



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

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 Jordon Moses and Counsel for Max Mason on January 17, 2020 on behalf of the late Max Mason.

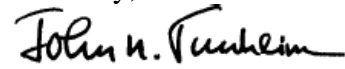
As Chief Judge, I am signing this letter on behalf of our Court, but be assured that all our District Judges, and our Magistrate Judges as well, are strongly supportive of the granting of a posthumous pardon for Mr. Mason. I will not repeat the excellent arguments set forth in favor of a pardon by Jordan 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 gonorrhea, 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.

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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,

A handwritten signature in black ink that reads "John R. Tunheim". The signature is written in a cursive, flowing style.

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

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:

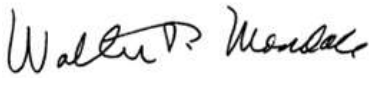
...I have always had some doubt about his guilt, and had it not been that his counsel raised some legal questions that I thought should be passed upon by the Supreme Court, I was of the intention to set aside the verdict and grant a new trial.

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 foreign 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



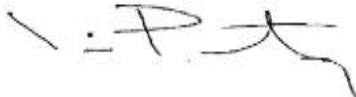
Arne Carlson
Pardon Board Member,
1991-1999



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



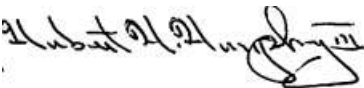
Russell Anderson
Pardon Board Member,
2006-2008



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



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 extraordinaire. 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."*¹

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.² 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.³

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.⁴

¹ 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/>

² *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.

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

⁴ 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."⁵ 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."⁶ 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."⁷

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.⁸

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."⁹ 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.¹⁰ Indeed, the prosecutor's closing argument supported this notion of fragile white femininity.¹¹

⁵ Editorial, The Ely Miner, June 18, 1920 at 4, https://www.mnhs.org/duluthlynchings/documents/Editorial_Section-86.001.php

⁶ Editorial, The Mankato Free Press, June 17, 1920 at 6, https://www.mnhs.org/duluthlynchings/documents/The_Duluth_Tragedy-90.001.php

⁷ *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

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

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

¹⁰ See n.2 *supra*.

¹¹ 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.¹² 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.¹³ 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,¹⁴ Duluth is consistently ranked Most Livable in the United States.¹⁵ 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.¹⁶ 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"¹⁷ —while reducing incarceration by 90,425 jail days and saving our community over 10.6 million dollars in needless incarceration.¹⁸ 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.¹⁹

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."

¹² 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).

¹³ Mem. in Support of Pet. for Posthumous Pardon at 13.

¹⁴ Gitchigami, or Big Water, is the Anishinaabe name for Lake Superior.

¹⁵ 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-livable-u-s-cities/>

¹⁶ 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

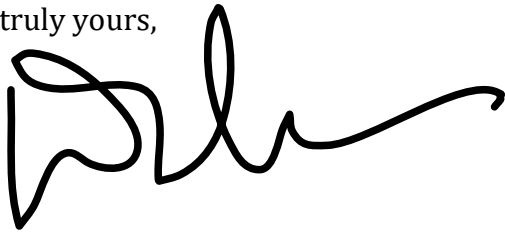
¹⁷ Pretrial Release Decisions in St. Louis County, MN, 2009-2014: Examining the Effects of Policy Changes Robert R. Weidner, Ph.D. May 2015, *Research Sponsored by The American Bar Association's Racial Justice Improvement Project*

¹⁸ *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.

¹⁹ 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.²⁰ 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,

A handwritten signature in black ink, appearing to read 'DKL', with a long horizontal flourish extending to the right.

Daniel K. Lew
Chief Public Defender

A handwritten signature in black ink, appearing to read 'Fred T. Friedman', written in a cursive style.

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

²⁰ 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.

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

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.

DULUTH COURTHOUSE
100 N. FIFTH AVE. W., #501
DULUTH, MINNESOTA 55802
218-726-2323

GOVERNMENT SERVICES CENTER
320 W. SECOND ST., #403
DULUTH, MINNESOTA 55802
218-726-2034

VIRGINIA COURTHOUSE
300 S. FIFTH AVE., #222
VIRGINIA, MINNESOTA 55792
218-749-7101

HIBBING COURTHOUSE
1810 TWELFTH AVE. E., #107
HIBBING, MINNESOTA 55746
218-262-0158

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