the negroes were kept overnight in a nearby house. One of these officers, on the witness stand with Mason before him, was not quite sure that he was one of the four, but said, "I believe he was.cdq; Mason was not one of the four. He was brought down by train the next day and taken to the county jail. The other officer, on the witness stand, with Mason before him, stated with positiveness that he was one of the thirteen taken from the cars on the morning of the fifteenth, was one of the six kept in jail, that he gave his name as Green, and that he was one of the three not hung. He says that Mason denied that he had offended and "cried in the police station." These officers

were trained by their calling to observe closely and identify men. They were honest. They helped round up the ten negroes at Virginia, rejecting two or three. They were in the auto with four of them. One thought Mason was along. The other was positive that he was one of the six who were taken to the police station, and so was never in Virginia. Mason concededly was never in the auto, nor in the police station, never was accused of anything there, never denied anything there, and never cried there. Both officers were mistaken, each in a different way. They were unable to distinguish from others the negro who had been in jail for five months charged with this crime. What of the identification by the young man and woman? The grand jury was in session—had been in session for a long while. They had been before it. It was time for an identification. The young man and woman and the officers had some natural interest in making an identification. The identification of a guilty negro was rightly enough to their liking. The boy and girl assumed to identify Mason and Miller—one short, one tall or slim. On their testimony if one was guilty the other was. What they said at the time was incompetent. There was no objection. Their evidence is not impressive. It must be read from the settled case for the paper book is abbreviated. The assumed identification was something like a month after June 14. Some distracting things had happened since. Their recollection of the black men was no more trustworthy than that of the officers. To my mind the evidence is legally insufficient upon which to rest an identification sustaining a conviction.

That the girl was diseased on July 10 and Mason on July 19 is not of much weight as an identifying circumstance. The state's physician says that infection would follow in from two to ten days after contact. The girl says she first noticed it in ten days or two weeks. She again says that she first noticed it three days before the doctor came. She had not told her mother. The doctor was not called by the family. He was sent by the prosecution. The date of the examination, July 10, does not seem disputed. There was a lapse of twenty-six days between the contact alleged and the examination. She either did not notice infection for 23 days, or had it for 10 to 16 days without mentioning it. Perhaps there is an explanation, though none is offered. But, this aside, about all that can be said is that the condition of Mason was consistent with guilt, if a crime was committed. It was not inconsistent with his innocence. A like condition in any other man in Duluth that night, white or black, on or off the show grounds, was consistent with his guilt of this crime. Likewise it was not inconsistent with his innocence. Identification was first necessary, and the disease did not identify. If the state had found the ones who participated in the assault, one only being infected, and infection followed, there would be proof that he accomplished the more serious crime. On the state's theory there were four or five other contemporaneous sources of infec-

tion. There was no elimination. As the proof is it is not forceful. Nor is the chance statement made by Mason's counsel in his brief in support of his objection to the testimony on constitutional and other grounds—an objection which he had a right to make—an admission against the defendant of its materiality or importance. That it furnishes the basis for an argument which might mislead is evident. Care was necessary to avoid being misled by a specious argument.

It was not for Mason to show what occurred at the show grounds and who participated. To my mind it is only a chance guess that he was connected with any offense at the show grounds. It is a less likely guess that he was an actor in a crime such as is charged. In my view the evidence does not sustain the conviction.<sup>53</sup>

#### D. *Mason's Pardon Requests*

In accordance with the then-prevailing statutes, Minnesota, Revised Laws of 1905, c. 104, § 5424-31, Mason applied to the Board of Pardons for pardon or commutation of his sentence, apparently every six months. The Parole Record from the prison indicates that his requests were denied on six occasions from September 1922 through March 1925.<sup>54</sup> On September 2, 1925, his application was finally approved.<sup>55</sup>

The minutes of the January 1923 Board of Parole<sup>56</sup> meeting reflect this statement attributed to the “State Agent Board of Parole”:

There has always been considerable mystery and doubt in the minds of the Duluth people about this case. There are people liv-

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53. *Mason*, 189 N.W. at 454–55.

54. *Max Mason: Case No. 6785. Parole Record*, MINN. HIST. SOC'Y, <https://media.mnhs.org/things/duluthlynchings/00002280.pdf> (last visited Sept. 9, 2021) [hereinafter *Parole Record*].

55. *Max Mason: Case No. 6785. Discharge Order, September 3, 1925*, MINN. HIST. SOC'Y, [https://www.mnhs.org/duluthlynchings/documents/Max\\_Mason\\_Case\\_No\\_6785\\_Discharge\\_Order\\_September\\_3\\_1925-622.001.php](https://www.mnhs.org/duluthlynchings/documents/Max_Mason_Case_No_6785_Discharge_Order_September_3_1925-622.001.php) (last visited Sept. 9, 2021) [hereinafter *Discharge Order*].

56. During much of Minnesota's history, criminal sentences were indeterminate, and Minnesota used a Board of Parole to grant discharges from incarceration. By statute, there existed a Minnesota Board of Pardons, which was vested with the authority to issue “absolute” or “conditional” pardons. MINN. STAT. § 638.02, subd. 1 (1965). Available records indicate that Max Mason applied multiple times for pardons or commutations of his sentence, and his applications appear to have been directed to the Board of Pardons. *See, e.g., Max Mason: Application No. 5702. Pardon Application*, MINN. HIST. SOC'Y, <http://media.mnhs.org/things/duluthlynchings/00002490.pdf> (last visited Sept. 9, 2021). It appears that there are no longer any records available from the Board of Pardons from that time. There are, however, documents indicating that the Board of Parole denied, and ultimately conditionally granted, parole during what appeared to be regularly scheduled meetings shortly after each application. *See Parole Record, supra* note 54; *Discharge Order, supra* note 55. *See also Max Mason: Case No. 6785. Parole Notice, March 13, 1923*, MINN. HIST. SOC'Y, <http://media.mnhs.org/things/duluthlynchings/00002322.pdf> (last visited Sept. 7, 2021). With the adoption of determinate sentencing, Minnesota ceased the use of a Board of Parole. At least one notation in the prison Parole Record appears to indicate that Mason's application was forwarded to the Board of Pardons. *Parole Record, supra* note 54.

ing there who doubt if there was any crime committed, there are many others who think that at least five others should have been convicted. There is a great deal of criticism over the way the matter was handled by the police and others. The real truth will probably never be known. This man's conduct and appearance here is good.<sup>57</sup>

These same minutes also include the position of the county attorney:

We have no recommendation to make either for or against the exercise of clemency in this case. The defendant was rather unfortunate in that he was the only man of the colored men involved who was convicted. Personally I never was of the impression that the evidence was any too strong in his case, and if he had been a white man, I am rather doubtful if he would have been convicted.<sup>58</sup>

Nonetheless, Mason's application was denied at that point.<sup>59</sup>

In what would be his final, successful application, Mason had the benefit of supporting letters from then-St. Louis County Attorney Mason Forbes and Judge L.S. Nelson, the presiding judge at his trial. The county attorney's letter responded to an inquiry from the Board as to the position of the County Attorney's Office:

I beg to say that on two occasions in reply to inquiries from the Board of Pardons I advised and recommended the exercise of clemency, and I am of the opinion that if the defendant's record while in the institution warranted the granting of a parole, I know of nothing in connection with the case which would warrant my recommending against such action. In fact, I had been hopeful that some clemency would have been extended to this defendant long ere now.<sup>60</sup>

The letter Judge Nelson sent to the Board was also supportive of a pardon for Max Mason, and it underscored the lingering doubts that the trial judge himself had harbored since the conviction:

57. *Max Mason: Application No. 5702. Pardon Calendars [Minutes], January 1923, Page 4*, MINN. HIST. SOC'Y, <http://media.mnhs.org/things/duluthlynchings/00002488.pdf> (last visited Sept. 7, 2021).

58. *Id.*

59. *Id.* The day after the lynchings, a candidate for Governor, J.A.O. Preuss, was campaigning in Duluth. He left little doubt as to his views:

During his speech, he utilized the occasion to state that he favored strict laws for assaults on women. "If I am elected governor, I will do all in my power to increase the penalty," he said. "I will sign any bill the legislature will pass along this line, and I'm in favor of making the penalty as severe as possible."

FEDO, *supra* note 4, at 124–25. Preuss was elected governor that fall, and would serve for the next four years. Thus, he served on the Board of Pardons each time Mason's requests were made and denied. It was Preuss' successor, Governor Theodore Christianson, who sat on the Board of Pardons when Mason's conditional parole was granted on September 3, 1925.

60. *Max Mason: Case No. 6785. Case Files. Letter from Mason M. Forbes to State Board of Parole, July 21, 1925*, MINN. HIST. SOC'Y, <http://media.mnhs.org/things/duluthlynchings/00002346.pdf> (last visited Sept. 7, 2021).

Max Mason, who was tried and convicted in my court in St. Louis County, and sentenced to Stillwater penitentiary – I have always had some doubt about his guilt, and had it not been that his counsel raised some legal questions that I thought should be passed upon by the Supreme Court, I was of the intention to set aside the verdict and grant a new trial.

In the evidence, it appeared from the testimony of the girl in question and her escort that five of the negroes had intercourse with her while she was in a faint, and her family physician who examined her about ten o'clock the following day found no trace of any one having had intercourse with her, as her organs were normal, no bruises, no inflammation – that while it was possible that they could have had intercourse with her, it did not appear to be probable, and the evidence of identification was far from satisfactory.

I am of the opinion that Max Mason should be pardoned at this time. I, therefore, earnestly recommend that he be either paroled or pardoned.<sup>61</sup>

At this time, the Board took half of Judge Nelson's advice, and conditionally paroled Max Mason:

In an almost unprecedented move, the Parole Board released Mason. Rape conviction meant a minimum of twelve years in Minnesota. Mason served only four. And blacks convicted of assaulting whites could be expected to serve nearly a full thirty-year sentence. The mysterious and unusual action of the Board may never be determined.<sup>62</sup>

Aside from the remarkably short period of incarceration given the severity of the purported crime and the length of the sentence, the Parole Board's 1925 release of Mason was also unusual in the condition it imposed: that Max Mason leave the state of Minnesota and not step foot in it again, at least not for the next sixteen years.<sup>63</sup>

If the 1925 Board had any concerns that Max Mason still posed a threat to society, it is unlikely the Board would have given him the freedom to go to another state just so long as he steered clear of Minnesota. The 1925 Board appeared to be more concerned about relieving the state of Minnesota of this living, breathing reminder of the horrible wrongs committed in Duluth in 1920 than in the protection of society.

Regardless of the Board's motivations, its early release of Mason demonstrated that, irrespective of the correctness of his conviction, the

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61. *Max Mason: Case No. 6785. Case Files. Letter from L. S. Nelson to State Board of Parole, May 25, 1925*, MINN. HIST. SOC'Y, <http://media.mnhs.org/things/duluthlynchings/00002342.pdf> (last visited Sept. 7, 2021) [hereinafter *Letter from Nelson*].

62. FEDO, *supra* note 4, at 172.

63. *Discharge Order, supra* note 55.

Board believed Max Mason had proven that he would go on to lead a law-abiding life. And, indeed, it appears that he did.

A search of genealogical records and newspapers found no records of criminal arrests or convictions following Max (also known as “Mack”) Mason’s release from prison in Minnesota. The evidence suggests he lived an ordinary and law-abiding life until the time of his premature death. In 1927, Mason married Pearlline Sharpley in Tuscumbia, Alabama. He became stepfather to Pearlline’s seven-year-old daughter, Helen.<sup>64</sup> By 1930 the family of three had moved to Memphis, Tennessee, where (according to census records) Mason worked as a waiter at a club.<sup>65</sup> Memphis city directories from the 1930s indicate that Mason also worked as a porter and laborer.<sup>66</sup> By 1939, Max and Pearlline had split up, and Pearlline remarried.<sup>67</sup> On November 14, 1942, Mason died in Memphis from bacterial endocarditis related to his rheumatoid heart disease.<sup>68</sup> His death certificate listed his occupation as a waiter.<sup>69</sup> He was forty-two years old.<sup>70</sup>

Until Fedo’s 1979 book rekindled public awareness, the history of the events of 1920 was largely forgotten, or perhaps actively suppressed:

There seemed to be a concerted effort on the part of many city officials to forget the tragedy happened, to expunge it from conversations and records. For more than half a century, lynching deniers held sway in northern Minnesota. Indeed, an employee at the St. Louis County Historical Society told me that the society had maintained a file on the lynchings for a number of years, but the director ordered it removed.<sup>71</sup>

Although aspects of the historical record may have been lost or destroyed, the Minnesota Historical Society has been able to amass a substantial body

64. Alabama Marriage License, Jefferson County, Phillip Pruitt and Helen Mason, May 1, 1939.

65. BUREAU OF THE CENSUS, U.S. DEP’T OF COM., FIFTEENTH CENSUS OF THE UNITED STATES: 1930, Population Schedule, 11th Ward, Enumeration District 79-38, Page 49, Sheet 4A, Line 25 (1930).

66. MEMPHIS CITY DIRECTORY, 695 (1932).

67. See BUREAU OF THE CENSUS, *supra* note 65.

68. State of Tennessee Certificate of Death, Mack Mason, November 12, 1942.

69. *Id.*

70. Other evidence of Mr. Mason’s good character and reputation can be found in the records of the Board of Parole in the form of letters. For example, the Rev. I.E. Nolte wrote in August of 1922 that he had “every confidence” that Mr. Mason “is thoroughly reformed through religious influences. . . . Personally, I would ask an unconditional pardon . . .” *Max Mason: Case No. 6785. Case Files. Letter from I. E. Nolte to State Board of Parole, August 19, 1922*, MINN. HIST. SOC’Y, <http://media.mnhs.org/things/duluthlynchings/00002316.pdf> (last visited Sept. 7, 2021). His former employer wrote the Board and noted that Mr. Mason, while in the employ of the circus “for quite a little while” was “always ready and willing to obey orders, kept his place and his morals and general character, and habits about average.” Moreover, the employer noted that, should Mr. Mason be released, the circus “will be pleased to re-employ him . . .” *Max Mason: Case No. 6785. Case Files. Letter from Jerry Mugivan to Frank A. Whittier, July 13, 1922*, MINN. HIST. SOC’Y, <http://media.mnhs.org/things/duluthlynchings/00002300.pdf> (last visited Sept. 7, 2021).

71. FEDO, *supra* note 4, at xxix.



of material about the lynchings and the aftermath.<sup>72</sup> Moreover, the memories of the events could not be completely erased, and at least some aspects of the story continued to be passed on.

For example, the opening lyrics to Bob Dylan's 1965 song "Desolation Row" likely contain a reference to the Duluth lynchings:

They're selling postcards of the hanging  
 They're painting the passports brown  
 The beauty parlor is filled with sailors  
 The circus is in town  
 Here comes the blind commissioner  
 They've got him in a trance  
 One hand is tied to the tight-rope walker  
 The other is in his pants  
 And the riot squad they're restless  
 They need somewhere to go  
 As Lady and I look out tonight  
 From Desolation Row.<sup>73</sup>

Although Dylan himself has never confirmed that the lynchings inspired this verse, others have made the apparent connection.<sup>74</sup>

Dylan was born in Duluth in 1941 and spent his early years there before the family moved to nearby Hibbing. His father, Abram Zimmerman, lived two blocks from the site of the lynchings. Although he was only eight or nine at the time, he likely passed the story on to his son, as some have theorized.<sup>75</sup>

The uncanny similarities between the lyrics and the historical event strongly suggest at least some influence. Given the dearth of public aware-

72. Dan Kraker, *Minn. grants state's first posthumous pardon to Max Mason, in case related to Duluth lynchings*, MPR NEWS, (June 12, 2020, 11:55 AM), <https://www.mprnews.org/story/2020/06/12/minn-grants-states-first-posthumous-pardon-to-max-mason>. See *supra* note 10.

73. BOB DYLAN, *Desolation Row*, in HIGHWAY 61 REVISITED (Columbia Records 1965). For a transcript of the song, see the Desolation Row page on Bob Dylan's official website, <https://www.bobdylan.com/songs/desolation-row/>.

74. See, e.g., Christa Lawler, *Duluth Lynchings Inspire Variety of Art*, DULUTH NEWS TRIB. (June 15, 2020, 6:00 AM), <https://www.duluthnewstribune.com/entertainment/art/6533926-Duluth-lynchings-inspire-variety-of-art>; Dave Hoekstra, *Bob Dylan's Duluth*, DAVE HOEKSTRA (July 1, 2001), [http://www.davehoekstra.com/wpcontent/uploads/2014/03/bob\\_dylans\\_duluth.pdf](http://www.davehoekstra.com/wpcontent/uploads/2014/03/bob_dylans_duluth.pdf); Chimesfreedom, *They're Selling Postcards of the Hanging: The Real Lynching in Dylan's "Desolation Row"*, CHIMESFREEDOM (June 14, 2016), <http://www.chimesfreedom.com/2016/06/14/theyre-selling-postcards-of-the-hanging-the-real-lynching-in-dylans-desolation-row/>; Sam Pethers, *September 18th, 1965: 10 Bob Dylan protest songs you've probably never heard*, GASLIGHT RECORDS, <https://gaslightrecords.com/articles/10-bob-dylan-protest-songs-youve-probably-never-heard> (last visited Sept. 7, 2021); Mickleblog, *Dylan, Duluth, and Desolation Row*, MICKLEBLOG (Feb. 11, 2015), <https://mickleblog.wordpress.com/2015/02/11/dylan-duluth-and-desolation-row/>.

75. "The family lived a couple of blocks away from the lynching site at what is now a parking lot at 221 Lake Ave. North." Dave Hoekstra, *Dylan's Duluth Faces Up to Its Past*, CHIC. SUN-TIMES, July 1, 2001. See also Andrew Buncombe, *They're Selling Postcards of the Hanging. . .': Duluth's Day of Desolation Remembered*, THE INDEPENDENT (Mar. 12, 2014, 05:49), <https://www.independent.co.uk/news/world/americas/they-re-selling-postcards-hanging-duluth-s-day-desolation-remembered-9185807.html>.

ness of the event in 1965, this would indicate that the story of the Duluth lynchings lived on at least in some form in the oral tradition prior to Fedo's book.

#### IV. AVAILABILITY OF A POSTHUMOUS PARDON UNDER MINNESOTA LAW

##### A. *Pardons in Minnesota*

Given the lack of historical precedent or clear legal authority, the threshold question with which the Board of Pardons was forced to grapple was whether a posthumous pardon was something within its power to grant.<sup>76</sup> The starting point for inquiring whether the Board had the inherent power was the historical basis for pardons generally.

A pardon has been described as a “matter of mercy,”<sup>77</sup> and an “act of grace,”<sup>78</sup>:

The essence of a pardon is that it reaches backward and removes the taint of the criminal conviction. By law, the pardon nullifies the conviction, purges appellant of it, and expressly permits appellant to refrain from disclosing the conviction except for very limited purposes. Minn. Stat. § 638.02, subd. 2(2) (1998). The law affords this extraordinary relief only after the convicted individual affirmatively demonstrates that he has satisfied all conditions of his sentence and is now “of good character and reputation.”<sup>79</sup>

There is an important distinction between a pardon and parole, as noted by the Minnesota Supreme Court:

The argument that laws vesting in administrative boards the authority to determine how a convict should be handled after conviction interfere with the pardoning power vested in the executive or a pardon board most frequently stems from the failure to distinguish between a pardon or reprieve and a parole or probation. A pardon is the exercise of executive clemency. It completely frees the offender from the control of the state and relieves him of all legal disabilities resulting from his conviction. As a practical matter, it wipes out the conviction itself.<sup>80</sup>

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76. Theo Keith, *Pardon Considered in 1920 Rape Case that Sparked Duluth Lynchings*, Fox 9 (Dec. 16, 2019), <https://www.fox9.com/news/pardon-considered-in-1920-rape-case-that-sparked-duluth-lynchings>.

77. *State ex rel. O'Connor v. Wolfer*, 54 N.W. 1065, 1065 (Minn. 1893).

78. *Washburn v. Utecht*, 51 N.W.2d 657, 657–58 (Minn. 1952).

79. *State v. Haugen*, No. C4-98-1400, 1999 WL 138730, at \*2 (Minn. Ct. App. Mar. 16, 1999) (Shumaker, J., concurring).

80. *State v. Meyer*, 37 N.W.2d 3, 13 (Minn. 1949).

Parole, on the other hand, “is not an act of clemency, but a penological measure for the disciplinary treatment of prisoners who seem capable of rehabilitation outside of prison walls.”<sup>81</sup>

The Minnesota Constitution provides that the “governor in conjunction with the board of pardons has power to grant reprieves and pardons after conviction for an offense against the state except in cases of impeachment.”<sup>82</sup> The powers and duties of the board of pardons, which is comprised of the governor, the attorney general, and the chief justice of the supreme court, “shall be defined and regulated by law.”<sup>83</sup> Consistent with this constitutional framework, the Minnesota Legislature has established that the board of pardons “may grant pardons and reprieves and commute the sentence of *any person* convicted of any offense against the laws of the state, in the manner and under the conditions and rules hereinafter prescribed, but not otherwise.”<sup>84</sup> Minn. Stat. § 638.02, subd. 2(2) provides that, “If the Board of Pardons determines that the person is of good character and reputation, the board may, in its discretion, grant the person a pardon extraordinary.”

Under the plain language of § 638.01, any person—whether living or deceased—who has been convicted of an offense against the laws of the state of Minnesota may be granted a pardon, reprieve, or commutation of sentence, except in the case of impeachment.<sup>85</sup> This is also reflected in the legislative history of § 638.01, where both a “prisoner” and, since March 1, 1906, “any person” may seek pardon relief from the Board of Pardons.<sup>86</sup> Here, therefore, both under the Minnesota Constitution and § 638.01, Mason is eligible to receive pardon relief, even though he is deceased.

In 1925, there was no provision in Minnesota statutes for a pardon extraordinary. Today, the Board of Pardons has that authority.<sup>87</sup> In 1925, the trial judge urged the Board of Pardons to either pardon or parole Max Mason.<sup>88</sup> He was ultimately granted a conditional parole.

### *B. The Availability of Posthumous Pardon Relief*

Although the grant of a posthumous pardon had no precedent in Minnesota, an analysis of the history of pardons in the United States demonstrated that the Board of Pardons does, indeed, have the authority to grant posthumous pardons in appropriate cases.

81. *Id.* (quoting *Commonwealth ex rel. Banks v. Cain*, 28 A.2d 897, 899 (Pa. 1942)).

82. MINN. CONST. art. V, § 7.

83. *Id.*

84. MINN. STAT. § 638.01 (2020) (emphasis added).

85. *Id.*

86. In at least two areas, the Minnesota Legislature has defined “person” to mean “one or more natural persons” and “bodies politic and corporate, and to partnerships and other unincorporated associations.” MINN. STAT. §§ 333.001, subd. 2, 645.44, subd. 7.

87. MINN. STAT. § 638.02, subd. 2 (2020).

88. *Letter from Nelson, supra* note 61.

Once again, as set forth in Minn. Const. art. V, sec. 7, the Board of Pardons consists of the governor, the attorney general, and the chief justice of the supreme court. “The Governor in conjunction with the board of pardons has power to grant reprieves and pardons after conviction for an offense against the State except in cases of impeachment.”<sup>89</sup>

Minnesota’s constitutional language parallels that of the U.S. Constitution and most state constitutions. The pardon clause of the U.S. Const., art. II, § 2, cl. 1, authorizes the President of the United States “to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.” In interpreting this provision, the U.S. Supreme Court has stated that the “plain purpose of the broad power conferred by § 2, cl. 1, was to allow plenary authority to the President to ‘forgive’ the convicted person in part or entirely . . . .”<sup>90</sup> The Supreme Court further held that the “pardoning power is an enumerated power of the Constitution” and that “its limitations, if any, must be found in the Constitution itself.”<sup>91</sup> By its express language, offenses leading to impeachment are excluded from federal pardons, and the act pardoned must be an offense against the United States, which precludes the President from pardoning offenses against the individual states and intervening in civil suits.<sup>92</sup> “Alone among the powers enumerated in the Constitution, the power to pardon proceeds unfettered.”<sup>93</sup> Thus, the presidential pardon power is very broad.<sup>94</sup>

Given the Minnesota Constitution’s virtually identical language, substituting the “Governor in conjunction with the Board of Pardons” for the President and offenses against “the State” for “The United States,” the history of the development and application of federal pardon power, as well as that of other states with comparable constitutional provisions, was critical in establishing the authority to grant posthumous pardons in Minnesota.

The Pardon clause of the U.S. Constitution was based upon the pardon power held by the King of England at the time the U.S. Constitution was adopted. As Chief Justice Taft noted in 1925, “the power of the king under the British Constitution, plainly was the prototype of this clause.”<sup>95</sup> “The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted.”<sup>96</sup> As noted by the *Schick* court, the drafters of the Constitution “were well-acquainted with the English crown

89. MINN. STAT. art. V, § 7.

90. *Shick v. Reed*, 419 U.S. 256, 266 (1974).

91. *Id.* at 267.

92. William F. Duker, *The President’s Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 525–26 (1977).

93. *Id.* at 535.

94. *See Ex parte Garland*, 71 U.S. 333, 380 (1866) (“The [pardon] power thus conferred is unlimited, with the exception [for impeachment] stated.”).

95. *Ex parte Grossman*, 267 U.S. 87, 118 (1925).

96. *Id.* at 108–09.

authority to alter and reduce punishments as it existed in 1787,”<sup>97</sup> and the “draftsmen of Art. II, § 2, spoke in terms of a ‘prerogative’ of the President, which ought not to be ‘fettered or embarrassed’.”<sup>98</sup>

In short, by 1787 [when the U.S. Constitution was adopted], the English prerogative to pardon was unfettered except for a few specifically enumerated limitations. The history of our executive pardoning power reveals a consistent pattern of adherence to the English common law practice.<sup>99</sup>

Similarly, the pardon powers vested in governors of the original states that had been British colonies were based on the English crown’s pardon power.<sup>100</sup>

While variations arose as the individual states adopted their own constitutions, the majority of states—like Minnesota—ultimately adopted pardon powers closely aligned with and based upon that of the U.S. Constitution:

During the pre-Independence period there were three models for the institution of clemency: (a) vesting the power in the governor; (b) vesting the power in the governor acting only with the consent of the Executive Council; (c) vesting the power in the legislature. During the period 1790 to 1860 there was a revival in public trust of the executive, and twenty-one states adopted model (a), while four preferred model (b). Since 1860, in keeping with the increasing professionalization of the pardoning power, the majority of state constitutions have provided for some sort of autonomous board of pardons having either formal decision-making power or at least an advisory role in this respect.<sup>101</sup>

Despite the British sovereign’s inherent authority to issue posthumous pardons, an authority existing in 1787 and continuing unchanged to the present, it apparently was not until the mid-twentieth century that any posthumous pardon was issued.<sup>102</sup>

97. *Schick v. Reed*, 419 U.S. 256, 260 (1974).

98. *Id.* at 263.

99. *Id.* at 262. See also THE FEDERALIST NO. 69 at 464 (Alexander Hamilton) (J. Cooke ed., 1961) (summarizing the proposed section to powers, including the power to pardon as “resembl[ing] equally that of the King of Great Britain and the Governor of New York.”).

100. Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569, 589 (1991).

101. Leslie Sebba, *The Pardoning Power – A World Survey*, 68 J. CRIM. L. & CRIMINOLOGY 83, 112 (1977).

102. Gerry Rubin, *Posthumous Pardons, the Home Office and the Timothy Evans Case*, CRIM. L. REV. 41 (Jan. 2007); see Darryl W. Jackson, Jeffery H. Smith, Edward H. Sisson & Helene T. Krasnoff, *Bending Towards Justice: The Posthumous Pardon of Lieutenant Henry Ossian Flipper*, 74 IN. L. REV. 1251, 1274 (1999) [hereinafter, *Bending Toward Justice*].

In 1950, Timothy Evans was convicted of murdering his wife and child, and executed.<sup>103</sup> During his trial, Evans had accused his downstairs neighbor, John Christie, of committing the murders.<sup>104</sup> Three years after Evans' execution, Christie was found to be a serial murderer, responsible for the deaths of six other women in the same house, including his own wife.<sup>105</sup> Prior to his own execution, Christie confessed to murdering Mrs. Evans.<sup>106</sup> An official inquiry concluded in 1966 that Christie had also murdered Evans' daughter.<sup>107</sup>

Not surprisingly, the wrongful conviction and execution of an innocent man had a significant impact on the British public.<sup>108</sup> In October of 1966, upon the advice of the Home Secretary, Queen Elizabeth II issued a posthumous pardon to Evans, exonerating him of his guilt and declaring his innocence.<sup>109</sup> This was apparently the first exercise of the power to grant posthumous pardons by an English sovereign.<sup>110</sup> The second posthumous pardon was granted by Queen Elizabeth II in 1993 to a man convicted of murder and executed in 1953.<sup>111</sup> In 2014, the Queen posthumously pardoned Alan Turing, famously credited with breaking the Nazi Enigma code during WWII, for the crime of homosexuality.<sup>112</sup> He had been chemically castrated in 1952, and committed suicide two years later.<sup>113</sup> In 2017, the British government enacted a law granting posthumous pardons to thousands of gay men who had been convicted of offences of previously criminalized homosexual conduct, an act modeled on the Queen's pardon of Mr. Turing.<sup>114</sup>

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103. Robert N. Moles & Bibi Sangha, *Westlake v CCRC [2004] EWHC 2779 (Admin) – [Timothy Evans – 10 Rillington Place Case]*, NETWORKED KNOWLEDGE, <http://netk.net.au/UK/EvansTimothy.asp> (last visited Sept. 9, 2021).

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. The British folksinger and songwriter Ewan McColl penned the song "Go Down Ye Murderers, the Ballad of Tim Evans" in 1957. It was recorded by many artists, including a young Judy Collins, and helped raise public awareness of the miscarriage of justice.

109. *See* 734 Parl. Deb., H.C. (5th Ser.) 38–40 (1966).

110. In modern times. *See* R v. Secretary of State for the Home Dep't. Ex p. Bentley [1993] 4 All E.R. 442 (Q.B.).

111. *Bending Toward Justice*, *supra* note 102 at 1275, n.2.

112. Thom Senzee, *With Queen's Decree, Alan Turing Is Now Officially Pardoned*, THE ADVOCATE (Aug. 22, 2014), <https://www.advocate.com/world/2014/08/22/queens-decree-alan-turing-now-officially-pardoned>.

113. *Id.*

114. Owen Bowcott, *UK Issues Posthumous Pardons for Thousands of Gay Men*, THE GUARDIAN (Jan. 31, 2017) <https://www.theguardian.com/world/2017/jan/31/uk-issues-posthumous-pardons-thousands-gay-men-alan-turing-law>. In 1997, a Criminal Cases Review Commission was established to investigate possible miscarriages of justice in England, Wales, and Northern Ireland. One of the Commission's early investigations led to the quashing of a murder conviction of a man executed in 1952, which resulted in compensation to the man's family in 2001. *See* Jamie Wilson, *£1.4m Award For Family of Wrongfully Hanged Man*, THE GUARDIAN (May 14, 2001)

By 1996, the authority of the English sovereign to grant pardons posthumously, although exercised only twice to that point, had become so accepted in Britain that the definitive treatise on English law, *Halsbury's Laws of England*, stated the black letter principle that a "pardon may be granted posthumously."<sup>115</sup> Ireland issued its first posthumous pardon in 2015.<sup>116</sup>

In the United States, no president issued a posthumous pardon until 1999, when President Bill Clinton posthumously pardoned Henry O. Flipper, the first African American graduate of West Point, who had been convicted of conduct unbecoming an officer.<sup>117</sup> Since then, only six other presidential pardons have been granted posthumously. In 2008, President George W. Bush pardoned Charlie Winters, who had been imprisoned for eighteen months for violating the 1939 Neutrality Act by facilitating the shipment of weapons to the fledgling State of Israel.<sup>118</sup> In 2018, President Donald Trump granted a posthumous pardon to Jack Johnson, boxing's first Black heavyweight champion, convicted more than 100 years earlier for violating the Mann Act in what history has viewed as a racially motivated conviction.<sup>119</sup> President Trump would go on to issue four additional posthumous pardons before leaving office.<sup>120</sup>

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<https://www.theguardian.com/uk/2001/may/14/jamiewilson>; THE CRIMINAL CASES REVIEW COMMISSION (CCRC), <https://ccrc.gov.uk>.

115. 8 HALSBURY'S LAWS OF ENGLAND 482 § 823 (4th ed. 1996).

116. Sarah Slater, *Search for remains of man who was issued with Ireland's first posthumous pardon halted*, IRISH EXAMINER (Oct. 4, 2020), <https://www.irishe Examiner.com/news/arid-40059215.html>.

117. *Bending Toward Justice*, *supra* note 102.

118. Eric Lichtblau, *Jailed for Aiding Israel, but Pardoned by Bush*, N.Y. TIMES (Dec. 23, 2008), <https://www.nytimes.com/2008/12/24/washington/24pardons.html>.

119. Johnson had served less than a year in a federal prison for what "many view as a racially motivated injustice," said President Trump in announcing the pardon. Camila Domonoske, *Legendary Boxer Jack Johnson Gets Pardon, 105 Years After Baseless Conviction*, NPR NEWS (May 24, 2018), <https://www.npr.org/sections/thetwo-way/2018/05/24/614114966/legendary-boxer-jack-johnson-gets-pardon-105-years-after-baseless-conviction>.

120. ASSOCIATED PRESS, *Trump just pardoned a scientist who helped develop weapons during WWII, including the nuclear bomb*, BUS. INSIDER (Oct. 11, 2019, 8:45 AM), <https://www.businessinsider.com/trump-pardons-scientist-who-helped-allies-triumph-in-wwii-2019-10> (Zay Jeffries); Todd Shields & Jennifer Jacobs, *Trump Pardons Susan B. Anthony for an Illegal Vote in 1872*, BLOOMBERG (Aug. 18, 2020, 8:32 AM), <https://www.bloomberg.com/news/articles/2020-08-18/trump-says-he-ll-pardon-susan-b-anthony-for-illegal-1872-vote> (Susan B. Anthony); Doha Madani, *Trump pardons Roger Stone, Paul Manafort, Charles Kushner and others*, NBC NEWS (Dec. 23, 2020, 6:40 PM) <https://www.nbcnews.com/politics/politics-news/trump-pardons-roger-stone-paul-manafort-charles-kushner-others-n1252307> (Russel Plaisance); Michael Klinski, *Several South Dakotans, including Paul Erickson, on President Trump pardon list*, ARGUS LEADER (Jan. 20, 2021, 12:30 AM) <https://www.argusleader.com/story/news/politics/2021/01/20/president-trump-pardons-several-south-dakotans-list-paul-erickson/4226090001> (Martin Jorgenson).

If the power of presidents to grant posthumous pardons had been available since 1787,<sup>121</sup> why did it take more than 200 years for the first one to be issued? The answer is both straightforward and highly instructive to the threshold question.

Prior to President Clinton's posthumous pardon of Lieutenant Flipper, the Office of the Pardon Attorney at the U.S. Department of Justice took the position that the president did not have the authority to grant posthumous pardons. The pardon attorney's position was based on three cases and one Attorney General's opinion from the nineteenth century, and one case from 1915.<sup>122</sup> None of the authorities relied upon by the pardon attorney involved the potential grant of a pardon to an individual who was known to be deceased. However, these early authorities stood for the proposition that a pardon was a "deed," and for it to be valid, delivery was essential and "delivery is not complete without acceptance."<sup>123</sup> Because a deed could be rejected, so too could a pardon be rejected and "we have discovered no power in a court to force it on him."<sup>124</sup>

Because a deceased individual could not "accept" a pardon, the Office of the Pardon Attorney concluded that posthumous pardons could not be validly issued. In more recent cases than those that had been considered by the Office of the Pardon Attorney, however, the Supreme Court clearly rejected the notion that a pardon must be "accepted" by the grantee in order for it to be effectuated. "[T]he requirement of consent was a legal fiction at best."<sup>125</sup> In a 1927 case involving the power of the president to commute a prisoner's sentence from hanging to life imprisonment without the prisoner's consent, the Court concluded that the prisoner's consent was not required and that the president had the authority based on the underlying principles giving rise to the pardon power:

A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the Constitutional scheme. When granted, it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed. Just as the original punishment would be imposed without regard to the prisoner's consent, and in the teeth of his will, whether he liked it or not, the public welfare, not his consent, determines what shall be done.<sup>126</sup>

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121. It should be noted that the Department of Justice discourages applications for posthumous pardons. "It is the general policy of the Department of Justice not to accept for processing applications for posthumous pardons. . . ." THE U.S. DEPT. OF JUST., POLICIES (Dec. 23, 2020) <https://www.justice.gov/pardon/policies>.

122. See *Burdick v. United States*, 236 U.S. 79 (1915); *United States v. Wilson*, 32 U.S. 150 (1833); *Sierra v. United States*, 9 Ct. Cl. 224 (1873); *Meldrim v. United States*, 7 Ct. Cl. 595 (1871); *Caldwell's Case*, 11 Op. Atty. Gen. 35 (1864).

123. *Wilson*, 32 U.S. at 161.

124. *Id.*

125. *Shick v. Reed*, 419 U.S. 256, 261 (1974).

126. *Biddle v. Perovich*, 274 U.S. 480, 487 (1927) (internal citations omitted).



Thus, the notion that the grantee of a pardon must “accept” the pardon for it to be effectuated, a principle based on nineteenth century case law not involving posthumous pardons, permeated American law for decades. With the clarification in *Schick*, and powerful additional legal and policy arguments, the notion that posthumous pardons could not be granted by the president was itself laid to rest in 1999.<sup>127</sup>

States with similar pardon provisions to that of Minnesota have granted posthumous pardons in rare cases in recent years. A brief review of some of these state pardons is instructive.

Perhaps the most informative scenario derives from Texas. In 2010, the Texas Attorney General was asked to opine whether the governor had the authority to grant posthumous pardons. In a detailed and thoughtful analysis, then-Attorney General (and now Governor) Greg Abbott ultimately concluded that such authority did exist.<sup>128</sup>

The Texas Attorney General began his analysis by examining the language of the Texas Constitution:

In all criminal cases, except treason and impeachment, the Governor shall have power, after conviction, on the written signed recommendation and advice of the Board of Pardons and Paroles, or a majority thereof, to grant reprieves and commutations of punishments and pardons. . . .<sup>129</sup>

This provision of the Texas Constitution is similar to that of Minnesota (as well as the U.S. Constitution and most other state constitutions). The only limitations on the governor’s pardon power in the Texas Constitution are the requirement that there be a recommendation by the Board of Pardons and Paroles, and that the underlying case not involve treason or impeachment. Beyond that, the governor’s pardon authority extended to all criminal cases.<sup>130</sup>

In interpreting the Texas Constitution, the Texas Attorney General presumed that its language was carefully selected, construed its words as they are generally understood, and relied heavily on the plain language of the Constitution’s literal text.<sup>131</sup> With this framework, Attorney General Abbott concluded:

Plain language of the Constitution does not expressly address whether the Governor may issue posthumous pardons. However, because the Constitution has given the Governor pardon power in all criminal cases, except treason and impeachment, and has not

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127. *See generally Bending Towards Justice*, *supra* note 102.

128. Authority of the Governor to grant a posthumous pardon, Tex. Att’y Gen. Op. GA-0754 (2010) [hereinafter *Authority of the Governor*].

129. *Id.* (citing Tex. Const. art. IV, § 11(b)).

130. *Id.*

131. *Id.*; *see also* Ninetieth Minn. State Senate v. Dayton, 903 N.W.2d 609, 618 (Minn. 2017) (“We must follow the plain language” of the Minnesota Constitution.).

otherwise limited its authority to grant posthumous pardons, it could be interpreted as implicitly authorizing him to grant pardons in criminal cases, so long as all constitutional requirements are met.<sup>132</sup>

The Texas Attorney General noted that a prior opinion of the Office of the Texas Attorney General had concluded otherwise. In that opinion,<sup>133</sup> the then-attorney general had concluded that, because the deceased was unable to accept the pardon, the governor did not have the authority to grant it. This 1965 opinion had been based on the same federal case law that had previously caused the U.S. Attorney General's Office of the Pardon Attorney to opine that the President could not issue posthumous pardons, as well as a 19th century Texas state case applying a common law requirement that a pardon be accepted in order to be valid.<sup>134</sup>

Citing the same U.S. Supreme Court case that ultimately led to the acceptance of presidential power to grant posthumous pardons,<sup>135</sup> the Texas Attorney General concluded that the basis for issuing a pardon "is the public welfare, not the consent of the grantee."<sup>136</sup> This more modern development of the law, then, provided Attorney General Abbott in 2010 a basis for reaching a different conclusion than that of his predecessor in 1965:

Given the shift in the United States Supreme Court precedent that formed the basis of the prior Texas decisions, it is possible that, were a Texas court to decide the issue today, it would reject the need for acceptance of an unconditional pardon as the United States Supreme Court has done.<sup>137</sup>

Based on this Attorney General opinion, then-Governor Rick Perry granted a posthumous pardon to Tim Cole, an African American man who had died in prison in 1999 following his 1985 conviction for the rape of a fellow college student.<sup>138</sup> After his death, DNA evidence had demonstrated that an already-imprisoned serial rapist (who had attempted to alert authorities as early as 1995 of his own culpability for the crime for which Cole had been convicted) was the actual rapist.<sup>139</sup>

More recently, Florida grappled with the issue of posthumous pardons for African American men accused of raping a white woman seven decades earlier. Samuel Shephard, Walter Irvin, Charles Greenlee, and Ernest

132. *Authority of the Governor*, *supra* note 128.

133. Tex. Att'y. Gen. Op. C-471 (1965) ("Whether the Board of Pardons and Paroles has the authority to recommend and grant a posthumous full pardon to a deceased convicted felon on application of a relative or other interested party.").

134. *Hunnicut v. State*, 1885 WL 6857 (Tex. Ct. App. 1885).

135. *Schick*, 419 U.S. at 261.

136. *Authority of the Governor*, *supra* note 128, at \*2.

137. *Authority of the Governor*, *supra* note 128.

138. Stephen Greenspan, *Posthumous Pardons Granted in American History*, DEATH PENALTY INFO. CTR. 10 (2011) [hereinafter *Posthumous Pardons*].

139. *Id.*

Thomas, who came to be known as the “Groveland Four,” were accused of abducting and raping a seventeen-year-old white girl in 1949.<sup>140</sup> Greenlee, Irvin, and Shephard were charged, imprisoned, and beaten the night of their arrest in the basement of a county jail. Shephard’s family home was burned to the ground by an angry mob. Thomas escaped into the surrounding swamps where a posse of one thousand armed, deputized men with bloodhounds hunted him down for more than a day. Thomas was shot dead before being charged or tried. Greenlee, who was sixteen at the time, was sentenced to life in prison by an all-white jury, while Irvin and Shephard were sentenced to death.<sup>141</sup>

While the U.S. Supreme Court ordered a retrial, the local sheriff drove the two handcuffed men into the countryside and shot them, claiming he acted in self-defense.<sup>142</sup> Shephard died on the spot, but Irvin survived to undergo a second trial. Despite a defense by future U.S. Supreme Court Justice Thurgood Marshall, Irvin was sentenced to death again, a sentence later commuted to life in prison. He died in 1969, one year after being released on parole. Greenlee was released from prison in 1962 and lived until his death in 2012.<sup>143</sup>

In 2019, the Florida Board of Executive Clemency unanimously recommended posthumous pardons for the men, and Governor Rick DeSantis issued the posthumous pardons, stating, “[m]ake no mistake, these men were victims. . . . Four men have had their history wrongly written for crimes they did not commit.”<sup>144</sup>

Of particular note, the purported victim of the 1949 attack, then eighty-six, appeared before the Florida Board of Executive Clemency where she stood by her original allegations.<sup>145</sup> “I’m beggin’ y’all not to give the pardons because they did it,” she said. “If you do, you’re going to be just like them.” In spite of this, the board voted unanimously to recommend the posthumous pardons.<sup>146</sup>

In 2009, the South Carolina Parole and Pardon Board granted posthumous pardons to two African American brothers convicted of and executed for killing a white Confederate Army veteran. In the decades since the executions of Thomas and Meeks Griffin, researchers pieced together evi-

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140. Ian Stewart, *Accused of Florida Rape 70 Years Ago, 4 Black Men Get Posthumous Pardons*, NPR News (Jan. 11, 2019, 5:45 PM) <https://www.npr.org/2019/01/11/684540515/accused-of-florida-rape-70-years-ago-4-black-men-get-posthumous-pardons>.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. Stewart, *supra* note 140.

146. Stewart, *supra* note 140.

dence indicating that their conviction and sentencing had been the fruit of racism.<sup>147</sup>

In February of 2020, California Governor Gavin Newsom granted a posthumous pardon to the African American civil rights leader Bayard Rustin, who had died in 1987. Rustin had been convicted in 1953 of a “moral charge” of having sex in a parked car with another man.<sup>148</sup>

In 2001, Governor Parris Glendening of Maryland granted a posthumous pardon to John Snowden, a black ice wagon merchant who had been hanged in 1919 for the rape and murder of the wife of a prominent white businessman. Eight decades after Snowden’s execution, Governor Glendening pardoned him, stating that the execution “may well have been a miscarriage of justice.”<sup>149</sup>

In 2005, the Georgia Board of Pardons and Parole granted a posthumous pardon to Lena Baker, a black maid executed in 1945 for killing the white man she claimed had held her in slavery and threatened her life.<sup>150</sup>

In 2019, Illinois Governor Bruce Rauner granted a posthumous pardon to Grover Thompson, an African American man convicted of murder in 1982 who died in prison in 1996. After Thompson’s death, a white serial murderer confessed to the crime.<sup>151</sup>

In 2013, the Alabama Parole Board granted posthumous pardons to three of the “Scottsboro Boys,” an infamous case where nine African American men had been accused of raping two women on a train in 1931. Convicted by all-white juries, all but the youngest received death sentences. Five of the men’s convictions were overturned after one of the alleged victims recanted her story and one received a pardon before his death in 1976.<sup>152</sup> This tragic episode gave rise to an Alabama statute setting forth procedures for posthumous pardons, titled by the legislature as the “Scottsboro Boys Act.”<sup>153</sup>

147. Alex Spillius, *South Carolina pardons black brothers convicted of 1913 killing*, THE TELEGRAPH (Oct. 18, 2019), <https://www.telegraph.co.uk/news/worldnews/northamerica/usa/6366628/South-Carolina-pardons-black-brothers-convicted-of-1913-killing.html>; *Posthumous Pardons*, *supra* note 138, at 10.

148. Phil Willon, *Newsom grants posthumous pardon to civil rights leader Bayard Rustin*, L.A. TIMES (Feb. 5, 2020, 3:00 AM) <https://www.latimes.com/california/story/2020-02-05/newsom-bayard-rustin-pardon-lgbtq-people-clemency-discriminatory-laws>.

149. *Posthumous Pardons*, *supra* note 138, at 6.

150. *Posthumous Pardons*, *supra* note 138, at 6; Gary Younge, *Pardon for maid executed in 1945*, THE GUARDIAN (Aug. 16, 2005), <https://www.theguardian.com/world/2005/aug/17/usa.garyyounge1>.

151. Sam Dunklau, *Wrongly-Convicted Illinois Man Receives Rare Posthumous Pardon*, ILLINOIS PUBLIC MEDIA (Jan. 15, 2019), <https://will.illinois.edu/news/story/wrongly-convicted-illinois-man-receives-rare-posthumous-pardon>.

152. Krishnadev Calamur, *Alabama Pardons Scottsboro Boys in 1931 Rape Case*, NPR NEWS (Nov. 21, 2013, 2:34 PM), <https://www.npr.org/sections/thetwo-way/2013/11/21/246576665/ala-bama-pardons-scottsboro-boys-in-1931-rape-case>.

153. ALA. CODE § 15-22-110 *et. seq.*

In 1996, Oklahoma Governor Frank Keating granted a posthumous pardon to J.B. Stradford, a black businessman who had been convicted of inciting a 1921 riot that had resulted in the deaths of more than 200 people and destroyed a large section of the town known as the “Black Wall Street.”<sup>154</sup> Modern historiography has demonstrated that the 1921 Tulsa massacre, one of the most notorious race riots in American history, had actually been triggered by whites rampaging through the black business district because of a rumored sexual assault by a black man of a white woman.<sup>155</sup> The horrific attack by the white mob, which included aerial bombings from civilian aircraft, resulted in the deaths of an estimated 250 people, many of whom were quickly placed in unmarked mass graves, some of which have only been discovered recently.<sup>156</sup> Stradford, who by all accounts had actually been a peacemaker attempting to stop the mob violence, is now viewed as a victim of the racism of the 1920s, and his conviction an effort to shift the blame of the white community for its murderous and destructive rampage to an African American.

In an eerie echo of the Duluth lynchings, not a single white person was ever prosecuted for causing the death of any African American during the 1921 Tulsa massacre, and the community quickly buried—quite literally, in mass graves—any memory of and responsibility for this stain on the white Tulsa community. Were it not for the efforts of modern historians, the horrors of the Tulsa race massacre may have been—like most of its victims—left buried for eternity, with one African American man wrongfully shouldering the blame. The posthumous pardon of Mr. Stradford came too late to clear his name while alive, but has played an important role in understanding the real history of the 1921 Tulsa riot and paving the way for community healing and reconciliation.<sup>157</sup>

While there has been a handful of other posthumous pardons granted throughout the United States,<sup>158</sup> the cases discussed above—as well as the

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154. *Seventy-five years after the fact and six decades after his death, a Black Tulsa businessman has been cleared of wrongdoing in connection with one of the deadliest race riots in American history*, N.Y. TIMES (Oct. 26, 1996), <https://writing.upenn.edu/~afilreis/50s/race-riot-verdict.html>.

155. Tim Madigan, *Remembering Tulsa*, SMITHSONIAN MAG. (Apr. 2021), <https://www.smithsonianmag.com/history/tulsa-race-massacre-century-later-180977145>.

156. DeNee L. Brown, *Scientists excavating Tulsa Race Massacre site unearth skeleton with bullet wounds*, WASH. POST (June 26, 2021, 8:30 AM), <https://www.washingtonpost.com/history/2021/06/26/tulsa-massacre-body-found-bullet>.

157. See OKLA. COMM’N TO STUDY THE TULSA RACE RIOT OF 1921, REPORT OF THE TULSA RACE RIOT (Feb. 28, 2001), <https://www.okhistory.org/research/forms/freport.pdf>; see also H.R. 1995, 110th Cong. (2007), <https://www.congress.gov/bill/110th-congress/house-bill/1995/text>.

158. California 1996, Jack Ryan, convicted in 1925 of murder. Dave Leshner, *Dead Man’s Name Finally to Be Cleared*, L.A. TIMES (Apr. 15, 1996), <https://www.latimes.com/archives/la-xpm-1996-04-15-mn-58720-story.html>. Colorado 2011, Joe Arridy, executed in 1939 for sexual assault and murder. Keith Coffman, *Colorado governor pardons man executed for murder in 1939*, REUTERS (Jan. 7, 2011, 4:50 PM), <https://www.reuters.com/article/us-pardon-colorado-post-humous/colorado-governor-pardons-man-executed-for-murder-in-1939-idUS>

pardons issued by Presidents Clinton and Trump—have a common theme: African American men convicted by all-white judges and juries based upon racism and the racist perceptions of African American men that pervaded American society. This is, perhaps, best illustrated by the posthumous pardons issued to thirty-four African American men and boys who had been lynched in Maryland between 1854 and 1933. These pardons were issued by Maryland Governor Larry Hogan on May 9, 2021, at an event to memorialize Howard Cooper, a fifteen-year-old boy who, in 1885, was dragged

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TRE70660W2011010. Florida 2010, Jim Morrison, convicted in 1970 for indecent exposure and profanity. Gary Fineout, *Jim Morrison Is Pardoned in Indecent Exposure Case*, N.Y. TIMES (Dec. 9, 2010, 3:34 PM), <https://artsbeat.blogs.nytimes.com/2010/12/09/jim-morrison-is-pardoned-in-indecent-exposure-case>. Georgia 1886, Leo Frank, sentenced to death for a 1913 murder but lynched in 1915 after his sentence of execution was commuted to life in prison. *Georgia Pardons Lynching Victim, ADL's First Case*, L.A. TIMES (Mar. 12, 1986), <https://www.latimes.com/archives/la-xpm-1986-03-12-mn-18400-story.html>. Illinois 1893, Samuel Fielden, Oscar Neebe, and Michael Schwab, sentenced to life in prison for their participation in the 1885 May market riot. Douglas O. Linder, *The Pardon of the Haymarket Prisoners*, FAMOUS TRIALS, <https://famous-trials.com/haymarket/1182-pardon>. Maryland 1994, Jerome Cardin, convicted in 1986 for stealing from a bank he co-owned. John W. Frece, *Schaefer grants Cardin pardon in S&L scandal*, THE BALT. SUN (Sept. 10, 1994), <https://www.baltimoresun.com/news/bs-xpm-1994-09-10-1994253007-story.html>. Maine 2020, Don Gellers, a tribal attorney who died in 2014 and was convicted in 1968 of marijuana possession. David Sharp, *Maine governor pardons tribal attorney for 1968 pot charge*, AP NEWS (Jan. 7, 2020), <https://apnews.com/a043b3358f308411263b2809a461dd6a>. Massachusetts 1977, Nicola Sacco and Bartolomeo Vanzetti, executed in 1927 for robbery and murder. *Proclamation by Gov. Michael S. Dukakis of Nicola Sacco and Bartolomeo Vanzetti Memorial Day*, SACCO AND VANZETTI COMMEMORATION SOCIETY (Aug. 23, 1977), [https://saccoandvanzetti.org/sn\\_display1.php?row\\_ID=12](https://saccoandvanzetti.org/sn_display1.php?row_ID=12). Montana 2006, seventy-eight people of German descent convicted during World War I under a state sedition statute. Charles S. Johnson, *78 convicted of sedition in Montana pardoned*, BILLINGS GAZETTE (May 3, 2006), [https://billingsgazette.com/news/state-and-regional/montana/convicted-of-sedition-in-montana-pardoned/article\\_45287525-4761-5939-abf4-d275e2755bea.html](https://billingsgazette.com/news/state-and-regional/montana/convicted-of-sedition-in-montana-pardoned/article_45287525-4761-5939-abf4-d275e2755bea.html). Nebraska 1886, William Jackson Marion, executed in 1887 for murder. Anna Bauman, *Man hanged in Beatrice in 1887; pardoned by then-Gov. Kerrey nearly a century later*, OMAHA WORLD-HERALD (Aug. 20, 2018), [https://www.omaha.com/news/state\\_and\\_regional/man-hanged-in-beatrice-in-pardoned-by-then-gov-kerrey/article\\_b9a8938c-7366-57be-a07a-4e2bff3d9704.html](https://www.omaha.com/news/state_and_regional/man-hanged-in-beatrice-in-pardoned-by-then-gov-kerrey/article_b9a8938c-7366-57be-a07a-4e2bff3d9704.html). New York 2003, Lenny Bruce, convicted in 1964 on obscenity charges. *Lenny Bruce Pardoned*, CBS/AP NEWS (Dec. 23, 2003, 1:16 PM), <https://www.cbsnews.com/news/lenny-bruce-pardoned>. Pennsylvania 1979, Jack Kehoe, executed in 1878 for murder. *John Kehoe*, THE KEHOE FOUNDATION, <http://kehoefoundation.org/john-kehoe>. Rhode Island 2011, John Gordon, executed in 1845 for murder. Press Release, Gov. Lincoln D. Chafee Pardons John Gordon, Office of the Gov. (June 29, 2011), <https://www.ri.gov/press/view/14182>. Illinois 2021, the “Martinsville 7,” executed in 1951. *‘Martinsville 7’ Granted Posthumous Pardons 70 Years After Their Executions*, DEATH PENALTY INFORMATION CENTER (Sept. 3, 2021), <https://deathpenaltyinfo.org/news/martinsville-7-granted-posthumous-pardons-70-years-after-their-executions>. Massachusetts 2021, Elizabeth Johnson Jr., convicted and sentenced in 1693 for witchcraft. Andrew Brinker, *Three centuries later, a push to exonerate one last witch*, BOSTON GLOBE (Aug. 18, 2021), <https://www.bostonglobe.com/2021/08/18/metro/three-centuries-later-push-exonerate-one-last-witch/>. Also of note: Nova Scotia, 2010, Viola Desmond, known as the “Canadian Rosa Parks,” one cent tax violation. Oliver Moore, *Nova Scotia redresses a civil rights injustice*, THE GLOBE AND MAIL (Apr. 15, 2010), <https://www.theglobeandmail.com/news/national/nova-scotia-redresses-a-civil-rights-injustice/article1210744>. Joan Weeks, *9 decades after hunting conviction, Mi’kmaq leader gets posthumous pardon*, CBC NEWS (Feb. 16, 2017), <https://www.cbc.ca/news/canada/nova-scotia/9-decades-after-hunting-conviction-mi-kmaq-leader-gets-posthumous-pardon-1.3985678>.

from the Baltimore County Jail and hanged while his appeal was still pending.<sup>159</sup>

While a posthumous pardon is of little benefit to the departed, a posthumous pardon confers an important benefit on society as a whole and allows for community healing. As President Clinton noted in his 1999 statement posthumously pardoning Lieutenant Flipper, a pardon:

teaches us that, although the wheels of justice turn slowly at times, still they turn. It teaches that time can heal old wounds and redemption comes to those who persist in a righteous cause. Most of all, it teaches us . . . that we must never give up the fight to make our country live up to its highest ideals.<sup>160</sup>

## V. THE RACIST MILIEU OF THE 1920s

The arrest and conviction of Max Mason, and the denial of his pardon applications from 1922 to 1925, must also be viewed within its broader historical and social context.

1920s America was a deeply racist society struggling to cope with the aftermath of slavery and the existing power structures premised on white supremacy. Women's suffrage, the influx of immigrants, and inroads into the power structure that had previously been the nearly exclusive domain of white Protestant males also created profound tensions and engendered efforts by the "old guard" throughout the country to cling to power.

America's oldest societal chasm—the black and white divide—exploded with renewed force in the 1920s, manifested in a myriad of ways both old and new. Minnesota was very much a part of this, too.

### A. *The Great Migration*

Like most northern states, Minnesota had few African American residents at the dawn of the twentieth century. African Americans accounted for less than 5,000 of Minnesota's population of 1.75 million in 1900.<sup>161</sup> Cultural and demographic shifts beginning in the early 1900s were accelerated by World War I, with African Americans moving north, in some cases to fill jobs left by white Americans serving in the armed forces. Northern states began to experience the type of overt racial tensions that had historically been associated with southern states. These tensions were further ex-

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159. Eric McDaniel, *Maryland Governor Grants Posthumous Pardons To 34 Black Lynching Victims*, NPR NEWS (May 9, 2021, 6:50 PM), <https://www.npr.org/2021/05/09/995246716/maryland-governor-grants-posthumous-pardons-to-34-black-lynching-victims>.

160. President William J. Clinton, Remarks on the Posthumous Pardon of Lt. Henry O. Flipper (Feb. 19, 1999) (transcript available at The American Presidency Project).

161. Walter F. Wilcox, *The Negro Population*, in DEP'T OF COM. AND LAB. BUREAU OF THE CENSUS BULLETIN 8: NEGROES IN THE UNITED STATES 11, 20 (1904), <ftp://ftp.census.gov/library/publications/decennial/1900/bulletins/demographic/8-negroes-in-us-part-1.pdf>.

acerbated by the large influx of African American southerners to northern states, known as the “Great Migration,” beginning in 1916:

About half a million African Americans and comparable numbers of southern white migrants flocked to jobs in northern cities during World War I. This Great Migration of both races continued after the war and inalterably transformed northern society, southernizing it, in a sense, by extending racial issues beyond southern boundaries. It brought black labor into competition with white workers, including many from the South. It ignited racial conflicts over housing, schools, public transportation, parks, and other accommodations and created a new bloc of voters in the ethnic crucible of urban politics. . . . Lynching, mob violence, and race riots exploded between 1917 and 1921.<sup>162</sup>

It is significant that one of the driving forces of the “Great Migration” was the vile and racist stereotype of the African American man as a sexual predator:

The accusations of rape of White females by Black males and the ideology of the Black male as an overhyped sexual deviant provided the excuses for the heinous act of violence by White mobs through lynching. . . . As a result, there occurred a mass exodus of African Americans from southern states to northern and western states to escape the mentality of White racist southerners. Consequently, because of racist beliefs and the fight over economic and other resources, bloody and deadly confrontations between Black and White citizens occurred in northern and western cities. The Red Summer of 1919 produced twenty-six racial riots in cities and towns, resulting in major casualties, mostly Black citizens defending themselves from White agitators.<sup>163</sup>

By the 1920s, the phenomena of racially motivated lynchings and white-on-black mob violence were no longer restricted to states of the former Confederacy. Racism permeated northern states, including Minnesota.

### *B. Prevailing Racist Tropes*

The notion that whites were inherently superior to blacks was not, of course, new to northern states in the early twentieth century. Racist views of white superiority had long held sway throughout the U.S. and Europe:

In the 18th and 19th centuries, many prominent whites in Europe and the U.S. regarded black people as mentally inferior, physically and culturally unevolved, and apelike in appearance. . . . In fact, this view of blacks was so widely accepted that the entry for

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162. ALLAN J. LICHTMAN, *WHITE PROTESTANT NATION: THE RISE OF THE AMERICAN CONSERVATIVE MOVEMENT* 39 (1st ed. 2008).

163. LaGarrett J. King, Christopher Davis & Anthony L. Brown, *African American History, Race and Textbooks: An Examination of the Works of Harold O. Rugg and Carter G. Woodson*, 36 J. SOC. STUD. RES. 359, 367–68 (2012).



“Negro” in the ninth edition of the *Encyclopedia Britannica* (1884, p. 316) stated authoritatively that the African race occupied “the lowest position of the evolutionary scale, thus affording the best material for the comparative study of the highest anthropoids and the human species.” According to the *Encyclopedia Britannica*, these anthropoid features included, among others: (a) “the abnormal length of the arm, which in the erect position sometime reaches the knee-pan”; (b) “weight of brain, as indicating cranial capacity, 34 ounces (highest gorilla 20, average European 45)”; (c) “short flat stub nose”; (d) “thick protruding lips”; (e) exceedingly thick cranium”; (f) “short, black hair, eccentrically elliptical or almost flat in section, and distinctly wooly”; and (g) “thick epidermis” (pp. 316-317).<sup>164</sup>

American presidents, reflecting the attitudes of their time, gave voice to the prevailing notion of white superiority that has coursed through American history. Thomas Jefferson said that “Blacks, whether originally a distinct race, or made distinct by time and circumstances, are inferior to the whites in the endowments both of body and mind.”<sup>165</sup> Even Abraham Lincoln, the so-called “Great Emancipator,” whom white history credits with “freeing the slaves,” had no hesitation in publicly declaring his deeply racist views during the Lincoln-Douglas debates:

There is a physical difference between the white and black races which I believe will forever forbid the two races living together on terms of social and political equality. And inasmuch as they cannot so live, while they do remain together, there must be the position of superior and inferior, and I as much as any other man am in favor of having the superior position assigned to the white race.<sup>166</sup>

These attitudes did not disappear at the end of the Civil War. In the early twentieth century, for example, President Theodore Roosevelt, hailed by history as a “progressive,” had no hesitation in categorically stating his view that African Americans “[a]s a race and in the mass are altogether inferior to the whites.”<sup>167</sup>

While there were certainly white voices challenging the notion that blacks were inherently inferior, these voices were relatively few, and drowned out by the overwhelming and accepted notion of white superiority. Moreover, and of particular significance to Max Mason, by the early twenti-

164. S. Plous & Tyrone Williams, *Racial Stereotypes from the Days of American Slavery: A Continuing Legacy*, 25 J. OF APPLIED SOC. PSYCH. 795, 795-96 (1995).

165. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 143 (William Peden ed., U. of N.C. Press 1996).

166. Plous & Williams, *supra* note 164, at 796 (quoting ABRAHAM LINCOLN & STEPHEN A. DOUGLAS, CREATED EQUAL? THE COMPLETE LINCOLN-DOUGLAS DEBATES OF 1858, at 235 (Paul M. Angle, ed., U. of Chi. Press 1958)).

167. Plous & Williams, *supra* note 164, at 796 (quoting 5 THEODORE ROOSEVELT, THE LETTERS OF THEODORE ROOSEVELT 235 (E. E. Morison ed., Harvard University Press 1952)).

eth century, racist stereotypes of African-American males as reflected in popular culture had taken an even darker turn: not only was the black man intellectually, physically, and morally inferior to whites, now he was depicted as a savage sexual predator threatening white womanhood.

Popular culture provides a window into the thoughts, attitudes, and prejudices of society. In the late nineteenth century, as the means of disseminating popular culture expanded, so, too, did its racist depictions of African Americans:

Popular culture presented Negroes as comic figures in the period from the late nineteenth century on, and the black figure shouldered aside many other ethnic types to become the most popular comic character for a time. . . . The minstrel show, our first national popular entertainment, had comic Negroes as the focus: and it became widely popular in the 1840s just when the slavery issue was becoming a serious political question. Again in the 1880s and 1890s when race relations were at their worst, most violent level, the comic black man became the most common figure in America's new popular entertainment—vaudeville and the musical revue. When he was being treated the worst, the Negro became the butt of the national joke, the principal comic character. In this way, popular culture's treatment of blacks reflected the society's humiliation of them. . . .

Certainly, the comic black figure had existed a half century before the 1880s, but often the treatment of blacks in illustrations presented them as humans. Then, in the 1880s coarse, grotesque caricatures began to dominate. Ugly, animal-like features were displayed. The St. Louis Beef Canning Company issued a series of advertising trade cards in the 1880s which revealed these views. These cards show blacks with big mouths, big ears, oversized hands and feet, sloping foreheads (meant to indicate limited intelligence), and behaving in exaggerated and ridiculous fashion. In a similar vein, several Alden Fruit Vinegar trade cards treated blacks as chicken-stealing, watermelon-eating brutes.

. . . .

This transition from human to grotesque in the 1880s suggests that whites had wearied of the whole Reconstruction question that had wracked the country from 1865 to 1877. This coarsening reflected the impact of the scientific racism that argued that non-whites, especially blacks, were less than human; the result of an increasing emphasis on monkey-like characteristics.<sup>168</sup>

The popular racist image of the African American as a savage beast reached its crescendo around the dawn of the twentieth century, both justi-

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168. J. Stanley Lemons, *Black Stereotypes as Reflected in Popular Culture, 1880-1920*, 29 AM. Q. 102, 103-05 (1977).

fyng the brutal and unlawful treatment of African Americans, and exonerating white society of any guilt.

The 1890s came to be the virtual abyss of black degradation in post-Civil War America. . . . Blacks were systematically disenfranchised, segregated, and excluded from the economy. All of this was emphasized with the lynchings, on the average, of nearly 110 Negroes every year from 1889 to 1902. Popular culture reflected this degraded situation by trying to ease the tension with laughter.<sup>169</sup>

In the early twentieth century, with no television or radio yet available, Americans derived their entertainment—and understanding of the world—from books, periodicals, stage performances, and, increasingly, the new medium of movies.<sup>170</sup>

Two of the most popular authors of the time, Thomas Nelson Page and Thomas Dixon, Jr., penned novels that captured the imagination of the American public.<sup>171</sup> These works helped solidify the notion of the black man as a rapist in the minds of white America:

White supremacist fiction by Page and Thomas Dixon, Jr., also depicted black men as politically ambitious, rapacious beasts who threatened the virtue and honor of white womanhood. . . . Dixon (1905/1907), one of the most popular and Negrophobic writers of the time, includes a scene in *The Clansman* in which a white woman is raped by a lascivious black soldier and Union League member. The soldier, “with an ugly leer, his flat nose dilated, his sinister bead-eyes wide apart gleaming ape-like” (p. 304), attacks his white victim with “[a] single tiger-spring, and the black claws of the beast sank into the soft white throat.” (p. 304). . . .

Many white supremacist texts of this period argued that white men rightfully asserted their manhood by lynching blacks suspected or accused of rape, and that it deterred potential black rapists.

. . . .

The novels of Page and Dixon also defend white violence against blacks by depicting the Ku Klux Klan as virtuous manly heroes who discipline savage black rapists. Both *Red Rock* and *The Clansman* include scenes in which the Klan forces black rapists out of town, and the narrator in each case sympathizes with the

169. *Id.* at 106.

170. *A Very Short History Of Cinema*, SCI. & MEDIA MUSEUM (June 18, 2020), <https://www.scienceandmediamuseum.org.uk/objects-and-stories/very-short-history-of-cinema>.

171. Taylor S. Hagood, *Page, Thomas Nelson (1853-1922)*, ENCYC. VA. (Feb. 12, 2021), <https://encyclopedia.virginia.org/entries/page-thomas-nelson-1853-1922>; Diane Roberts, *Thomas Dixon Jr.: The great-granddaddy of American White nationalism*, WASH. POST (Jan. 21, 2019), <https://www.washingtonpost.com/outlook/2019/01/21/thomas-dixon-jr-great-granddaddy-american-white-nationalism/>.

Klan, since its use of force protects white women from the beastly instincts of black men.<sup>172</sup>

Dixon's *The Clansman* formed the basis for the most notorious American movie of all times: D.W. Griffith's *The Birth of a Nation*. To the extent Dixon's writings had not sufficiently impacted white America, *Birth of a Nation* certainly did.

Of course, there had been other movies prior to *The Birth of a Nation* that fostered racist stereotypes of African Americans. *Birth of a Nation*, however, bears a great deal of responsibility for expanding and promoting those stereotypes to include the depiction of the African American male as a brutal rapist and defiler of white women:

Early silent movies such as "The Wooing and Wedding of a Coon" in 1904, "The Slave" in 1905, "The Sambo Series" 1909 through 1911, and "The [redacted]" in 1915 offered existing stereotypes through a fascinating medium. . . . The premier of "Birth of a Nation" during the reconstruction period in 1915 marked the change in emphasis from the happy Sambo and the pretentious and inept Jim Crow stereotypes to that of the Savage. In this D.W. Griffith film, the Ku Klux Klan tames the terrifying, savage African-American through lynching. . . . Acts of racial violence were justified and encouraged through the emphasis on this stereotype of the Savage. The urgent message to whites was, we must put Blacks in their place or else . . .<sup>173</sup>

While arguably the most successful disseminator of the black-man-as-rapist stereotype, *Birth of a Nation* was no outlier at the time:

One significant factor in the growing hostility toward black men at this time was the increased production and circulation of white supremacist literature, (both fiction and nonfiction prose) that depicted them as rapacious savages. . . . [W]hite supremacist literature of this period often justified the disenfranchisement and lynching of black men by constructing them as bestial and as a threat to the chastity of white women. In contrast, it constructed white masculinity as a chivalrous protector of white womanhood from the rapacious black males.<sup>174</sup>

The impact of *Birth of a Nation* can scarcely be overstated. Not only did it widely promote this most vile of racial stereotypes and inculcate them in the minds of white society, it is credited as giving rise to the rebirth of

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172. Robert Nowatzki, *Race, Rape, Lynching, and Manhood Suffrage: Constructions of White and Black Masculinity in Turn-of-the-Century White Supremacist Literature*, 3 J. MEN'S STUD. 161, 164–65 (1994).

173. Laura Green, *Negative Racial Stereotypes and Their Effect on Attitudes Toward African-Americans*, FERRIS STATE UNIV.: JIM CROW MUSEUM, <https://www.ferris.edu/htmls/news/jimcrow/links/essays/vcu.htm> (last visited Sept. 3, 2021).

174. Nowatzki, *supra* note 172, at 162.

the nation's oldest and most despicable racist organization: the Ku Klux Klan.<sup>175</sup>

While the Ku Klux Klan was, in the nineteenth century, predominantly concentrated south of the Mason/Dixon line, its second iteration, beginning in 1915 and crescendoing in the 1920s, achieved enormous popularity and penetration throughout the United States:

From 1920 to 1925 the Ku Klux Klan grew more explosively than any political or social movement in U.S. history. In these few years the Klan recruited some three million to six million white Protestants from across America's working and middle classes, representing those who founded and "owned this country," said Imperial Wizard Hiram Wesley Evans in 1923.<sup>176</sup>

Most relevant to Max Mason, Ku Klux Klan membership was rapidly expanding in Minnesota, including among government officials, precisely during the time of Mason's conviction, incarceration, unsuccessful pardon requests, and ultimate parole-cum-banishment from the state in 1925.

### C. *The Ku Klux Klan in Minnesota*

Much like the history of the Duluth lynchings themselves, the history of the Ku Klux Klan in Minnesota in the 1920s had, for decades, been all-but-vanished from the state's collective memory. It is only recent scholarship that has explored and illuminated the history of the KKK in Minnesota.<sup>177</sup>

The words of these scholars paint a disturbing picture of 1920s Minnesota:

The Ku Klux Klan, organized by Confederate veterans in 1866 and virtually destroyed by the Civil Rights Act of 1871, was re-born with a new structure and a broader, more formal agenda in 1915. The new Klan, too, began in the South but, popularized by the inflammatory film *Birth of a Nation*, soon spread north and west. It identified the values of a white Protestant past as the only true American way of life which, it proclaimed, needed protection. Changes associated with industrialization and accelerated by World War I, such as the increase of large-scale business, rapid urban growth, and the influx of millions of European immigrants—including many Catholics and Jews—frightened citizens struggling to adapt to a postwar culture. Throughout the 1920s, the Klan's invocation of God, flag, and country—"one-hundred

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175. Alexis Clark, *How 'The Birth of a Nation' Revived the Ku Klux Klan*, HISTORY (July 29, 2019), <https://www.history.com/news/kkk-birth-of-a-nation-film>.

176. LICHTMAN, *supra* note 162, at 42.

177. See, e.g., Elizabeth Dorse Hatle & Nancy M. Vaillancourt, *One Flag, One School, One Language: Minnesota's Ku Klux Klan in the 1920s*, 61 MINN. HIST. 360 (2009), [collections.mnhs.org/MNHHistoryMagazine/articles/61/v61i08p360-371.pdf](https://collections.mnhs.org/MNHHistoryMagazine/articles/61/v61i08p360-371.pdf); ELIZABETH DORSE HATLE, THE KU KLUX KLAN IN MINNESOTA (2013).

percent Americanism”—spurred growing national membership estimated at 25 to 30 percent of the Protestant population. . . .

Through awesome spectacles, economic boycotts, rumors, and political actions against Jews, Catholics, immigrants, and people of color, the Klan sought to uphold its definition of American values. By the 1920s the KKK was flourishing in the Midwest, which provided more than one-third of its membership. According to historian Richard K. Tucker, midwesterners flocking to its flaming crosses were not rabid would-be lynchers, but, rather, ordinary men and women caught up in a rush of nationalism, nativism, and the perceived need for self-preservation. These ordinary people included thousands of Minnesotans, distributed across the state.<sup>178</sup>

These researchers had no difficulty in recognizing the connection between a resurgent KKK and the Duluth lynchings:

In Duluth, veterans returned to find U.S. Steel, the city’s largest employer, importing blacks to work at the Morgan Park steel mill and quell strike threats by white workers. The black population of Duluth was not large, but the distrust of blacks boiled over into a horrendous event on June 15, 1920, when circus workers Elias Clayton, Elmer Jackson and Isaac McGhie were murdered by a white mob. The furious crowd wrongly believed the black men had raped a white girl. Ten thousand are believed to have attended the lynchings.

The Duluth lynchings prompted the Minnesota legislature to adopt the nation’s first anti-lynching law in 1921<sup>179</sup>:

Minnesota, like the country, was in the grip of a postwar depression that fueled the insecurities that attracted some people to the Klan. Throughout the 1920s the KKK grew in Minnesota, recruiting thousands to its gospel of white Protestant supremacy, mixing in local politics, and trying to inject religion into the public schools.<sup>180</sup>

In 1921, Northstar Klan No. 2 began holding meetings at Olivet Methodist Church in Minneapolis. Within a year, the Klan claimed 1,500 mem-

178. Hatle & Vaillancourt, *supra* note 177, at 361.

179. Minn. Stat. § 373.28, repealed by, Minn. Laws. 1984, c. 629, § 4. This statute provided for civil remedies for lynching victims, to be recovered from the county where the victim had been held by police. It also allowed the governor to remove the responsible police or sheriff for malfeasance. See generally Douglas R. Heidenreich, *A Citizen of Fine Spirit*, 18:2 *William Mitchell Magazine*, Fall (2000). The law was championed in the legislature by Nellie Griswold Francis, an African American suffragist and civil rights activist. <https://www.mnopedia.org/person/francis-nellie-1874-1969>. Her husband, attorney William T. Francis, oversaw an investigation of the lynchings on behalf of the NAACP that uncovered significant exculpatory evidence. Francis forwarded the report to Governor Burnquist, who took no action. See FEDO, *supra* note 4, at 116, 141.

180. Hatle & Vaillancourt, *supra* note 177, at 362.

bers in the Duluth area chapter. In 1925, the Knights of the Ku Klux Klan of Minnesota filed Articles of Incorporation with the State.<sup>181</sup>

The Klan drew heavily from fraternal orders, including the Masons and the Shriners. From 1924 to 1927, the St. Paul Weekly Midway News published a Klan membership directory in each issue.<sup>182</sup>

The national Imperial Wizard, Hiram Wesley Evans, held a rally in Virginia, Minnesota in July of 1927, attended by an estimated ten to twenty thousand people from all over the United States.<sup>183</sup>

In 1924, when Max Mason's pardon application was rejected, the Ku Klux Klan was at its zenith in Minnesota.

By the mid-1920s, the Klan was reaching the apex of its power. In 1924 it was influential enough that a motion to denounce it by name failed at the Democratic National Convention. . . . In August of that year, Minnesota's statewide konklave, or Klan convention, was held at the Rice County fairgrounds in Faribault. According to a Klan report, 2,000 men and 500 women in full regalia took possession of the town, staging a street demonstration as part of the gathering. . . . It was estimated that more than 69 Minnesota cities and towns were represented.<sup>184</sup>

The apparent connections between the KKK and Duluth officialdom are troubling:

The first newspaper report of a Ku Klux Klan chapter in Duluth, Minnesota is titled, "Ku Klux Klan in Duluth; Has 1,500 Members in City." The local Klan was "said to have been organized with a membership of 700 at the Owl's Hall on West Superior Street early last summer." On the 1925 and 1926 [membership] lists, close to 50 percent of the Duluth Ku Klux Klan members were World War I veterans; police officers are also on the Duluth Klan lists as is Sergeant Olson, who was in charge of the men at the Duluth jail the night of the lynchings. The Duluth Ku Klux Klan held its meetings at the Owl's Fraternity Hall less than a block and a half from the jail the young African Americans were taken out of in June 1920.<sup>185</sup>

181. Hatle & Vaillancourt, *supra* note 177, at 362.

182. Hatle & Vaillancourt, *supra* note 177, at 363.

183. Steven Ivancic, *The Ku Klux Klan on the Iron Range?*, BRUCE MINE INCIDENT BLOG (last visited Jan. 15, 2020), <https://brucemineincident.wordpress.com/related-places-of-interest-2/the-ku-klux-klan-on-the-iron-range>.

184. Hatle & Vaillancourt, *supra* note 177, at 364.

185. Hatle & Vaillancourt, *supra* note 177, at 35 (noting that one Duluth County Commissioner (Thomas H. Little), the St. Louis County Auditor and Fifth District County Commissioner (Walter H. Borgen), the Director of the Duluth Safety Council (K. Stanley Duff), and Land Commissioner for the Duluth and Iron Range and Chicago, Rock Island and Pacific Railroads, and President of St. Louis County Country Club (Luther B. Arnold) were all Klan members.); Hatle & Vaillancourt, *supra* note 177, at 120.

The unknown and perhaps unknowable connections between the KKK and the Duluth lynchings raise disturbing questions:

The second movement of the Ku Klux Klan in the 1920s was up and possibly in operation in Minnesota before 1920. Whether there were Klan recruiters in Duluth in 1919 cannot be firmly determined. There was a climate in Duluth, though, that was very receptive to Klan recruiters immediately after Clayton, Jackson and McGhie were lynched in June 1920. There may not have been Klan involvement directly with the lynchings, but it is possible that after the lynchings, Klan connections may have helped in the cover-up of whoever played a role in the lynchings.<sup>186</sup>

While the Minnesota Ku Klux Klan may never be directly linked to the Duluth lynchings, it is beyond dispute that the Ku Klux Klan, and its profoundly racist ideology, played a public and pervasive role in Minnesota in the 1920s. It was during this period, when unabashed racism could be openly expressed and embraced by many, including elected officials,<sup>187</sup> that Max Mason was convicted, denied a pardon, and ultimately paroled with the unusual requirement that he get out and stay out.

The ascendancy of the KKK in Minnesota is not the only context for understanding the climate of racism that pervaded Minnesota in the 1920s. There were, indeed, other indicia that Minnesota, like the rest of the United States, was responding to the siren song of white supremacy.

#### D. Eugenics

The racist eugenics movement was also ascendant among American white elites at this time. “Eugenics” was a term coined in 1883 by England’s Francis Galton. He combined the Greek words for “good” and “origin” to refer to the social philosophy advocating the improvement of human heredity through selective breeding.<sup>188</sup> Encouraging people with good genetic traits to reproduce was known as positive eugenics, whereas discour-

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186. Hatle & Vaillancourt, *supra* note 177, at 119.

187. In 1903, Little Falls newspaper owner C.A. Lindbergh—father of the famed aviator, Charles Lindbergh—began his run for Congress. He published a letter setting forth his “views on the race problem” in which he described what he characterized as the three main reasons for the limited progress of “the Negro.” MAX WALLACE, *THE AMERICAN AXIS: HENRY FORD, CHARLES LINDBERGH, AND THE RISE OF THE THIRD REICH* 82 (2003). These were, “[f]irst, by nature he is inferior to the white race. Second, he is natural to a climate that tends to sluggishness. Third, there is not sufficient inducement for him to become progressive. . . . We may criticize the south for their subordination of the Negro, but we cannot condemn, for we in the northern world would, if we had an equal colored population, render the same treatment. What to do about the Negro is a problem that is practically settled. . . . He will be kept down, there is no question about it.” *Id.* Were these views sufficiently out-of-step from the mainstream to disqualify him from elective office? No. C.A. Lindbergh was elected to Congress from Minnesota’s 6th District in 1906 and served five terms.

188. Teryn Bouch & Laura Rivand, *America’s Hidden History: The Eugenics Movement*, NATURE (Sept. 18, 2014), <https://www.nature.com/scitable/forums/genetics-generation/america-s-hidden-history-the-eugenics-movement-123919444>.



aging people with bad qualities from reproducing was known as negative eugenics.<sup>189</sup> The concept migrated to the U.S. where it was enthusiastically embraced:

The United States in the 1920s was caught up in a mania: a drive to use newly discovered scientific laws of heredity to perfect humanity. Modern eugenics . . . had crossed the Atlantic and become a full-fledged intellectual craze. The United States suddenly had a new enemy: bad “germplasm,” and those who carried it. The “unfit,” eugenicists warned, threatened to bring down not only the nation but the whole human race.<sup>190</sup>

America’s leading citizens embraced eugenics, it permeated popular culture, and was taught at 376 universities and colleges, including Harvard, Columbia, Berkley, and Cornell:

The driving force behind the eugenics movement of the 1920s was, historians suggest, the collective fears of the Anglo-Saxon upper and middle classes about a changing America. Record levels of immigration were transforming the nation’s ethnic and religious makeup. And with increased industrialization and urbanization, community and family ties were fraying. These anxieties were being redirected and expressed in the form of fears about the unfit.<sup>191</sup>

Eugenics reached into every corner of the nation, and became a popular subject in the mass media—often intermixed with strong strands of “scientific” racism. Mass-market books spread the message to a vast reading audience, none more so than Madison Grant’s *The Passing of the Great Race*, which argued in 1916 that the “Nordic” race was superior to other races—and responsible for all progress—but also in peril.<sup>192</sup>

The full title of Grant’s book, *The Passing of the Great Race: Or, The Racial Basis of European History*, leaves little doubt as to its subject matter and perspective. Nor does his text leave any doubt as to the role of African Americans in his racialized view of humanity:

There exists to-day a widespread and fatuous belief in the power of environment, as well as of education and opportunity to alter heredity, which arises from the dogma of the brotherhood of man, derived in its turn from the loose thinkers of the French Revolution and their American mimics. Such beliefs have done much damage in the past and if allowed to go uncontradicted, they do even more serious damage in the future. Thus, the view that the Negro slave was an unfortunate cousin of the white man, deeply tanned by the tropic sun and denied the blessings of Christianity

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189. *Id.*

190. ADAM COHEN, IMBECILES: THE SUPREME COURT, AMERICAN EUGENICS, AND THE STERILIZATION OF CARRIE BUCK 2 (2016).

191. *Id.* at 4.

192. *Id.* at 59.

and civilization, played no small part with the sentimentalists of the Civil War. And it has taken us fifty years to learn that speaking English, wearing good clothes, and going to school and to church do not transform a Negro into a white man.<sup>193</sup>

Grant's readers were also graced with Grant's insight as to the rightful place of blacks in society, and the dangers posed by allowing any deviations from their role:

Negroes are never socialists or labor unionists and as long as the dominant imposes its will on the servient race and as long as they remain in the same relation to the whites as in the past, the Negroes will be a valuable element in the community but once raised to social equality their influence will be destructive to themselves and to the whites. If the purity of the two races is to be maintained they cannot continue to live side by side and this is a problem from which there can be no escape.<sup>194</sup>

The exhortations and fear-mongering of the eugenicists led to a groundswell of eugenic sterilization laws throughout the United States, beginning in 1907 in Indiana.<sup>195</sup>

Eugenics was a powerful force in Minnesota in the 1920s. In 1919, Dr. Arthur Rodgers, who was then the highly respected Superintendent of the Minnesota School for the Feeble Minded in Faribault, published *Dwellers in the Vale of Siddem*, a purported study of hereditary defectiveness in the residents of a fictional Minnesota community he dubbed Hog Hollow.<sup>196</sup> Like the better-known "studies" of individual families published by Arthur Estabrook and Henry Goddard, Rodgers' Hog Hollow residents displayed an "appalling amount" of hereditary defectiveness and depicted Minnesota's feeble-minded as "the gravest sort of social menace," describing in lurid detail the wicked misdeeds of the men and women of Hog Hollow so depraved that they lived beneath the level of animals.<sup>197</sup>

As the number of allegedly feeble-minded Minnesotans swelled, eugenicists stepped up their campaign for a sterilization law. In the early 1920s, their most vocal and persistent crusader was the idiosyncratic physician Charles Dight, who founded and presided over the Minnesota Eugenics Society. . . . Dight bombarded Minnesotans with pro-eugenics newspaper articles, letters to the editor, pamphlets, radio programs, and a relentless lobbying campaign. The socially unfit have become "a peril to this nation,"

193. MADISON GRANT, *THE PASSING OF THE GREAT RACE: OR, THE RACIAL BASIS OF EUROPEAN HISTORY* 16 (4th ed. 1921).

194. *Id.* at 87–88.

195. Note, *Eugenic Sterilization in Indiana* 38 *IND. L. J.* 275, 276 (1963).

196. A.C. Rogers & Maud A. Merrill, *Dwellers in the Vale of Siddem*, MINN. DEPT. OF ADMIN., <https://mn.gov/mnddc/past/pdf/10s/18/18-DIV-ACR.pdf> (last visited Nov. 16, 2021).

197. See Molly Ladd-Taylor, *Eugenics Sterilization in Minnesota*, 59 *MINN. HIST.* 237, 237–45 (2005).

Dight proclaimed in a 1922 pamphlet. They were increasing at a “dangerous rate,” had a “strong predisposition” to criminality, and constituted a burden on society.<sup>198</sup>

The drumbeat for a eugenics sterilization law grew deafening during the time of Max Mason’s incarceration, ultimately resulting in Minnesota becoming the seventeenth state, on April 8th of 1925, to legalize eugenic sterilization.<sup>199</sup>

While concepts of “feeble-mindedness” and “defectives” crossed racial lines in eugenics discussions, there is no question that racism pervaded the eugenics movement:

Race played a key role in many early eugenic constructions of the unfit. An article on “The Race Problem” by Chicago doctor Charles S. Bacon in the mainstream northern medical journal of 1903 noted that “the tendency to negro degeneracy and eventual elimination is I believe apparent.”<sup>200</sup>

Eugenics began to fall into disfavor as the horrors of the Nazi regime became increasingly known. The Nazis had, of course, carried eugenics to its logical extreme, which most Americans found abhorrent. The Nazi eugenics program had actually found its antecedents in American law.<sup>201</sup> The Nazi eugenics program had been enthusiastically embraced by U.S. eugenicists before the full extent of its horrors became known, not the least of which was Dr. Dight who, in his capacity as president of the Minnesota Eugenics Society, sent a fawning letter to Adolf Hitler in August of 1933 enclosing a clipping from the *Minnesota Journal* of Minneapolis, “relating to, and praising your plan to stamp out mental inferiority among the German people.”<sup>202</sup> Dr. Dight offered his “sincere wish that your efforts along that line will be a great success and will advance the eugenics movement in other nations as well as in Germany.”<sup>203</sup>

198. *Id.* at 241.

199. *Id.*

200. MARTIN S. PERNICK, *THE BLACK STORK: EUGENICS AND THE DEATH OF “DEFECTIVE” BABIES IN MEDICINE AND MOTION PICTURES SINCE 1915*, at 55 (1996). “The Black Stork,” originally released in 1916, was an explicit depiction of “negative eugenics,” allowing so-called “defectives” to die. In the original version, the “defective” baby whose death is facilitated by the physician-hero of the film is portrayed as deriving his defectiveness from his grandfather’s liaison with “a slave—a vile filthy creature who was suffering from a loathsome disease.” *Id.* at 56. Because of fears that a graphic depiction of a “Southern ‘gentlemen’ just out of the embrace of a diseased slave” would inflame and alienate southern viewers, “the scene was re-shot to substitute a white servant girl for the slave.” *Id.* at 57.

201. See JAMES Q. WHITMAN, *HITLER’S AMERICAN MODEL: THE UNITED STATES AND THE MAKING OF NAZI RACE LAW* (2017).

202. Letter from Dr. Charles F. Dight, President, Minnesota Eugenics Society, to Chancellor Adolf Hitler (Aug. 1, 1933), [https://www.blackwellburke.com/wp-content/uploads/2020/12/2020.01.17-FINAL-Max-Mason-Memorandum-of-Law-and-exhibits\\_61920.pdf](https://www.blackwellburke.com/wp-content/uploads/2020/12/2020.01.17-FINAL-Max-Mason-Memorandum-of-Law-and-exhibits_61920.pdf).

203. *Id.*

### E. *De Facto Segregation*

Racial covenants creating all-white neighborhoods began appearing in Minnesota in 1918.<sup>204</sup> In 1926, racial covenants were upheld by the U.S. Supreme Court.<sup>205</sup> While Minnesota in the 1920s may not have had the type of express racial segregation laws of some states, the widespread use of these racial covenants created *de facto* segregation, the legacy of which continues to this day. Minnesota's scheme of racial covenants has been dubbed "Jim Crow of the North."<sup>206</sup>

## VI. THE PARDON OF MAX MASON

Prior to the Board of Pardons hearing in June of 2020, a broad group of individuals and organizations submitted letters of support. Submissions came from, *inter alia*, the federal judges of the United States District Court for the District of Minnesota, the Office of the St. Louis County Attorney (the office that originally prosecuted Max Mason a century earlier), the Office of the Public Defender for the Duluth judicial district, the Mayor of Duluth, the Federal Bar Association, the Minnesota State Bar Association, the Minnesota Association of Black Lawyers, the Cardozo Society, and all living past members of the Board of Pardons except former Gov. Jesse Ventura, who was unavailable when the letter was circulated.<sup>207</sup>

As remarkable as the letters of support were, the testimony at the Board hearing may have been even more compelling. The current Duluth Chief of Police offered his voice in support of the pardon.<sup>208</sup> Such support of the police chief was certainly powerful by virtue of his office. But it was who he was that gave it such moment: Mike Tusken, the great-nephew of Irene Tusken, the original accuser of Mason and his co-workers.

Chief Tusken told the Board of Pardons that he had only learned about his family's connection to the lynchings in 1996, after his great-aunt had passed away.<sup>209</sup> He attributed the lack of any family discussion of Irene Tusken's role "to the great shame experienced by our family and the desire to repress and forget the situation" noting, "in much the same way, Duluth followed suit" in trying to forget the tragic events.<sup>210</sup>

Chief Tusken told the Board: "Not only is the conviction unjust, but the facts lacked the basis for an arrest in the first place. . . . Justice was

204. See generally *Mapping Prejudice*, UNIV. OF MINN. LIBR., <https://www.mappingprejudice.org> (last visited Jan. 15, 2020).

205. See *Corrigan v. Buckley*, 271 U.S. 323 (1926).

206. See *Jim Crow of the North*, Season 1, Ep. 20 (Twin Cities PBS Feb. 25, 2019), <https://www.tpt.org/minnesota-experience/video/jim-crow-of-the-north-stijws>.

207. Interview with Lori Swanson & Mike Hatch, Former Minnesota Attorneys General (Apr. 23, 2020).

208. See *WDIO, WDIO Live2: Minnesota Board of Pardons*, YouTube (June 12, 2020), <https://www.youtube.com/watch?v=BDMjISK2eGM>.

209. *Id.*

210. *Id.*

denied Mr. Max Mason during his lifetime, but this Board has an opportunity to right the wrong today. . . . Never has there been a time that we must work relentlessly in our fervent pursuit to seek and find justice than today.”<sup>211</sup>

In his presentation, Minneapolis attorney Jerry W. Blackwell offered a moving and uniquely eloquent call for justice:

There are few principles in our society more important than equal justice under the law. I am here this morning in the hopes that you will use your pardon power to right a wrong of unequal justice from 100 years ago but the circumstances surrounding that wrong make it as ripe now as ever. . . .

Ten thousand whites witnessed the three murders. What was the equal justice? No one was tried, no one convicted, no one held accountable for the racist terrorism inflicted and the killing of multiple, yes, unarmed Black men. In contrast, four black men paid with their very lives based overwhelmingly on an implausible claim of victimhood by a white woman and the fortuity of being born Black and passing through Duluth. I am here talking about a history that does not go away until we set it right. Max Mason’s story is a part of the Duluth tragedy story, and it is a history that does not go away. . . .

Mr. Mason deserves our mercy, our clemency, because we served him a tainted justice when it should have been pure. A tainted justice is necessarily injustice. In fairness to him, in allegiance to our ideals for justice, we didn’t do right by him and a pardon is all that we can do now to make it right. You have the authority. Clear his name and memory. . . .<sup>212</sup>

The Board hearing was held in the shadow of the murder of George Floyd and the cries for justice the gruesome video of his death evoked from all corners of the world, most especially Minnesota. The recency of Floyd’s death—less than three weeks before the hearing— injected a sense of urgency to bring some measure of justice to Max Mason.

At the conclusion of the testimony, the Board of Pardons voted unanimously to grant Minnesota’s first-ever posthumous pardon and clear the name of Max Mason for history.<sup>213</sup> Not long after this seminal event, Minnesota Attorney General Keith Ellison—one of the three Pardon Board members—asked attorney Blackwell if he would assist in the prosecution of the former Minneapolis police officers charged with killing George Floyd. Blackwell volunteered, and became one of the state’s co-lead prosecutors at the trial of Derek Chauvin, which resulted in one of the rarest of occur-

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211. *Id.*

212. Jose Tover, *Max Mason Pardon*, YOUTUBE (June 12, 2020), [https://www.youtube.com/watch?v=LZqft4\\_L0Kc](https://www.youtube.com/watch?v=LZqft4_L0Kc) (the Board hearing was conducted virtually due to COVID-19 restrictions).

213. *Id.*

rences in a U.S. courtroom even today: the conviction of a white police officer for the murder of an African American man.<sup>214</sup>

## VII. THE FUTURE OF POSTHUMOUS PARDONS

The lack of posthumous pardons in the first two hundred years of the United States' existence can be explained, in part, by early legal decisions that concluded a pardon was a "deed" that had to be "accepted" to be valid, and thus could not be granted posthumously. Following the *Schick* decision in 1974, that impediment to posthumous pardons was no longer tenable. Although it took twenty more years for the first federal pardon to be issued by a U.S. President, and still more for a growing number of states to begin exercising their extant authority to grant posthumous pardons, it remains a relatively rare and newsworthy occurrence.

As George Santayana observed just a few years before the Duluth lynchings, "[t]hose who cannot remember the past are condemned to repeat it."<sup>215</sup> Posthumous pardons, and the attendant spotlight on and remembrance of the past, make it more difficult for us to forget history. The disturbing parallels between the environment that gave rise to the lynchings in Duluth and the conviction of an innocent man to our own social issues serve as both history and harbinger.

A posthumous pardon can do nothing for the pardoned. While it can in some cases be of benefit to relatives, its greater value lies in the impact it can have on society.<sup>216</sup> As a form of restorative justice, the posthumous pardon is a way of recognizing and acknowledging injustices and righting wrongs. It also provides a focal point for societal learning and growth.<sup>217</sup>

While it may be too early to tell, there is evidence that posthumous pardons will in the future be issued by more jurisdictions and with greater frequency. Particularly with respect to addressing racial injustices of the past, this would be welcome and a much-needed step towards true justice.

Perhaps there will be more "group pardons" like those issued to lynching victims in Maryland. Or perhaps some jurisdictions will adopt a formalized review process similar to Britain's Criminal Cases Review Committee,

214. Scott Pelley, 60 MINUTES INTERVIEWS WITH PROSECUTOR OF DEREK CHAUVIN, CBS NEWS (Apr. 26, 2021), <https://www.cbsnews.com/news/derek-chauvin-prosecutors-george-floyd-death-60-minutes-2021-04-25>. The author of this article participated in the prosecution of Derek Chauvin as well.

215. 7 GEORGE SANTAYANA, *THE LIFE OF REASON: INTRODUCTION AND REASON IN COMMON SENSE* 172 (Marianne S. Wokeck & Martin A. Coleman eds., MIT Press 2011).

216. See generally Andrew Novak, *Transparency and Comparative Executive Clemency: Global Lessons for Pardon Reform in the United States*, 49 U. MICH. J. L. REFORM 817, 847 (2016).

217. The Open Doors project of the Minnesota Federal Court in Minnesota, for example, has developed a curriculum for schools based on the Duluth Lynchings. The Max Mason pardon comprises an important part of the curriculum. See *Open Doors (2021) A Century-Old Injustice: Remembering the 1920 Duluth Lynchings*, U.S. DIST. CT. DIST. OF MINN., <https://www.mnd.uscourts.gov/open-doors>.

or other jurisdictions will realize and embrace the power of the posthumous pardon they didn't know they had.

Regardless of the process, posthumous pardons can play a critical role in examining our past, understanding the miscarriages of justice that have plagued our history, shining light on our darkest chapters, and bringing us that much closer to justice—true justice—and liberty for all.

APPENDIX 1

March 2020

The Honorable Tim Walz  
Governor  
100 State Capitol  
75 Rev. Dr. Martin Luther King Jr. Blvd.  
St. Paul MN 55155

The Honorable Lorie Gildea  
Chief Justice  
25 Rev. Dr. Martin Luther King Jr. Blvd.  
St. Paul MN 55155

The Honorable Keith Ellison  
Attorney General  
102 State Capitol  
75 Rev. Dr. Martin Luther King Jr. Blvd.  
St. Paul MN 55155

Greetings:

Please accept this letter of support for a posthumous *pardon extraordinaire* for Max Mason, a young black man convicted of an allegation 100 years ago in a situation that gave rise to the lynchings of several young black men in Duluth.

There are two strong reasons for the Minnesota Board of Pardons to issue this *pardon extraordinaire*.

First, there is strong consensus in the articles and books written about the Duluth lynchings that this conviction occurred because of Max Mason’s race. In his letter in support of the pardon, current St. Louis County Attorney Mark Rubin wrote, “The historical record clearly reflects that Mr. Mason was investigated, charged and convicted because of his race and not because of the strength and sufficiency of the evidence.” He stated that this case would not have been charged today.

Indeed, just two years after the conviction, the successor county attorney advised the Board of Pardons:

Personally I never was of the impression that the evidence was any too strong in his case, and if he had been a white man, I am rather doubtful if he would have been convicted.

On appeal from Mr. Mason’s conviction, dissenting Justice Dibell, a Duluthian, wrote as follows:

It was not for Mason to show what occurred at the show grounds and who participated. To my mind it is only a chance guess that he was connected with any offense at the show grounds. It is a less likely guess that he was an actor in a crime such as is charged. In my view the evidence does not sustain the conviction.

Four years after Mr. Mason’s conviction, the presiding trial judge noted to the Board of Pardons:



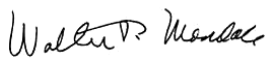
...I have always had some doubt about his guilt, and had it not been that his counsel raised some legal questions that I thought should be passed upon by the Supreme Court, I was of the intention to set aside the verdict and grant a new trial.

Second, a pardon reminds all of us that the lynchings and circumstances giving rise to them were a stain on the history of Minnesota and do not reflect who we are as a state.

It would also help us continue to learn and grow as a society. Winston Churchill once said, "Those who fail to learn from history are condemned to repeat it." Ignorance of history contributes to the perpetuation of stereotypes and the repetition of disturbing behavior. Indeed, while society has come a long way since 1920, in January 2020, FBI Director Christopher Wray told the House Judiciary Committee that violent racist extremism is a "national threat priority" equivalent to former terrorist organizations like ISIS.

For these reasons, we support the issuance of a posthumous *pardon extraordinaire* for Mr. Max Mason.

Sincerely,



Walter Mondale  
Pardon Board Member,  
1960-1964



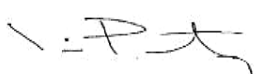
Arne Carlson  
Pardon Board Member,  
1991-1999



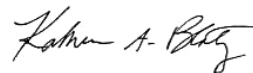
Al Quie  
Pardon Board Member,  
1979-1983



Mark Dayton  
Pardon Board Member,  
2011-2019



Tim Pawlenty  
Pardon Board Member,  
2003-2011



Kathleen Blatz,  
Pardon Board Member,  
1998-2006



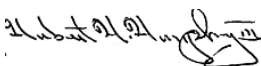
Russell Anderson  
Pardon Board Member,  
2006-2008



Eric Magnuson,  
Pardon Board Member,  
2008-2010



Mike Hatch  
Pardon Board Member,  
1999-2007



Skip Humphrey  
Pardon Board Member,  
1983-1999



Lori Swanson  
Pardon Board Member,  
2007-2019

APPENDIX 2

The State of Minnesota



Certificate of Pardon Extraordinary

Whereas Max Mason was by the judgment of the court convicted of:

<b>Offense</b>	<b>Conviction Date</b>	<b>Court File No.</b>
Rape	November 27, 1920	6785

And Whereas application for a posthumous Pardon Extraordinary was made to and filed with the Board of Pardons of the State of Minnesota alleging that the applicant served the sentence imposed, thereby satisfying the judgment of conviction;

And Whereas the Board of Pardons heard and considered the application on June 12, 2020, and determined: the applicant is of good character and reputation; the applicant has substantially complied with the requirements of Minnesota Statutes § 638.02 and acts amendatory thereof; the conviction should be set aside; and the applicant should not be required to disclose the conviction at any time or place other than in a judicial proceeding or as part of the licensing process for peace officers;

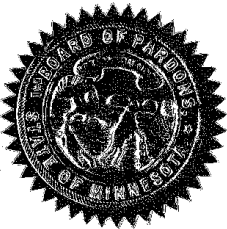
Now Therefore, the Board of Pardons of the State of Minnesota, for good and sufficient reasons and by virtue of the authority vested in said Board by the Constitution and Laws of the State of Minnesota, does hereby grant the applicant a Pardon Extraordinary.

In Testimony Whereof, we, the members of the Board, have set our respective hands and caused the Seal of the Board of Pardons to be hereunto affixed.

*[Signature]* 6/22/20  
Governor Date

*[Signature]* 6-24-20  
Attorney General Date

*[Signature]* 6/24/20  
Chief Justice of the Supreme Court Date



<b>SUMMARY OF INVESTIGATION</b>	<b>Application for Posthumous Pardon Extraordinary</b>	
	Applicant Name:	<b>Max Mason</b>
	aka/fka:	
	Date of Birth:	<b>4/24/1899 or 8/27/1899<sup>1</sup></b>

<b>OFFENSE &amp; SENTENCE INFORMATION</b>
---

1.	<b>Offense</b>	Rape
	<b>Conviction Date</b>	November 27, 1920
	<b>Discharge Date</b>	September 3, 1925
	<b>County</b>	St. Louis
	<b>Court File No.</b>	6785
	<b>Disposition</b>	Convicted by a jury of rape and sentenced to an indeterminate prison term of up to 30 years.
	<b>Sentence</b>	Indeterminate prison term of up to 30 years.
	<b>Description of Crime/Offense:</b>	On June 14, 1920, Mason arrived in Duluth with a traveling circus. Nineteen-year-old Irene Tusken and a young man attended the circus and, as they were leaving the grounds after dark, were allegedly confronted by six black circus workers who put a gun to the man's head, forced the couple to a nearby ravine, and gang raped Tusken while she was largely unconscious. Afterwards, the young man escorted Tusken home, where she said goodnight to her parents and went to bed without any mention of the events. The young man proceeded to his night job and, in the early morning hours of June 15, 1920, told his father about the alleged gang rape. Police promptly arrested several black circus workers, including Mason, and brought them before Tusken and the young man for identification. Neither could identify any of the workers as the alleged assailants and Tusken shook her head no when Mason was presented. Tusken was also examined by a family physician who found no evidence of sexual intercourse, including abrasions, bruising, inflammation, soreness, or tenderness. Mason was allowed to leave with the circus to its next destination in Virginia, Minnesota. Thirteen others, however, were taken to jail as likely suspects, three of whom—Elias Clayton, Elmer Jackson, and Isaac McGhie—were lynched by a mob later that night. <i>See Ex. A.</i>

<sup>1</sup> While the application filed on Mason's behalf indicates he was born on April 24, 1899, other records suggest he was born on August 27, 1899. *See Ex. D.*

<p><b>Description of Crime/Offense (Continued):</b></p>	<p>Despite his earlier release, Mason along with several others was arrested in Virginia, Minnesota, on June 16, 1920, and taken to county jail. Mason denied he was guilty, claimed he was at work at the time of the alleged rape, and some of his black coworkers corroborated his whereabouts. In the middle of July 1920, nearly a month after the alleged rape, Mason and several other jailed men were taken to the scene of the crime after dark for identification. This time both Tusken and the young man identified Mason, along with one other black man, as being involved in the alleged gang rape, not from his face but from his size, general appearance, talk, and walk. Around the same time, both Mason and Tusken were determined to have gonorrhoea, though it was not entirely clear when Tusken first noticed signs of the disease. At the time of the alleged rape, Mason would have been 20 or 21 years old. <i>See Ex. A.</i></p> <p>Mason was indicted by a grand jury for the rape of Tusken on July 19, 1920. A jury found him guilty on November 27, 1920, and judge L.S. Nelson sentenced him on December 2, 1920, to an indeterminate prison term of up to 30 years. The sentence was stayed pending further proceedings and was not executed until July 30, 1921. Exs. B–F.</p> <p>In June 1922, the Minnesota Supreme Court affirmed Mason’s conviction, finding his identification a month after the alleged rape, coupled with testimony that he and Tusken both had gonorrhoea, was sufficient to support the jury’s verdict. Justice Dibell dissented, asserting that the cross-racial identification of Mason, a month after the alleged rape and in the dark, was unreliable and the mere fact that both Mason and Tusken had gonorrhoea was “not of much weight as an identifying circumstance.” Justice Dibell concluded that it was “only a chance guess that [Mason] was connected with any offense at the show grounds” and that it was “a less likely guess that he was an actor in a crime such as is charged.” Ex. A.</p> <p>Between September 1922 and March 1925, Mason was denied parole on six separate occasions. On September 23, 1925, the State Board of Parole discharged him on the condition that he go to Decatur, Alabama, and remain outside Minnesota until November 25, 1941. Exs. G–H.</p>
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**PARDON HISTORY**

Available records indicate Mason previously applied for a pardon or commutation in December 1922 and again in March 1924, claiming he was innocent, that the evidence was insufficient to sustain his conviction, and that the jury’s verdict was “due entirely to passion and prejudice.” Exs. I & M. During the pardon process, St. Louis County Attorney Mason Forbes expressed his

view that Mason was “rather unfortunate in that he was the only [man] of colored men involved who was convicted,” that he “never was of the impression that the evidence was any too strong,” and that Mason likely would not have been convicted “if he had been a white man.” Exs. J & N. An unidentified agent of the State Board of Parole similarly noted that “[t]here has always been considerable mystery and doubt in the minds of the Duluth people of this case,” including whether any crime had actually occurred, and that there was a “great deal of criticism over the way the matter was handled by the police and others.” Exs. K & O. The Board of Pardons denied the two applications on January 8, 1923, and November 13, 1924, respectively. Exs. L & P.

In a subsequent letter to the State Board of Parole, judge L.S. Nelson recommended either parole or a pardon, noting he “always had some doubt about [Mason’s] guilt” and, had it not been for legal questions he thought should be addressed by the Supreme Court, he would have set aside the jury’s verdict and granted a new trial. Ex. Q.

At its meeting on December 16, 2019, the Board of Pardons granted an application for rehearing filed on Mason’s behalf, which allowed for the filing of a successive pardon application. The Board, however, must still decide whether it has the authority under Minnesota law to grant a posthumous pardon.

#### **ADDITIONAL RECORD**

Available records suggest that, prior to his rape conviction, Mason spent some time in Alabama state prison for larceny and 30 days on a work farm in Louisville, Kentucky, possibly for selling whiskey. *See* Exs. D, M, & O. In their memorandum in support of a posthumous pardon, Mason’s sponsors assert he was not convicted of any crimes following his release from prison.

#### **APPLICANT’S DESCRIPTION OF OFFENSE(S)**

In their memorandum in support of a posthumous pardon, Mason’s sponsors state he was convicted of a fictitious charge of raping a white woman by an all-white jury in the 1920s and based on the flimsiest of evidence, including identifications made under pressure nearly a month after the alleged incident and the mere coincidence that Mason and Tusken were both diagnosed with gonorrhea, which was rampant at that time.

#### **APPLICANT’S PERSONAL INFORMATION**

Available records indicate Mason was born in Decatur, Alabama in 1899, both of his parents died by the time he was 18 years old, he lived in Louisville, Kentucky, for a spell, and he eventually joined the John Robinson Circus in Indiana. Before joining the traveling circus, he worked in a basket factory, waiting tables at a hotel, as a porter, and as an “elevator boy.” Ex. D.

In their memorandum in support of a posthumous pardon, Mason’s sponsors state that, following his release from prison in 1925, Mason lived an ordinary and law-abiding life until his premature death at the age of 46. He married in Alabama in 1927, becoming a stepfather to a 7-year-old girl, and moved with his family to Memphis, Tennessee in 1930, where he worked as a waiter, a

porter, and a laborer. Mason and his wife separated in 1939, and he died on November 14, 1942, in Memphis from a heart condition.

**APPLICANT’S REASONS PARDON EXTRAORDINARY SHOULD BE GRANTED**

In their memorandum in support of a posthumous pardon, Mason’s sponsors state a pardon should be granted because Mason, a poor African-American laborer from the South, was convicted of raping a white woman by an all-white Duluth jury in the 1920s based on the flimsiest of evidence; the judge and prosecutor did not oppose a pardon when Mason requested one in the 1920s; and he went on to live a quiet and law-abiding life following his discharge from prison. They also state that Minnesota and Duluth cannot fully heal from the lynching of Elias Clayton, Elmer Jackson, and Isaac McGhie until the “other wrong arising from the horrors of those events” is recognized and righted by the pardon of Mason.

**REQUIRED NOTIFICATIONS AND RESPONSES**

<b>Judge(s):</b>	<b>County:</b>	<b>Reply/Response:</b>
Sally Tarnowski	St. Louis	Supports a posthumous pardon [not the sentencing judge].
<b>County Attorney(s):</b>	<b>County:</b>	<b>Reply/Response:</b>
Mark S. Rubin	St. Louis	Supports a posthumous pardon, explaining the historical record reflects Mason was charged and convicted because of his race, not the strength of the evidence, and that justice is overdue.
<b>Victim(s):</b>	<b>Offense #:</b>	<b>Comments:</b>
Irene Tusken	6785	Deceased
Mike Tusken (relative)	6785	Still awaiting any response, though the county attorney’s letter indicates his position in favor of a pardon “enjoys the expressed support of the victim’s family representative.”

**APPLICANT’S EXHIBITS**

1. Memorandum in Support of Posthumous Pardon of Max Mason submitted by Jordan Moses and attorney Jerry Blackwell, describing the events leading up to the Duluth lynching and Mason’s arrest, Mason’s trial and appeal, Mason’s requests for parole and a pardon, and the racist milieu of the 1920s. The memorandum also argues that posthumous pardons are available under Minnesota law and that Mason is deserving of such a pardon.
2. Parole Record
3. Summary of Pardon Application No. 5702
4. Letter from the St. Louis County Attorney to the State Board of Parole, dated June 12, 1925, explaining he had “been hopeful that some clemency would have been extended to [Mason] long ere now.”
5. Letter from Judge L.S. Nelson to the State Board of Parole, April 27, 1925.

6. Discharge Order, September 3, 1925
7. Letter submitted to a journal by C.F. Dight, President of the Minnesota Eugenics Society, praising Adolf Hitler's plan to stamp out "congenital feeble-mindedness, insanity, epilepsy, and some other serious conditions that are inheritable" from among the German people.
8. Pardon Application No. 5702, dated December 18, 1922.
9. Notice dated March 13, 1923, denying Mason's request for parole.
10. Letter from I.E. Nolte of the Duluth Mission, dated August 15, 1922, recommending Mason be granted a pardon or parole because of "his innocence" and reform "through religious influences."
11. Letter from Jerry Mugivan of the John Robinson Circus, dated July 13, 1922, explaining Mason was "always ready and willing to obey orders, kept his place and his morals and general character and habits," and that the circus would be pleased to reemploy him should he be released from prison.
12. Letter of support dated April 28, 2020, from the Minnesota Chapter of the Federal Bar Association, stating that Mason's conviction involved a fundamental miscarriage of justice and that a posthumous pardon would memorialize for present and future generations that "the pursuit of justice and the rule of law endure even after mortal life has long concluded."
13. Letter of support dated February 27, 2020, from Duluth Mayor Emily Larson, explaining that the lynching of Elias Clayton, Elmer Jackson, and Isaac McGhie and the related wrongful conviction of Mason were overt acts of racial hatred that have been a stain on the consciousness of the Duluth community over a century. She states a pardon would publicly remove "the taint of an evidentiary flawed and racially motivated conviction from Max Mason's record," and would also be an act of grace for Duluth and an example of justice for future generations to emulate.
14. Letter of support dated April 23, 2020, from the Minnesota Association of Black Lawyers, asserting that a posthumous pardon would right the gross miscarriage of justice that occurred against Mason and the three African-American men who were lynched for a crime that was "fabricated and unquestionably accepted on the basis of their race," and would serve as a testament to the progress "we have made in the quest for racial equality."
15. Letter of support dated April 1, 2020, from the Twin Cities Cardozo Society and the Jewish Community Relations Council of Minnesota and the Dakotas, expressing deep concern about "the grievous, racially motivated injustices perpetrated on Mr. Mason 100 years ago by Minnesota's law-enforcement and court systems." They further state that a pardon would also be consistent with the "evolving standards of American justice since 1920," which has been marked by greater protection of minority rights and the recognition or expansion of constitutional rights to counsel during custodial interrogation, counsel for indigent defendants, and equal protection.

<b>INVESTIGATIVE EXHIBITS</b>
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- A. *State v. Mason*, 152 Minn. 306 (June 9, 1922)
- B. Indictment, July 19, 1920
- C. Jury Verdict, November 27, 1920
- D. Sentencing Hearing Transcript, December 2, 1920
- E. Order for Issuance of Commitment, July 30, 1921
- F. Warrant of Commitment, August 6, 1921

- G. Parole Record
- H. Discharge Order, September 3, 1925
- I. Pardon Application No. 5702, filed December 1922
- J. Letter from St. Louis County Attorney to the Board of Pardons, January 2, 1923
- K. Summary of Pardon Application No. 5702
- L. Board of Pardons Record showing pardon application no. 5702 denied January 8, 1923
- M. Pardon Application No. 6205, filed March 1924
- N. Letter from St. Louis County Attorney to the Board of Pardons, April 14, 1924
- O. Summary of Pardon Application No. 6205
- P. Board of Pardons Record showing pardon application no. 6205 denied November 13, 1924
- Q. Letter from Judge L.S. Nelson to Board of Parole, April 27, 1925
- R. St. Louis County Judge Response
- S. St. Louis County Attorney Response
- T. Letter from former Pardon Board members Walter Mondale, Arne Carlson, Al Quie, Mark Dayton, Tim Pawlenty, Kathleen Blatz, Russell Anderson, Eric Magnuson, Mike Hatch, Skip Humphrey, and Lori Swanson, supporting a pardon due to the “strong consensus in the articles and books written about the Duluth lynchings that [the] conviction occurred because of Max Mason’s race” and the fact that the “lynchings and circumstances giving rise to them were a stain on the history of Minnesota and do not reflect who we are as a state.”



**MINNESOTA BOARD OF PARDONS**

1450 Energy Park Drive, Suite 200, St. Paul, MN 55108  
651-361-7171



**County Attorney Statement**

**Re:** Pardon Extraordinary Application for: Mason, Max Case #: 6785

I, Mark S. Rubin St. Louis County Attorney,

Support the pardon extraordinary application.

Do not support the pardon extraordinary application.

Statement to the Board (if desired):

\_\_\_\_\_ (See Attached) \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Signed: Mark S. Rubin  
St. Louis County Attorney

218-726-2323  
(phone)

Dated: Feb. 6, 2020

Please return to:

Minnesota Board of Pardons  
1450 Energy Park Drive  
Suite 200  
St. Paul, MN 55108

Email: [mnboardofpardons@state.mn.us](mailto:mnboardofpardons@state.mn.us)

Fax: 651-603-6770



OFFICE OF THE SAINT LOUIS COUNTY ATTORNEY

MARK S. RUBIN COUNTY ATTORNEY

February 6, 2020

Minnesota Board of Pardons
1450 Energy Park Drive, Suite 200
St. Paul, MN 55108

Re: Pardon Extraordinary Application for: Mason, Max. Case #6785

Dear Members of the Board of Pardons,

History reveals that Mr. Mason's conviction, although upheld on appeal, was a part of a horrific set of circumstances resulting in great injustices to say the least. I refer back to the words of the successor County Attorney in 1923 where he stated in response to a request for parole:

"The defendant was rather unfortunate in that he was the only man of the colored men involved who was convicted. Personally I never was of the impression that the evidence was any too strong of this case, and if he had been a white man, I am rather doubtful he would have been convicted."

See Petitioner's Memorandum of Law, p. 13.

The Judge in the case also later expressed:

"In fact I had been hopeful that some clemency would have been extended to this defendant long ere now."

See Petitioner's Memorandum of Law, p. 14.

For over 40 years, I have been a prosecutor. In my current role as St. Louis County Attorney, criminal prosecutions are filed in my name. The historical record is before the Board. If this case had been submitted to me today, in a society where we strive for justice without racial bias, this case would never have been charged. Further, even if it had been charged, the evidence would not be sufficient to sustain a jury verdict of guilty.

Four office locations: Duluth Courthouse, Government Services Center, Virginia Courthouse, Hibbing Courthouse. Includes addresses and phone numbers for each.

Page 2

The historical record clearly reflects that Mr. Mason was investigated, charged and convicted because of his race and not because of the strength and sufficiency of the evidence. The improper comments of the prosecutor in his final argument only served to further fan the flames of racial injustice, and distracted the jury from their appointed duty to fairly judge the evidence:

“In his closing argument, Warren Green told the jury that this case was the most important he’d ever brought into court. Why do we have mobs? he asked. It is because people think the Negroes won’t be convicted. That’s why they take the law into their own hands. People of Duluth and St. Louis County want to know through your verdict that when a white girl is ravished by a black or white man, and the man is proven guilty, as in this case, the man is going to be found guilty.”

See Petitioner’s Memorandum of Law, p. 8.

These days, our world needs all the mercy and grace we can muster up. This is at least something we can do on behalf of Mr. Mason’s memory. If the pardon will help facilitate a redemption of his name, reconciliation for our community, and a restoration of justice, then it should be granted. I should also add that my position enjoys the expressed support of the victim’s family representative.

As a prosecutor, my pursuit of justice has always been firmly rooted in my belief in redemption and restoration. Mercy sometimes, is what justice calls for. Justice is overdue for Mr. Mason. His time is now. Maybe this is the “bending of the arc of justice” that Dr. Martin Luther King Jr. talked about...

I support the request for a pardon extraordinary.

Respectfully Submitted,



MARK S. RUBIN  
ST. LOUIS COUNTY ATTORNEY



United States District Court  
District of Minnesota

Chief Judge John R. Tunheim

June 3, 2020

**VIA EMAIL**

Minnesota Board of Pardons  
1450 Energy Park Drive, Suite 200  
Saint Paul, MN 55108  
[mnboardofpardons@state.mn.us](mailto:mnboardofpardons@state.mn.us)

Re: Application for Pardon Extraordinary for Max Mason

Dear Governor Walz, Attorney General Ellison and Chief Justice Gildea:

The District Judges of the United States District Court for the District of Minnesota write this letter in the hope that you will grant the Application for Pardon Extraordinary submitted by Jordan Moses and Counsel for Max Mason on January 17, 2020 on behalf of the late Max Mason.

As Chief Judge, I am signing this letter on behalf of our Court, but be assured that all our District Judges, and our Magistrate Judges as well, are strongly supportive of the granting of a posthumous pardon for Mr. Mason. I will not repeat the excellent arguments set forth in favor of a pardon by Jordan Moses, Jerry Blackwell, and many others. Much has been said, and the submissions are eloquent and well-stated. However, I can add that I have read the entire transcript of the trial of Mr. Mason, and to say that he was convicted on the flimsiest of evidence is a vast understatement. A very tardy identification under pressure and the diagnoses of gonorrhoea, which in Mr. Mason's case was disputed, surely cannot support a criminal conviction of rape under any fair legal standard. Contemporaneous statements by the prosecuting attorney and the presiding judge strongly support the conclusion that this was a grievously wrong conviction.

I do not believe this Court has ever written in support of a state pardon before, although our judges frequently are called upon to make recommendations to the President on applications for pardons. We deeply respect the wise judgments made by the Board of Pardons throughout the history of our State and the important role that the pardon power has played in lives of Minnesotans. However, there is urgency to the granting of a pardon for Max Mason. Time likely will not ever fully heal the horrific wrongs committed in 1920. We can only do what we can now, and that is to try to address the injustices that can be remedied, and never, ever, forget this sad and awful history. Events that occurred one hundred years ago present the opportunity today for an important teaching moment, and our Court is committed to being part of a commemoration that can help improve the future of Minnesota.

Re: Pardon Extraordinary for Max Mason

Page Two

June 3, 2020

We strongly encourage the granting of posthumous Pardon Extraordinary to Max Mason. Recognition of a grievous wrong is long overdue. Thank you very much.

Sincerely,

John R. Tunheim  
Chief Judge, U.S. District Court



**OFFICE OF THE PUBLIC DEFENDER  
SIXTH JUDICIAL DISTRICT**

1400 Alworth Building  
306 West Superior Street  
Duluth, MN 55802  
(218) 733-1027 Fax: (218) 733-1034

Daniel K. Lew, Chief Public Defender

May 20, 2020

Minnesota Board of Pardons  
Department of Corrections Central Office  
1450 Energy Park Drive #200  
St. Paul, MN 55108

Dear Board of Pardons:

We are writing to urge the Board to grant Max Mason's posthumous request for a pardon extraordinary. We hope with the proper context of Mr. Mason's conviction, the Board will do the right thing and take this important step toward rectifying a century of racial injustice.

I.

*"The lynchings in Duluth were only one part of a nationwide paroxysm of racial violence that peaked in 1919. In June 1920 the entire country continued to be convulsed in violent racial hatred and plagued by mass violence."<sup>1</sup>*

In 1919, racial tension throughout the United States was reaching a boiling point. In northeastern Minnesota, thousands of lives and jobs were destroyed by World War I, the Spanish influenza, and the 1918 Cloquet fire. Many were left feeling hopeless. The time was ripe for scapegoats, and incendiary propaganda like *The Birth of a Nation* inflamed the passions of white America.<sup>2</sup> Race riots and lynchings were common. During the Red Summer, over 1000 people throughout the country died—including nearly one hundred Black men lynched by white mobs.<sup>3</sup>

Duluth was not exempt from violence. Racism, panic, and a false accusation of rape from a white woman named Irene Tusken led to the deaths of circus employees Elias Clayton, Elmer Jackson, and Isaac McGhie on June 15, 1920. The three young Black men were lynched from a lamppost just yards away from the police department, with a mob of 10,000 Duluthians cheering the executions.<sup>4</sup>

<sup>1</sup> Heidi Bakk-Hansen, *The Victims of the 1920 Duluth Lynchings*, ZENITH CITY ONLINE, <http://zenithcity.com/archive/legendary-tales/the-victims-of-the-1920-duluth-lynchings/>

<sup>2</sup> *The Birth of a Nation*, released in 1915, "bears a great deal of responsibility for expanding and promoting [negative] stereotypes[,] includ[ing] the depiction of the African American male as a brutal rapist and defiler of white women[.]" Mem. in Support of Pet. for Posthumous Pardon at 38.

<sup>3</sup> Dr. George Edmund Haynes, *For Action on Race Riot Peril*, THE NEW YORK TIMES, October 5, 2019.

<sup>4</sup> The person responsible for protecting the young men in jail, Sgt. Olson, was later confirmed to be an enrolled member of the Ku Klux Klan. See Mem. in Support of Posthumous Pardon of Max Mason at 42. Furthermore, the Commissioner of Public Safety would not have allowed police to act even if they had wanted to: "I don't want to see the blood of one white person spilled for six blacks." *Id.* at 5.

Duluth's horrific lynching garnered equally horrifying media support. For example, the Ely Miner newspaper said the lynching was "most effective" and "those who were put out of their criminal existence by the mob will not assault any more young girls."<sup>5</sup> The Mankato Free Press added, "white men—men of blood—will not sit idly by when black rascals pounce like fiends on white women. [...] Mad dogs are shot dead without ceremony. Beasts in human shape are entitled to but scant consideration."<sup>6</sup> Across the bridge in Superior, Wisconsin, the Chief of Police declared, "We are going to run all idle negroes out of Superior and they're going to stay out."<sup>7</sup>

It was in this atmosphere that a young Black circus employee named Max Mason was arrested for raping Ms. Tusken—the same alleged rape that had already cost Messrs. Clayton, Jackson, and McGhie their lives.

## II.

Mr. Mason's trial and conviction were based on two of the most common factors in wrongful convictions lasting to this day: racial bias and eyewitness misidentification.

Immediately after the alleged assault, Ms. Tusken and her companion said Mr. Mason was not involved in the alleged rape. However, the next day, the Duluth Police Department decided they did not have enough Black suspects. Police chased the circus to Virginia, Minnesota, where they arrested every Black man they could find, including Mr. Mason. This time, under pressure from the police, Ms. Tusken identified Mr. Mason as one of her "rapists."

Ms. Tusken was examined the day after the alleged rape by her family physician, Dr. David Graham. He told police Ms. Tusken had no signs of assault, and in his professional opinion, she was not raped.<sup>8</sup>

The lack of physical evidence left only eyewitness identification and the racially biased testimony of a white woman who said she recognized Mr. Mason as one of the Black men who allegedly attacked her.

"The vagaries of eyewitness testimony are well known; the annals of criminal law are rife with instances of mistaken identification...The hazards of such testimony are established by a formidable number of instances in the records of English and American trials."<sup>9</sup> Here, Ms. Tusken's false identification of Mr. Mason—urged by a police department desperate to find a scapegoat—was enough for a jury to quickly convict Mr. Mason. It was likely easy for the jury to do so, given the prevalent belief that Black men were predators trying to steal the virtue of white women.<sup>10</sup> Indeed, the prosecutor's closing argument supported this notion of fragile white femininity.<sup>11</sup>

<sup>5</sup> Editorial, *The Ely Miner*, June 18, 1920 at 4, [https://www.mnhs.org/duluthlynchings/documents/Editorial\\_Section-86.001.php](https://www.mnhs.org/duluthlynchings/documents/Editorial_Section-86.001.php)

<sup>6</sup> Editorial, *The Mankato Free Press*, June 17, 1920 at 6, [https://www.mnhs.org/duluthlynchings/documents/The\\_Duluth\\_Tragedy-90.001.php](https://www.mnhs.org/duluthlynchings/documents/The_Duluth_Tragedy-90.001.php)

<sup>7</sup> *Superior Police to Deport All Idle Negroes*, *Duluth News Tribune*, June 17, 1920 at 1,

[https://www.mnhs.org/duluthlynchings/documents/Superior\\_Police\\_to\\_Deport\\_Idle\\_Negroes\\_at\\_Once-119.001.php](https://www.mnhs.org/duluthlynchings/documents/Superior_Police_to_Deport_Idle_Negroes_at_Once-119.001.php)

<sup>8</sup> Under pressure from police and prosecution, Dr. Graham later equivocated, saying his findings were inconclusive.

<sup>9</sup> *United State v. Wade*, 388 N.W.2d 218, 228 (1967).

<sup>10</sup> See n.2 *supra*.

<sup>11</sup> Prosecutor Warren Greene told the jury that Messrs. Clayton, Jackson, and McGhie were lynched "because people think the Negroes won't be convicted. That's why they take the law into their own hands. People of Duluth and St.

Mr. Mason appealed the results of his trial, but our Supreme Court upheld the conviction.<sup>12</sup> Mr. Mason then sought clemency, which both the trial judge and St. Louis County Attorney supported. Indeed, five years after Mr. Mason's conviction, the St. Louis County Attorney freely admitted a white person would not have been convicted with the evidence presented.<sup>13</sup> Though Mr. Mason was eventually paroled on the condition he leave Minnesota and never return, he was never pardoned.

### III.

Duluth is a special place. Under the watchful gaze of Gitchigami,<sup>14</sup> Duluth is consistently ranked Most Livable in the United States.<sup>15</sup> Our city features multiple award-winning colleges and universities that focus on public service and academic innovation, while our indigenous Ojibwe neighbors contribute mightily to our vibrant culture. We are also thriving under the excellent leadership of our city's first female mayor and the Sixth District's first female Chief Judge.

When we see something wrong in our city, we take creative steps to fix it. The arena of racial justice is not exempt from this notion. Less than ten years ago, white defendants in St. Louis County were three times as likely to be released from jail pending trial compared to black or indigenous defendants, and district court judges set bail twice as high for racial minority defendants compared to their white counterparts.<sup>16</sup> Instead of accepting this injustice as an unchangeable fact of the criminal courts, we took the opportunity to change, grow, and learn. With assistance from the Racial Justice Improvement Project, we set up robust pretrial initiatives including intensive pretrial release and specialized training for judges.

Within four years, the pretrial disparity between white and racial minority defendants was significantly reduced, and the racial disparity (as reported by a local researcher) was deemed no longer "statistically significant"<sup>17</sup> —while reducing incarceration by 90,425 jail days and saving our community over 10.6 million dollars in needless incarceration.<sup>18</sup> Similarly, our treatment courts consistently lead the nation in reducing recidivism, reducing harm and celebrating changed lives. Our neighbors have learned to heal their chemical use disorders and mental health crises, and we have learned to better serve our local veterans.<sup>19</sup>

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Louis County want to know through your verdict that when a white girl is ravished by a black or white man, and the man is proven guilty, as in this case, the man is going to be found guilty."

<sup>12</sup> When Mr. Mason appealed his conviction, the Supreme Court readily upheld the sufficiency of the scant evidence against him; Justice Dibell alone dissented, pointing out the weakness of the eyewitness identification. *State v. Mason*, 189 N.W. 452, 454 (Minn. 1922) (Dibell, J., dissenting).

<sup>13</sup> Mem. in Support of Pet. for Posthumous Pardon at 13.

<sup>14</sup> Gitchigami, or Big Water, is the Anishinaabe name for Lake Superior.

<sup>15</sup> See, e.g., *Duluth, Minneapolis Rank Among Top 10 Most Liveable U.S. Cities*, WCCO, August 21, 2014, <https://minnesota.cbslocal.com/2014/08/21/duluth-minneapolis-rank-among-top-10-most-liveable-u-s-cities/>

<sup>16</sup> Dr. Robert R. Weidner, *Pretrial Detention & Release Decisions in St. Louis County, MN, in 2009 & 2010: Interim Findings* at 5-6, RACIAL JUSTICE IMPROVEMENT PROJECT, August 8, 2011

<sup>17</sup> Pretrial Release Decisions in St. Louis County, MN, 2009-2014: Examining the Effects of Policy Changes Robert R. Weidner, Ph.D. May 2015, *Research Sponsored by The American Bar Association's Racial Justice Improvement Project*

<sup>18</sup> ST. LOUIS COUNTY INTENSIVE PRE-TRIAL RELEASE PROGRAM AND COMMUNITY SANCTIONS PROGRAM REPORT JULY 2013 TO DECEMBER 2016 (42 MONTHS), ARROWHEAD REGIONAL CORRECTIONS REPORT, December 2016.

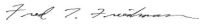
<sup>19</sup> See, e.g., *Duluth judge honored, again*, DULUTH NEWS TRIBUNE, June 15, 2018

Now we need your help to come alongside our city and address one of the dark chapters still open from the 1920 lynchings. Our community has owned this racist history, and repairing the future is our shared responsibility.<sup>20</sup> The hope for a better tomorrow compels us to recognize that Mr. Mason was convicted of sexual assault *solely because he was Black*. The community celebrated while Mr. Mason went to prison. Bigotry triumphed over justice. Today, Minnesota law gives this Board the authority to publicly rebuke one of the injustices that scar our State, and we urge you to take this powerful opportunity to do the right thing in the name of the future of every Minnesotan.

Very truly yours,



Daniel K. Lew  
Chief Public Defender



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Fred T. Friedman  
Chief Public Defender Emeritus (1986-2014)

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<sup>20</sup> The St. Louis County Attorney and Duluth mayor both support this petition, along with living relatives of Irene Tusken — including Mike Tusken, the Duluth Police Chief, and Tom Tusken, the Duluth Denfeld Principal.





Emily Larson  
Mayor

Room 422  
411 West First Street  
Duluth, Minnesota 55802

218-730-5230

elarson@duluthmn.gov

February 27, 2020

Minnesota Board of Pardons  
1450 Energy Park Drive, Suite 200  
St. Paul, MN 55108

Re: Pardon Extraordinary Application for: Mason, Max. Case #6785

Dear Members of the Board of Pardons:

As the mayor of Duluth, I am writing in strong support of the application for the posthumous pardon of Max Mason.

The lynching of Elias Clayton, Elmer Jackson, and Isaac McGhie and the related wrongful conviction of Max Mason were overt acts of racial hatred which have been a stain on the consciousness of the Duluth Community for a hundred years. To facilitate reconciliation and begin healing the wounds created by these horrific events, our community has openly and honestly acknowledged the racial bigotry in our past, built a memorial to the lynching victims, and is now earnestly supporting the pardon application for Mr. Mason.

The citizens of Duluth have an openhearted confidence in the American ideal of justice and liberty for all. Our community failed to uphold those principals when confronted with racial violence and hatred in 1920. By recognizing our past mistakes and working to restore Mr. Mason's reputation, we are striving to live up to the promise of our Constitution and Bill of Rights. By publicly removing the taint of an evidentiarily flawed and racially motivated conviction from Max Mason's record, we, as a society, would not only be doing the right thing on behalf of Max Mason, it would be an act of grace for the Duluth community and an example of justice for future generations to emulate.

We cannot undo the tragic events that took place in Duluth in June 1920, but we can do our best to learn from our mistakes and do better today and in the future for the benefit of our nation, our state, our community, and our children.

Yours truly,

Emily Larson  
Mayor

[www.duluthmn.gov](http://www.duluthmn.gov)

The City of Duluth is an Equal Opportunity Employer.



**Federal Bar  
Association  
Minnesota Chapter**

Honorable Tony N. Leung  
President  
c/o: Diana E. Murphy United States Courthouse  
300 South Fourth Street, 9W  
Minneapolis, MN 55415  
leung\_chambers@mnd.uscourts.gov  
(612) 664-5470

April 30, 2020

**VIA EMAIL**

Minnesota Board of Pardons  
1450 Energy Park Drive, Suite 200  
Saint Paul, MN 55108  
[mnboardofpardons@state.mn.us](mailto:mnboardofpardons@state.mn.us)

**Re: Application for Pardon Extraordinary of Max Mason**

Dear Chief Justice Gildea, Governor Walz and Attorney General Ellison:

The Federal Bar Association - Minnesota Chapter writes in support of the Petition to Grant a Posthumous Pardon to Max Mason.<sup>i</sup> A cornerstone principle of the Chapter’s mission is to strengthen the legal system and administration of justice to make real the motto of “Equal Justice Under Law” engraved into the marble west architrave of the United States Supreme Court building. By pardoning Mr. Mason posthumously, you would be memorializing for present and future generations that the pursuit of justice and the rule of law endure even after mortal life has long concluded.

The Memorandum in support of pardon, as well as the numerous letters of support, details the fundamental miscarriage of justice in Mr. Mason’s case. In addition to the evidentiary and procedural infirmities of the trial and appeal, the horrific Duluth public lynchings of Mr. Mason’s coworkers in 1920, the contemporaneous unspoken doubts about what had happened, and the racial animus of the times, rendered it impossible for him to have a fair trial and review. The prosecutor’s closing argument at the trial then supports the argument in the Petition now that there was an utter failure of the rule of law for Mr. Mason:

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Honorable Donovan W. Frank • Patrick Martin • Rachna B. Sullivan • Honorable Joan N. Eriksen • Rachel Zimmerman Scobie  
William J. Otteson • Tara C. Norgard • Hon. Susan Richard Nelson • Kelly G. Laudon

[W]e have mobs because people think the Negroes won't be convicted. That's why they take the law into their own hands. People of Duluth and St. Louis County want to know through your verdict that when a white girl is ravished by a black or white man, and the man is proven guilty, the man is going to be found guilty.<sup>1</sup>

The jury did as they were expected to do. Mr. Mason was convicted, but there was no justice.

Incised into the east side architrave of the United States Supreme Court building are the words, "Justice the Guardian of Liberty." The Federal Bar Association – Minnesota Chapter respectfully requests that Mr. Mason's liberty be guarded at long last by granting his pardon.

Sincerely,

**Federal Bar Association – Minnesota Chapter**



By Tony N. Leung, Its President

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<sup>1</sup>The Federal Bar Association – Minnesota Chapter takes this position only in its own name and not in the name of the national Federal Bar Association or its other Professional Chapters.

<sup>2</sup>Michael Fedo, "The Lynchings in Duluth" at 160-161 (*Minnesota Historical Society*, 2d ed. 2016).



June 5, 2020

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The Honorable Tim Walz  
Governor of Minnesota  
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The Honorable Keith Ellison  
Attorney General of the State of Minnesota  
102 State Capitol  
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The Honorable Lorie S. Gildea  
Chief Justice  
Minnesota Supreme Court  
25 Rev. Dr. Martin Luther King, Jr. Blvd.  
St. Paul, Minnesota 55155

Re: Max Mason: Application for Posthumous Pardon Extraordinary [Matter No. 6785; Item No. 14: June 12, 2020 Meeting of the Minnesota Board of Pardons]

Dear Governor Walz, Attorney General Ellison, and Chief Justice Gildea:

On behalf of the Minnesota State Bar Association, and with the unanimous support of our bar association's Council, please accept this message in support of the Application for a Posthumous Pardon Extraordinary for Mr. Max Mason. The background facts and realities, coupled with the wide-ranging support for this unique application, combine to make this a compelling opportunity to recognize, acknowledge, and then right a terrible wrong. Granting the application would contribute to the healing of a tragic wound—a wound inflicted not only upon Mr. Mason and his family, but also visited upon the soul of our Minnesota legal profession and community.

The Board of Pardons, as you know, spoke to this during the 1920's—discharging Mr. Mason from custody and, in effect, banishing him from our State. Even then, the St. Louis County Attorney confirmed that the evidence was such that Mr. Mason would not have been convicted "had he been a white man." Now today, the current St. Louis County Attorney, Mark Rubin, has confirmed further that: "The historical record clearly

reflects that Mr. Mason was investigated, charged and convicted because of his race and not because of the strength and sufficiency of the evidence." Their support, and the wide and deep support from the broader profession and community, confirms that the granting of this application now, especially now, is and would be the right thing to do.

Our State's treatment of Mr. Mason, and the tragic and terroristic events of Duluth in the 1920's, have long been a stain on our State and society—rooted in a racism that continues to haunt and harm our lives, and enacted under a purported and twisted version of the rule of law. The 1920's may seem now like a long time ago, but it is always the right time to right a wrong—and Mr. Mason's arrest, conviction, imprisonment and banishment is a wrong that has long called for righting.

This is a uniquely important time for all of us to right that wrong, and a unique opportunity for us to learn lessons and to live forward toward the possibility of healing and reconciliation. We urge the Minnesota Board of Pardons to grant this application—made on behalf of Mr. Mason and his family, of course; but also, in important ways, made on behalf of us all.

Respectfully,

A handwritten signature in black ink that reads "Tom Nelson". The signature is written in a cursive, slightly slanted style.

Tom Nelson  
MSBA President (2019/2020)

Enclosure:  
(2020 President's Page – Bench & Bar: "Our Duluth Lynchings")

President'sPage | BY TOM NELSON

# Our Duluth Lynchings

On June 15, 1920—in less than a day's time—three young Black men (Elias Clayton, Elmer Jackson, and Isaac McGhie) were wrongly arrested; ripped out of their jail cell by a vicious mob; taunted, tortured and dragged to a lamppost; and mercilessly murdered. Lynched. It didn't happen "Down South;" it happened here, in Duluth. Thousands of White Minnesotans were involved. This coming June 15—100 years later to the day—in a deliberate act of remembrance and with a community-wide commitment to learning and hope, we will gather in Duluth to mark those murders and to move forward together. We will do so again the next day in Minneapolis. Please join us. Here is some background.

The basic facts are lawless and brutal. For some unknown reason, Irene Tusken claimed that six young Black circus workers raped her on June 14. Her doctor examined her, and later testified that she had not been raped or otherwise assaulted. The next morning, June 15, thirteen Black men were apprehended by the police as the circus was leaving town; seven were released; six were jailed. That evening, the Duluth Herald



TOM NELSON is a partner at Stinson LLP (formerly Leonard, Street and Deinard). He is a past president of the Hennepin County Bar Association.

headline read: "West Duluth Girl Victim of Six Negroes." A mob of thousands gathered outside the jail (having been urged to "join the necktie party"); overcame the police; broke into the jail; conducted a "trial" on the spot; dragged three of them to the street to



their ghastly deaths; posed for souvenir photographs; and left their victims dead at the lamppost. "Strange fruit," as Billie Holiday would later sing. Judges Cant and Fesler tried to stop the slaughter; as did Attorneys McCleam and McDevitt, and Fathers Powers and Maloney—only to be told: "To hell with the law!" and "We don't care if they are innocent or not." The bodies were removed the next day, and taken to Crawford Mortuary (after another mortuary declined to help). They were buried in unmarked graves—a wrong only recently righted.

Three men were convicted of "rioting," but served light sentences. No murderers were ever convicted of the murders, despite thousands of eye witnesses. Some members of the media were outraged; others excused, justified, or even tried to explain the "benefits" of the lynchings.

There was and is no excuse, of course. The throng of Minnesotans that night in Duluth did not lose their minds or misplace their consciences. They knew what they were doing and they intended to do it. The pictures show their individual faces—some somber and others smiling, seemingly proud of what they had done. Individuals don't get to blame, or hide in, some sort of "mob mentality." We lawyers know that. Mob Rule is, after all, the exact opposite of the Rule of Law.

Between the 1870's and 1950's, there were more than 4,500 terror lynchings in America. Those lynchings were intended to create fear. They were spectacles meant to be seen and to convey a message—with children on parents' shoulders for a better view; sometimes with the local Black population forced to watch. They were performed in the presence of the purported Rule of Law, and sometimes with its permission—often in the public

square; sometimes on a courthouse lawn. The killings took place while statues were being built (purportedly to honor those who fought for "the lost cause," largely during the 1890's to the 1920's, and notably again during the Civil Rights Era of the 50's and 60's), and while federal anti-lynching statutes were being resisted (filibustered in the U.S. Senate, citing the canard of "racial favoritism" or promising enforcement under states' rights). The lynchings could only have happened by viewing people of color as some sort of unworthy "Other," not as fellow human beings. A reminder of the need for vigilance, even today, when incidents and policies seem afoot to "otherize" still others.

As the Duluth killers proudly sought a photographic trophy of their treachery (suitable for postcards, which promptly flew off the shelves of Duluth merchants at 50 cents each), one of the lynchers yelled out, ironically and aptly: "Throw a little light on the subject!" Headlights illuminated the scene for those preening to be seen. That photograph cannot be un-seen; nor should it be. As Ida B. Wells said so well: "The way to right wrongs is to turn the light of truth upon them." History can be a light in its own right, helping us face forward into our future together. That's what the coming months hold: not just noting history, but making history.

This is all such a sobering part of our history; sickening, really; but also strengthening—if we learn from it. As it turns out, Duluth was the very first community in our nation to build a monument to honor its lynching victims. The Clayton-Jackson-McGhie Memorial is a dignified and moving plaza—taking back the corner of First Street and Second Avenue South (one block up from Superior Street), across the street from the site of the 1920 murders. Engraved into the walls, in bold letters, it says: “An Event Happened Here Upon Which It Is Difficult To Speak And Impossible To Remain Silent.” Sculpted into the walls are images of Mr. Clayton, Mr. Jackson, and Mr. McGhie—not as they were in that photograph, but instead standing tall and strong. That memorial calls for you to visit. [www.claytonjacksonmcghie.org](http://www.claytonjacksonmcghie.org)

These coming months (and June 15 and 16, in particular) will include unique, important, moving, and motivating moments.

■ On June 15 in Duluth, Bryan Stevenson will speak at the site of the lynchings. He is the author of “Just Mercy” and the founder of the Equal Justice Initiative in Montgomery, Alabama—site of the national lynching memorial. A sacred place. [www.eji.org](http://www.eji.org)

■ Earlier that Monday, there will be an extended public program at Duluth’s courthouse plaza. Minnesota federal courts will be closed that day, in honor of the commemoration proceedings. Judge Richard Gergel, author of “Unexampled Courage,” will join us.

■ On Tuesday, June 16, at the Minneapolis Hilton, Bryan Stevenson and Judge Gergel will speak to us again.

Please mark your calendars to join us as we mark these moments—and as we move forward together. ▲

# MABL

MINNESOTA ASSOCIATION OF BLACK LAWYERS

P.O. Box 582892, Minneapolis, Minnesota 55458-2892 | [www.mabl.org](http://www.mabl.org)

April 23, 2020

Minnesota Board of Pardons  
1450 Energy Park Drive, Suite 200  
St. Paul, MN 55108

Re: Pardon Extraordinary Application for: Mason, Max. Case #6785

Dear Members of the Board of Pardons,

The Minnesota Association of Black Lawyers (MABL) supports the posthumous pardon extraordinary application of Max Mason.

We believe that the Minnesota Board of Pardons has an opportunity to change the narrative of Duluth's and Minnesota's legacy to speak truth relating to racial inequality and act to promote justice where others were silent. Though your decision will not change or re-write the past, your decision regarding the posthumous pardon extraordinary application of Mr. Mason recognizes this historic wrongdoing and demonstrates that we are ready and willing to stand up for justice.

As a threshold matter, Mr. Mason is eligible for a posthumous pardon extraordinary under all the applicable requirements, including that he was a man of good character and whose reputation would have otherwise been untarnished were it not for this horrific series of events that completely derailed his life.

As is clear from Mr. Mason's application, his conviction was very loosely based on a flimsy accusation, with no factual corroboration, and eyewitness identification coerced from two witnesses whose credibility was bestowed upon them only by the color of their skin.

Unfortunately, Mr. Mason was convicted because of his race. Even though white men knew the case was unsubstantiated, they either did nothing, or their dissent was insufficient to make a difference. For example, based on his exam, Irene Tusken's family physician, Dr. David Graham, told the case detective, "I don't think she was raped." See Petitioner's Memorandum of Law, p. 5. And yet when he testified, Dr. Graham failed to fully stand up for the truth. *Id.* at 7.

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When Mr. Mason appealed his conviction, Justice Homer Dibell wrote an articulate dissent identifying all the ways in which the conviction did not hold water. *Id.* at 9-12. Nonetheless, Mr. Mason's conviction was affirmed.

Six times, the Minnesota State Board of Parole denied Mr. Mason's parole requests despite the fact that even the County Attorney himself knew the evidence was weak and stated that Mason was convicted primarily because of his race and would likely not have been convicted had he been white. *Id.* at 13. In his seventh parole application, even the judge who presided over the case, Judge L.S. Nelson, supported unconditional parole or pardon. *Id.* at 15.

The pending pardon application is rich with context for how this gross miscarriage of justice occurred against Mr. Mason and the three African American men who were lynched for an alleged crime that was proven to be a meritless allegation fabricated and unquestionably accepted on the basis of their race. *See id.* at 5. All reasons point to the racist environment in which the likes of the Ku Klux Klan and advocates of the racist eugenics movement published and perpetuated derogatory stereotypes, among other things, stoking fears of black men's virility and supposed savage tendencies towards white women.

While we still have much progress to make in achieving racial equality, Duluth and Minnesotan society as a whole, has made progressive strides away from the racist milieu of the 1920s in which Mr. Mason could not escape. We know better. Therefore, we must do better.

In this case, by granting the pardon extraordinary, the Pardon Board will accomplish its fundamental purpose: "reach[ing] backward and removing the taint of the criminal conviction." *See State v. Haugen*, No. CA-98-1400, 1999 WL 138730, at \*2 (Minn. Ct. App. March 16, 1999). Extending this mercy and grace to Mr. Mason's legacy and memory is long overdue. Righting this wrong also serves as a testament to the progress we have made in the quest for racial equality. This Pardon Board has the unique opportunity to step up and show the world how far the City of Duluth and the State of Minnesota have come since the days when some of our citizens found it right and proper to imprison and lynch innocent black men, then display and sell photographs of their heinous crimes with pride.

For these reasons, MABL supports the request for a posthumous pardon extraordinary for Max Mason.

Respectfully Submitted,



Franklin Aba-Onu  
Vice President  
Minnesota Association of Black Lawyers

cc: Governor Timothy J. Walz  
Attorney General Keith Ellison  
Chief Justice Lorie Skjerven Gildea