



# Application for Pardon Extraordinary

## MINNESOTA BOARD OF PARDONS

1450 Energy Park Drive, Suite 200, St. Paul, MN 55108

phone: 651-361-7171; fax: 651-603-6770

website: <https://mn.gov/doc/about/pardon-board/>

The Board of Pardons may grant a pardon extraordinary to an individual it determines to be of good character and reputation, provided the following requirements are satisfied:

1. the sentence imposed by the court is fully served and expired; and
2. the applicable waiting period has elapsed or has been waived by the Board:
  - a. **FIVE years** from the date of discharge if the person was convicted of a crime not included within the definition of crimes of violence under Minn. Stat. § 624.712, subdivision 5, and during that time the person has not been convicted of any other crimes.
  - b. **TEN years** from the date of discharge if the person was convicted of a crime of violence as defined in Minn. Stat. § 624.712, subdivision 5, and during that time the person has not been convicted of any other crimes.

### Instructions

1. Complete all sections of this application. Sign the last page and include the county and state in which the application is signed. Omissions or false statements may constitute grounds for denial of a pardon.
2. Submit the application, and all attachments you wish to include, using one of the following methods:
  - a. mail the application to the Board of Pardons at the above address;
  - b. scan and e-mail the application to [mnboardofpardons@state.mn.us](mailto:mnboardofpardons@state.mn.us); or
  - c. fax the application to 651-603-6770 and later,
3. We will acknowledge receipt of your application.

### Applicant Identification Information

Last name Mason	First name Max	Middle name Unknown
Date of birth April 24, 1899	Place of birth Decatur, Alabama	Social security number N/A
Current address Jordon Moses (Chair, 2020 Clayton Jackson McGhie Memorial, Inc. Events), Applying on Behalf of Max Mason, deceased; Counsel for Jordon Moses: Blackwell Burke P.A., Jerry W. Blackwell and Corey L. Gordon, 431 South 7 <sup>th</sup> Street, Suite 2500		
City Minneapolis	State Minnesota	Zip code 55415
Telephone 612-343-3232	E-mail <a href="mailto:blackwell@blackwellburke.com">blackwell@blackwellburke.com</a> <a href="mailto:cgordon@blackwellburke.com">cgordon@blackwellburke.com</a>	
Driver's license number N/A	Issuing state N/A	

Full name  
Max Mason

Date of birth  
April 24, 1899

### **DATA PRIVACY NOTICE**

*Be advised that the information you provide as part of this application, and any relevant materials found by Board of Pardons staff in investigating your application, will be discussed at the public meeting of the Board of Pardons and that these records are open to public inspection per Minn. Stat. § 638.07. Failure to provide the requested information may affect the processing of your application and result in the denial of your pardon.*

### **Use of Other Names**

List every name by which you have been known including conviction name, maiden name, former married name, nicknames, and all aliases.

1.	2. Nickname:
3.	4.

### **Pardon Application History**

Have you previously applied for a pardon in Minnesota? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	If yes, please list the dates you applied. December 19, 1922, February 21 and March 25, 1924 See exhibits to Memorandum in Support of Pardon
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### **Criminal History**

Have you previously been in prison? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No			
List all states where you have been in prison.	1. MCF-Stillwater	Offender number for all states where you have been in prison.	1. Unknown
	2.		2.
	3.		3.
List any pending criminal charges or investigations.	Arresting agency for pending criminal charges or investigations		
1. None	1. N/A		
2.	2.		

## Conviction Instructions

**If you fail to disclose any criminal convictions, including out-of-state convictions, in your application, the Board of Pardons may view the failure as an attempt to conceal your criminal record.**

### Please read this before filling out the following pages:

- ❖ You must include all convictions in this application, including misdemeanor traffic convictions. The Board of Pardons may grant pardons only for Minnesota convictions, but you must include all convictions in other states or countries and all violations of conditions of release (including supervised release, conditional release, and parole) in your application.
- ❖ A conviction is a criminal case in which you pled guilty to, or were found guilty of, a misdemeanor, gross misdemeanor, or felony.
- ❖ You must provide the date, county of conviction, and whether you pled guilty to the crime.
- ❖ If you are uncertain about any conviction information, please explain as best you can.
- ❖ To ensure you have included all your convictions, please check the following resources:
  - Bureau of Criminal Apprehension records at: <https://dps.mn.gov/divisions/bca>
  - Minnesota Department of Motor Vehicles at: <https://dps.mn.gov/divisions/dvs>
  - Minnesota State Courts at: <http://www.mncourts.gov/>
- ❖ You must notify the board if you are charged with a new offense after you submit your application.
- ❖ On the following pages, please provide information for every conviction for which you are seeking a pardon. Please add more sheets if necessary, using the same format.
- ❖ Under the “Other Conviction” section, you must list all convictions for which you are not seeking a pardon. This should include, but is not limited to, out-of-state convictions, federal convictions, and any misdemeanor traffic convictions for which you are not seeking a pardon.
- ❖ If you are unsure whether to include a conviction, please include the information.

**I am seeking a pardon for the following conviction:**

Provide a detailed description of the offense. If you are seeking a pardon for more than one conviction, please start with the most recent conviction and attach additional sheets if necessary, using the same format.

Court file number No. 6785	Date of conviction July 30, 1921	County of conviction St. Louis County, Minnesota	
Offense Rape	Sentence Indeterminate 30-year	Plea Not guilty	Discharge date November 25, 1941
Trial judge Hon. L.S. Nelson	Prosecuting attorney Warren Greene	Defense attorney R. C. McCullouch	Victim(s) Irene Tusken
Amount of court-ordered restitution, fines, or fees None	Amount paid N/A	Amount still owed N/A	If you paid all restitution for this conviction, attach documentation that confirms this.

Describe your offense.

See attached Memorandum In Support of Pardon

**If you went to trial in this case,** provide a brief statement of the evidence and testimony presented at your trial, to the extent the information is accessible to you or to the best of your recollection.

See attached Memorandum In Support of Pardon

List any violations of your conditions of release (parole, probation, supervised, conditional) related to this conviction, including the violation dates.

Violations	Violation dates
None	N/A

**I am seeking a pardon for the following conviction:**

Provide a detailed description of the offense. If you are seeking a pardon for more than one conviction, please start with the most recent conviction and attach additional sheets if necessary, using the same format.

Court file number	Date of conviction	County of conviction	
Offense	Sentence	Plea	Discharge date
Trial judge	Prosecuting attorney	Defense attorney	Victim(s)
Amount of court-ordered restitution, fines, or fees	Amount paid	Amount still owed	If you paid all restitution for this conviction, attach documentation that confirms this.

Describe your offense.

**If you went to trial in this case**, provide a brief statement of the evidence and testimony presented at your trial, to the extent the information is accessible to you or to the best of your recollection.

List any violations of your conditions of release (parole, probation, supervised, conditional) related to this conviction, including the violation dates.

Violations	Violation dates

**I have been convicted of the following offenses and I am not seeking a pardon from the Minnesota Board of Pardons on the following offenses:**

List all crimes for which you are **not** seeking a pardon extraordinary, including, but not limited to, all out-of-state and federal offenses and misdemeanor traffic offenses. Attach additional sheets if necessary, using the same format.

Offense	Date of offense	Sentence
Date of conviction/Court file number		County/State of conviction
Offense	Date of offense	Sentence
Date of conviction/Court file number		County/State of conviction
Offense	Date of offense	Sentence
Date of conviction/Court file number		County/State of conviction
Offense	Date of offense	Sentence
Date of conviction/Court file number		County/State of conviction
Offense	Date of offense	Sentence
Date of conviction/Court file number		County/State of conviction
Offense	Date of offense	Sentence
Date of conviction/Court file number		County/State of conviction
Offense	Date of offense	Sentence
Date of conviction/Court file number		County/State of conviction
Offense	Date of offense	Sentence
Date of conviction/Court file number		County/State of conviction

**The Reasons You Are Asking for a Pardon**

**Describe your past and current employment and education since your convictions (information must be provided here, do not attach a resume).**

See attached Memorandum In Support of Pardon

**Describe steps you have taken to improve yourself since your conviction(s) including such things as community service or volunteer activities, participation in support groups, and service to family members.**

See attached Memorandum In Support of Pardon

**Describe why you believe the board should grant you a pardon.**

See attached Memorandum In Support of Pardon

**What would a pardon help you accomplish?**

See attached Memorandum In Support of Pardon

**Individuals Speaking on your Behalf**

One or two people may speak in support of your application at the hearing.

Name and address of person who will speak	How you are associated	Brief summary of information to be presented
Jordon Moses 222 E Superior St, Ste. 327 Duluth, MN 55802 www.claytonjacksonmcghie.org	Clayton Jackson McGhie Memorial, Inc. Events Chair	See attached Memorandum in Support of Pardon
Jerry W. Blackwell Blackwell Burke P.A. 431 S. 7 <sup>th</sup> Street Minneapolis, MN 55415	Attorney for Jordon Moses	See attached Memorandum in Support of Pardon

**Recommendation Letters**

Although not required, the Board of Pardons requests that applicants submit three letters of recommendation. Please attach the letters to this application.

**I hereby declare under penalty of perjury that everything I have stated in this document is true and correct. I authorize any agency or individual in any state to provide the Minnesota Board of Pardons with information relating to my application including records of arrests and convictions and I understand that the information provided may include information previously subject to an order of expungement.**

**I further declare under penalty of perjury that everything I have stated in this document is true and correct based on the information currently available in the public record.**

Applicant signature

1/17/2020

Date

Hennepin

County

Minnesota

State



# **STATE OF MINNESOTA BOARD OF PARDONS**

## **APPLICATION FOR POSTHUMOUS PARDON OF MAX MASON**

On

Jordon Moses, Petitioner  
Behalf of Max Mason, Deceased

Jerry W. Blackwell (MN #186867)  
Corey L. Gordon (MN #0125726)  
BLACKWELL BURKE P.A.  
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ATTORNEYS FOR PETITIONER  
JORDON MOSES

## MEMORANDUM IN SUPPORT OF POSTHUMOUS PARDON OF MAX MASON

### I. INTRODUCTION

One hundred years ago, the City of Duluth experienced “the foulest blot upon the city ever known in its history.” *Grand Jury Finds that Public Safety Head is Incompetent for Place*, Duluth Herald, July 13, 1920, at 1. 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. *Id.* These murders – these lynchings – were witnessed by an estimated 10,000 people, twenty percent of the population in Duluth at the time. Michael Fedo, *The Lynchings in Duluth at 66* (Minnesota Historical Society, 2d ed. 2016) (hereinafter “Fedo”).<sup>1</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. *Id.* at 110.

The lynchings were not only a foul blot on Duluth, but the entire state as well. Not surprisingly, memories of the incident faded and it soon 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 have been unearthed and the story once again placed in the public eye.

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<sup>1</sup> Fedo’s book was originally published in 1979 by Brasch and Brasch under the title, *They Was Just Niggers*. 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*, MNHS SHOP (January 16, 2020, 12:01 P.M.), <https://www.mnhs.org/mnhpress/books/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* (University of Minnesota Press, 2003) (a 2004 Minnesota Book Award finalist) (hereinafter “Bessler”). 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.

For many years, the three victims of the lynchings – Elias Clayton, Elmer Jackson, and Isaac McGhie – lay, like their story, buried in unmarked graves. Fedo at 176. In 1991, when their bodies were discovered in Duluth’s Park Hill Cemetery, their graves were finally marked with granite headstones. *Id.* 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 where they were lynched. Chris Julin, *Dedicating a Memorial*, Minnesota Public Radio, October 10, 2003, *available at* [http://news.minnesota.publicradio.org/features/2003/10/10\\_julinc\\_lynchingdedicati/](http://news.minnesota.publicradio.org/features/2003/10/10_julinc_lynchingdedicati/). Duluth, and by extension all of Minnesota, had begun its process of healing, a process that will reach its zenith on June 15th of this year, the hundredth anniversary of the lynchings.

But the healing cannot be complete until one other wrong arising from the horrors of those events is recognized, and righted; the posthumous pardon of the one man convicted of the alleged rape: Max Mason.

This Memorandum is submitted to the Board of Pardons in support of a Petition to Grant a Posthumous Pardon to Max Mason pursuant to Minn. Stat. § 638.02, subd. 2 (2019).

## **II. THE FACTS<sup>2</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

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<sup>2</sup> 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 source materials. These holdings include those specifically related to Max Mason, including his original trial transcript and subsequent incarceration and parole records. [www.mnhs.org/duluthlynchings/](http://www.mnhs.org/duluthlynchings/). The Minnesota Historical Society currently maintains Fedo’s book files in its Reference Library. <https://www.mnhs.org/duluthlynchings/resources.php/>

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 Missabe 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 father 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.

Bessler at. 185.

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. *Id.* There, the Sullivans told the chief that “some niggers” had raped Irene Tusken. *Id.* 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. *Id.* 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. *Id.* 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 nigger that was idle between about nine and ten o'clock last night," he commanded.

Bessler at 185-86; *see also* Fedo at 19-22.

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." Fedo at 23. Even after a police officer urged him to try again, the boy failed to identify anyone. *Id.* 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 Virginia. Only when no incriminating statements were forthcoming were seven of the men set free.

Bessler at 186; *see also* Fedo at 23-24.

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. Bessler at 187. The police chief suspected that five of them had participated in the rape, but held McGhie only as a material witness. *Id.* Believing additional men had participated in the rape, the police chief sought assistance from Virginia police, where the circus had travelled for its next stop. There, St. Louis County sheriff's deputies arrested ten more men, including Max Mason:

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.

*Id.* at 187.

The next morning, Irene Tusken was examined by the family physician, Dr. David Graham. *Id.* 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.” *Id.* Word of the alleged rape and arrests of several Black circus workers spread like wildfire through the city. *Id.* at 188. By the evening of June 15, an angry mob had formed outside the jail demanding access to the prisoners. *Id.* The handful of police officers left to guard the jail that night struggled to keep the mob at bay. *Id.* at 189. 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. *Id.* at 191.

The mob grew louder. Rocks and epithets were hurled at the police station. *Id.* 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. The mob hanged the three men from a lamppost. *Id.* at 191-96. Order was ultimately 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. Bessler at 197. 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. Fedo at 118-19. 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.

Low 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.

Bessler at 205.

At Mason's trial, in late November, Dr. Graham, the family physician who had examined Tusken the morning after the alleged rape, became far less certain than he had been 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?" Bessler at 210. To that, he replied, "That would be hard to answer," noting that "evidence of assault was inconclusive." Fedo at 159; Bessler at 210-11.<sup>3</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. Bessler at 213. The strategy was not unreasonable given the all-white

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<sup>3</sup> 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." Duluth Rip-Saw June 26, 1920, p. 1-4.

[www.MNHS.org/duluthlynchings/documents/Negroes\\_Did\\_Not\\_Rape\\_Girl-81.001.php](http://www.MNHS.org/duluthlynchings/documents/Negroes_Did_Not_Rape_Girl-81.001.php)

jurors' likely biases and prejudices about African Americans, including Max Mason and his attorneys.<sup>4</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.

*Id.* at 215.

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. Bessler at 211.

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. *Id.* 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. *Id.* While such a condition could be consistent with gonorrhea, it could also have been consistent with other maladies.

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<sup>4</sup> “Talk circulating around Duluth at that time was that no jury could acquit a man who had to get those outside ‘nigger lawyers’ to defend himself; they were only asking for trouble.” Fedo at 156.



More importantly, even if both Tusken and Mason had gonorrhea, that simply was not a remarkable coincidence in 1920. 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 means all combined to ensure that these diseases reached epidemic proportions.

WJ Wertheimer, *The Politics of STDs. Dwindling Resources for a Growing Problem*, 17 Primary Care 183, 183 (1990).

When the United States entered World War II, the military draft and the resultant physical examinations of conscripts revealed high rates of infection: thirteen percent of the draftees were infected with either syphilis or gonorrhea. Allan M. Brandt, *The Syphilis Epidemic and Its Relation to AIDS*, 239 Science 377 (1988). In the United States, deaths from syphilis had soared nearly eightfold between 1900 and 1920. Dep't of Commerce, U.S. Bureau of the Census, *Mortality Statistics 1920* 39 (1922).

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.”

Fedo at 160-61.

The jury took less than one day to return a guilty verdict. Max Mason was sentenced to 30 years in prison. *Id.* at 162.

### **C. Max Mason’s Appeal**

Mason’s conviction was affirmed by the Minnesota Supreme Court in 1922. *State v. Mason*, 152 Minn. 306, 189 N.W. 452 (1922) (concluding that the evidence was sufficient for the jury to find guilt). 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.” *Id.* at 311, 189 N.W. at 453.

A dissent was authored by Duluth native Justice Homer Dibell, who had himself served as a district court judge in Duluth for twenty years before his election to the Court 1918, just two years before the Duluth lynchings. Bessler at 222. Dibell’s dissent, which has been described as “blistering,” *id.*, is worthy of quotation in its entirety.<sup>5</sup>

DIBELL, J. (dissenting).

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

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<sup>5</sup> Justice Dibell wrote 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” within White society and even Justice Dibell’s sensitive dissent advocating for reversal of Max Mason’s conviction nonetheless reflected the prevailing white attitudes and backdrop of accepted racist views of that era.

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 relation 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.' 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 infection. 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.

*Mason*, 189 N.W. at 454-55.

#### **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 of 1925. Exhibit A, Minnesota State Prison. Parole Record of Max Mason: Case No. 6785. Minnesota Historical Society, Saint Paul, MN ("Exhibit A"). On September 2, 1925, his application was finally approved. Exhibit E.

The minutes of the January 1923 Board of Parole<sup>6</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 living 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.

Exhibit B, Minnesota Board of Pardons. Max Mason: Application No. 5702, Pardon Calendar [Minutes] 1923. Minnesota Historical Society, Saint Paul, MN (“Exhibit B”).

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.

*Id.*

Nonetheless, Mason’s application was denied at that point.<sup>7</sup> *Id.*

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<sup>6</sup> 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. § 5424-31. 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.*, Exhibit G, Minnesota State Prison. Application No. 5702, Case No. 6785 (December 18, 1922). Minnesota Historical Society, Saint Paul, MN (“Exhibit G”). 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*, Exhibits A and E; *see also* Exhibit H, Minnesota State Prison. Denial of Parole Application: Case No. 6785 (March 13, 1923). Minnesota Historical Society, Saint Paul, MN (“Exhibit H”). 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. Exhibit A.

<sup>7</sup> 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:

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.

Exhibit C, Minnesota State Prison. Letter from Mason M. Forbes to State Board of Parole, July 21, 1925. Max Mason: Case No. 6785. Minnesota Historical Society, Saint Paul, MN ("Exhibit C").

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:

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.

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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 at 124-25. Preuss was elected governor that fall, and would serve for the next four years. Thus, he served on the Board of Pardon 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.

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.

Exhibit D, Minnesota State Prison. Letter from L.S. Nelson to State Board of Parole,

May 25, 1925. Max Mason: Case No. 6785. Minnesota Historical Society, Saint Paul, MN (“Exhibit D”).

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.

Fedo at 172. 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 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 16 years. Exhibit E, Minnesota State Prison. Discharge Order, September 3, 1925. Max Mason: Case No. 6785. Minnesota Historical Society, Saint Paul, MN (“Exhibit E”).

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 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 Pearline Sharpley in Tuscumbia, Alabama. He became stepfather to Pearline's 7-year-old daughter, Helen. By 1930 the family of three had moved to Memphis, Tennessee, where (according to census records) Mason worked as a waiter at a club. Memphis city directories from the 1930s indicate that Mason also worked as a porter and laborer. By 1939, Max and Pearline had split up, and Pearline remarried. On November 14, 1942, Mason died in Memphis from bacterial endocarditis related to his rheumatoid heart disease. His death certificate listed his occupation as a waiter. He was 46 years old.<sup>8</sup>

### **III. AVAILABILITY OF A POSTHUMOUS PARDON UNDER MINNESOTA LAW**

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<sup>8</sup> 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 . . ." Exhibit I, Letter from Rev. I.E. Nolte, The Duluth Mission, to State Board of Pardon and Parole (August 15, 1922) (from Parole Record of Max Mason: Case No. 6785). 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 . . ." Exhibit J, Letter from Jerry Mugivan, The John Robinson Shows Co., to Frank A. Whittier, Parole Department, Minnesota State Prison (July 13, 1922) (from Parole Record of Max Mason: Case No. 6785).

## A. Pardons in Minnesota

A pardon has been described as a “matter of mercy,” *State ex rel. O’Connor v. Wolfer*, 54 N.W. 1065, 1065 (Minn. 1893), and an “act of grace,” *Washburn v. Utecht*, 51 N.W.2d 657, 657-58 (Minn. 1952):

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.”

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

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.

*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.”

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

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.” Minn. Const. art. V, sec. 7. 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.” *Id.* 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.” Minn. Stat. § 638.01 (emphasis added). 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 section 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. *Id.* This is also reflected in the legislative history of section 638.01, where both a “prisoner” and since March 1, 1906, “any person” may seek pardon relief from the board of pardons.<sup>9</sup> Here, therefore, both under the Minnesota Constitution and section 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. Minn. Stat. § 638.02, subd. 2. In 1925, the trial judge urged the Board of Pardons to either pardon or parole Max Mason. Exhibit D. He was ultimately granted a conditional parole. Now, one hundred years after the tragic and terrible events in Duluth, the unspeakable horrors of the lynchings, and the wrongs committed against Max Mason, it is time

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<sup>9</sup> 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.

for *this* Board of Pardons to right a century-old wrong and grant a pardon extraordinary to Max Mason, and let the full healing finally begin.

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

Although the grant of a posthumous pardon appears to be without precedent in Minnesota, an analysis of the history of pardons in the United States demonstrates that the Board of Pardons does, indeed, have the authority to grant posthumous pardons in appropriate cases.

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.” *Id.*

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 s 2, cl. 1, was to allow plenary authority to the President to ‘forgive’ the convicted person in part or entirely . . .” *Schick v. Reed*, 419 U.S. 256, 266 (1974). 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.” *Id.* at 267. 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. William F. Duker, *The President’s Power to Pardon: Constitutional History*, 18 Wm. & Mary L. Rev. 475, 525-26, (1977). “Alone among the power enumerated in the Constitution, the power to pardon

proceeds unfettered.” *Id.* at 536. The presidential pardon power is thus very broad. *See Ex parte Garland*, 71 U.S. 333, 380 (1886) (“The [pardon] power thus conferred is unlimited, with the exception [for impeachment] stated.”).

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, is instructive.

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.” *Ex parte Grossman*, 267 U.S. 87, 117 (1925). “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.” *Id.* at 108-109. As noted by the *Schick* court, the draftsmen of the Constitution “were well-acquainted with the English crown authority to alter and reduce punishments as it existed in 1787,” 419 U.S. at 260, and the “draftsmen of Art. II, § 2, spoke in terms of a ‘prerogative’ of the President, which ought not to be ‘fettered or embarrassed.’” *Id.* at 263.

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.

*Id.* at 262. *See also*, Hamilton’s Federalist No. 69, p. 464 (J. Cooke ed. 1961) (summarizing “proposed section to powers, including the power to pardon as ‘resemble[ing] equally that of the King of Great Britain and the Governor of New York.’”). 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. Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from The King*, 69 Tex. L. Rev. 569, 589 (1991).

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.

Leslie Sebba, *The Pardoning Power – a World Survey*, 68 J. Crim, L. & Criminology 83, 112 (1977).

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-20th century that any posthumous pardon was issued.

In 1950, Timothy Evans was convicted of murdering his wife and child, and executed. During his trial, Evans had accused his downstairs neighbor, John Christie, of committing the murders. 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. Prior to his own execution, Christie confessed to murdering Mrs. Evans. An official inquiry concluded in 1966 that Christie had also murdered Evans' daughter.

Not surprisingly, the wrongful conviction and execution of an innocent man had a significant impact on the British public.<sup>10</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. *See*, 734 Parl. Deb., H.C. (5th Ser.) at 38-40 (1966). This was apparently the first exercise of the power to grant posthumous pardons by an English sovereign. The second posthumous pardon was granted by Queen Elizabeth II in 1993 to a man convicted of murder and executed in 1953. In 2014, the Queen posthumously pardoned Alan Turing, famously credited with breaking the Nazi Enigma code during WWII, for the crime of homosexuality. He had been chemically castrated in 1952, and committed suicide two years later. 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>.

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.” 8 Halsbury’s Laws of England 482 ¶ 823 (4th ed. 1996).

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. Darryl W. Jackson et. al., *Bending Toward Justice: The Posthumous Pardon of Lieutenant Henry Ossian Flipper*, 74 *Ind. L.J.* 1251 (1999) [hereinafter, Jackson, *Bending Toward Justice*]. Since then, only two other

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<sup>10</sup> The British folksinger and songwriter Ewan McColl penned the song “Go Down Ye Murders, 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.

presidential pardons have been granted posthumously: In 2008, by President George W. Bush to Charlie Winters, who had been imprisoned for 18 months for violating the 1939 Neutrality Act by facilitating the shipment of weapons to the fledgling State of Israel, Eric Lichtblau, *Jailed for Aiding Israel, but Pardoned by Bush*, The New York Times, Dec. 23, 2008, <https://www.nytimes.com/2008/12/24/washington/24pardons.html>, and in 2018, by President Donald Trump, who 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>11</sup>

If the power of presidents to grant posthumous pardons had been available since 1787, 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 present 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 19th century and one case from 1915.<sup>12</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

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<sup>11</sup> 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, 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>.

<sup>12</sup> See *Burdick vs. United States*, 236 U.S. 79 (1915); *United States vs. Wilson*, 32 U.S. 150, 161 (1833); *Sierra v. United States* 9 Ct. Cl. 224(1873); *Meldrim v. United States*, 7 Ct. Cl. 595 (1871); and *Caldwell's Case*, 11 Op. Atty. Gen. 35, (1864).



is not complete without acceptance.” *Wilson*, 32 U.S. at 161. 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.”

*Id.*

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.” *Schick*, 419 U.S. at 261. 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.

*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 19th 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. *See generally*, Jackson, *Bending Toward Justice*.

Not surprisingly, 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 also 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. Authority of the Governor to grant a posthumous pardon, Tex. Att’y Gen. Op. GA-0754 (2010).

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. . . .

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

In interpreting the Texas Constitution, The Texas Attorney General presumed that its language was carefully selected and construed its words as they are generally understood and relied heavily on the plain language of the Constitution’s literal text. *Id.*; *see also*, *Ninetyeth Minn. State Senate v. Dayton*, 903 N.W. 20, 609, 618 (Minn. 2017) (“We must follow the plain language” of [the Minnesota Constitution]). 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 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.

Tex. Att’y Gen. Op. GA-0754. The Texas Attorney General noted that a prior opinion of the Office of the Texas Attorney General had concluded otherwise. In that opinion, Tex. Att’y. Gen. Op. C-471 (1965), 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. *Hunnicut v. State*, 1885 WL 6857 (Tex. Ct. App. 1885).

Citing the same U.S. Supreme Court case that ultimately led to the acceptance of presidential power to grant posthumous pardons, *Schick*, 419 U.S. at 261, the Texas Attorney General concluded that the basis for issuing a pardon “is the public welfare, not the consent of the grantee.” Tex. Att’y Gen. Op. GA-0754 (quoting *Biddle*, 274 U.S. at 486). 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 of 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.

Tex. Att’y Gen. Op. GA-0754. 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. 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. *Posthumous Pardons Granted in Am. Hist.* (Death Penalty Info. Ctr.), Mar. 2011, at 10.

More recently, the State of 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 Thomas, who came to be known as the “Groveland Four,” were accused of abducting and raping a seventeen year old white girl in 1949. 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. Ian Stewart, *Accused of Rape 70 Years Ago, 4 Black Men Get Posthumous Pardons*, NPR, Jan. 11, 2019, <https://www.npr.org/2019/01/11/684540515/accused-of-florida-rape-70-years-ago-4-black-men-get-posthumous-pardons>.

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. 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. *Id.*

One year ago, 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.” *Id.*

Of particular note, the purported victim of the 1949 attack, then 86, appeared before the Florida Board of Executive Clemency where she stood by her original allegations. “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. *Id.*

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 evidence indicating that their conviction and sentencing had been the fruit of racism. 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 Granted in Am. Hist.* at 10.

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.” *Id.* at 10.

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. *Id.* at 6.; Gary Younge, *Pardon for maid executed in 1945*, The Guardian, Aug. 16, 2005, <https://www.theguardian.com/world/2005/ang/17/usa.garyyoung1>.

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. 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>.

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. Krishnadev Calamur, *Alabama Pardons Scottsboro Boys in 1931 Rape Case*, NPR, Nov. 21, 2013, <https://www.npr.org/sections/thetwo-way/2013/11/21/246576665/alabama-pardons-scottsboro-boys-in-1931-rape-case>. This tragic episode gave rise to an Alabama statute setting forth procedures for posthumous pardons, titled by the legislature as the "Scottsboro Boys Act," 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." *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*, Oct. 26, 1996, <https://writing.upenn.edu/~afilreis/50s/race-riot-verdict.html>. Modern historiography has demonstrated that the 1921 Tulsa riots, 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. 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. 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.

Not surprisingly, no white people were ever convicted of any crimes in connection with the 1921 Tulsa riot, 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 riot 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. *See* Okla. Comm’n to Study the Tulsa Race Riot of 1921, Report of the Tulsa Race Riot, (Feb. 28, 2001) (available at <https://www.okhistory.org/research/forms/freport.pdf>). *See also* H.R. 1995, 110th Congress (2007-2008) (available at <https://www.congress.gov/bill/110th-Congress/house-bill/1995/text>).

While there have been a handful of other posthumous pardons granted throughout the United States,<sup>13</sup> the cases discussed above – as well as the pardons issued by Presidents Clinton

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<sup>13</sup> California 1996, Jack Ryan, convicted in 1925 of murder. Dave Leshner, *Dead Man's Name Finally to Be Cleared*, Los Angeles Times, Apr. 15, 1996, <https://www.latimes.com/archives/la-xpm-1996-04-15-mn-58720-story.html>; Colorado 2011, Joe Arridy, executed 1939 for sexual assault and murder. Keith Coffman, Colorado governor pardons man executed for murder in 1939, Reuters, Jan. 7, 2011, <https://www.reuters.com/article/us-pardon-colorado-posthumous/colorado-governor-pardons-man-executed-for-murder-in-1939-idUSTRE70660W20110107>; Florida 2010, Jim Morrison, 1970 conviction for indecent exposure and profanity. Gary Fineout, *Jim Morrison Is Pardoned in Indecent Exposure Case*, The New York Times, Dec. 9, 2010, <https://artsbeat.blogs.nytimes.com/2010/12/09/jim-morrison-is-pardoned-in-indecent-exposure-case/>; Georgia 1986, Leo Frank, sentenced to death for 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*, Los Angeles 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, 1986 conviction for stealing from bank he co-owned. John W. Frece, *Schaefer grants Cardin pardon in S&L scandal*, The Baltimore 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, Aug. 23, 1977, [https://saccoandvanzetti.org/sn\\_display1.php?row\\_ID=12](https://saccoandvanzetti.org/sn_display1.php?row_ID=12); Montana 2006, 78 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 1986, 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, <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>). 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,



and Trump, have a common theme: African American men convicted by all-white judges and juries based upon racism and racist perceptions of African American men that pervaded American Society.

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.”

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

#### **IV. 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 partially 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.

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<https://www.theglobeandmail.com/news/national/nova-scotia-redresses-a-civil-rights-injustice/article1210744/>; Nova Scotia 2017, Gabriel Sylliboy, a renowned Mi’kmaq leader convicted in 1929 of hunting out of season. 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>.

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. 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>. 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 exacerbated 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.

Allan J. Lichtman, *White Protestant Nation: The Rise of the American Conservative Movement* 39 (1st ed. 2008).

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 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.

LaGarrett J. King, et al., *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).

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 20th 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 “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 woolly”; and (g) “thick epidermis” (pp. 316-317).

S. Plous & Tyrone Williams, *Racial Stereotypes from the Days of American Slavery: A Continuing Legacy*, 25 J. of Applied Soc. Psychol. 795-96 (1995).

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.” Andrew Johnson spoke of the “great difference between the two races in the physical, mental, and moral characteristics.” 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.

*Id.* at 796.

These attitudes did not disappear at the end of the Civil War. In the early 20th 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.” *Id.*

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 20th 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 a savage sexual predator threatening white womanhood.

Popular culture provides a window into the thoughts, attitudes, and prejudices of society. In the late 19th 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.

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

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

*Id.* at 106.

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.

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. These works helped solidify the notion of the black man as 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 Klan, since its use of force protects white women from the beastly instincts of black men.

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).

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 Nigger" 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 . . .

Laura Green, *Negative Racial Stereotypes and their Effect on Attitudes Toward African-Americans*, <https://www.ferris.edu/htmls/news/jimcrow/links/essays/vcu.htm>.

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.

Nowatzki at 162.

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 the nation's oldest and most despicable racist organization: the Ku Klux Klan.

While the Ku Klux Klan was, in the 19th 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.

Lichtman at 42.

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-banished from the state's collective memory. It is only recent scholarship that has explored and illuminated the history of the KKK in Minnesota. 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/MNHistoryMagazine/articles/61/v61i08p360-371.pdf; Elizabeth Dorse Hatle, *The Ku Klux Klan in Minnesota* (2013).

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 reborn 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 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.

Elizabeth Dorse Hatle & Nancy M. Vaillancourt at 361.

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:

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.

*Id.* at 362.

In 1921, Northstar Klan No. 2 began holding meetings at Olivet Methodist Church in Minneapolis. Within a year, the Klan claimed 1,500 members in the Duluth area chapter. In 1925, the Knights of the Ku Klux Klan of Minnesota filed Articles of Incorporation with the State.

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. *Id.* at 362-63.

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

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.

*Id.* at 364.

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.

Hatle 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.) *Id.* 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.

*Id.* at 119.

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 very 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>14</sup> that Max Mason

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<sup>14</sup> 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

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 “born” to refer to the social philosophy advocating the improvement of human heredity through selective breeding. Encouraging people with good genetic traits to reproduce was known as positive eugenics, whereas discouraging people with bad qualities from reproducing was known as negative eugenics. 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.

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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.

Adam Cohen, *Imbeciles: The Supreme Court, American Eugenics, and the Sterilization of Carrie Buck 2* (2016). 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.

*Id.* at 4.

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. *Id.* at 59.

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 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.

Madison Grant, *The Passing of the Great Race, or The Racial Basis of European History* 16 (4th ed. 1921).

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.

*Id.* at 87-88.

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

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. 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. See Molly Ladd-Taylor, *Eugenics Sterilization in Minnesota*, 59 Minn. Hist. 237, 237-45 (2005).

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,” 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.

*Id.* at 241. The drumbeat for a eugenics sterilization law grew deafening during the time of Max Mason’s incarceration, ultimately resulting in Minnesota becoming the 17th state, on April 8th of 1925, to legalize eugenic sterilization. *Id.*

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.”

Martin S. Pernick, *The Black Stork: Eugenics and the Death of “Defective” Babies in American Medicine and Motion Pictures since 1915*, 55 (1996).<sup>15</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. *See* James Q. Whitman, *Hitler’s American Model: The United States and the Making of Nazi Race Law* (2017). 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 Adolph Hitler

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<sup>15</sup> “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 filthy creature who was suffering from a loathsome disease.” Pernick 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.

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.” 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.” *See* Exhibit F, Letter from Dr. Charles F. Dight, President, Minnesota Euenics Society, to Chancellor Adolf Hitler (August 1, 1933) (“Exhibit F”).

### **E. *De Facto* Segregation**

Racial covenants creating all-white neighborhoods began appearing in Minnesota in 1918. *See generally* Mapping Prejudice, <https://www.mappingprejudice.org> (last visited Jan. 15, 2020). In 1926, racial covenants were upheld by the U.S. Supreme Court. *See, Corrigan v. Buckley*, 271 U.S. 323 (1926). 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.” *See Jim Crow of the North*, Minnesota Experience, season 1, ep. 20 (Feb. 25, 2019), <https://www.tpt.org/minnesota-experience/video/jim-crow-of-the-north-stijws/>.

## **V. CONCLUSION**

The tragic events giving rise to the Duluth lynchings in 1920 also resulted in a grievous wrong against Max Mason, the one individual convicted of the purported crimes. It is not surprising that Mason, a poor African-American laborer from the South, was convicted of a fictitious charge of raping a white woman by an all-white jury in the 1920s in Duluth.

The evidence clearly demonstrates that Max Mason was convicted of the alleged crime based on the flimsiest of “evidence,” especially in light of the history of the times and



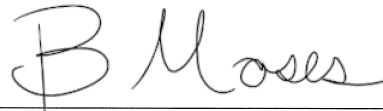
contemporary standards for convictions based on circumstantial evidence. The judge and prosecutor at the time were not opposed to a pardon for Max Mason.

Moreover, following his parole and expulsion from Minnesota, Max Mason by all accounts went on to live a quiet, crime-free life, until his premature death in his 40s. As a result, he is of “good character and reputation” and deserving of a pardon.

There is no question that the Minnesota Board of Pardons is vested with the authority to grant a posthumous pardon to Max Mason. There is also no question that now, one century after the horrors of Duluth in 1920, the time has come for Max Mason to receive that pardon. Accordingly, we hereby respectfully request that the Board of Pardons grant the Petition for Pardon Extraordinary of Mr. Max Mason.

Dated: January 17, 2020

Respectfully submitted,



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Jordon Moses, Petitioner



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Jerry W. Blackwell (MN #186867)

Corey L. Gordon (MN #0125726)

BLACKWELL BURKE P.A.

431 South Seventh Street, Suite 2500

Minneapolis, MN 55415

Phone: (612) 343-3232

Fax: (612) 343-3205

Email: [blackwell@blackwellburke.com](mailto:blackwell@blackwellburke.com)

[cgordon@blackwellburke.com](mailto:cgordon@blackwellburke.com)

ATTORNEYS FOR PETITIONER  
JORDON MOSES

Discharged SEP 8 - 1925

2025 5191 10-10 500

No. 6785

Name Max Mason Alias \_\_\_\_\_  
 Rec'd August 8, 1921 County St. Louis  
 Crime Rape  
 Maximum 30 yrs Minimum 7 yrs  
 Previous Commitments \_\_\_\_\_

**Parole Record**

ACTED ON	DISPOSITION	Paroled
SEP 12 1922	Denial	Employer
Mar 13 1923	Denial	Employer
SEP 27 1923	Denial	Employer
MAR 12 1924	Denial	
SEP 5 1924	Denial	Violation
MAR 5 1925	Denial	
SEP 2 1925	Disch'd to Alabama	Returned

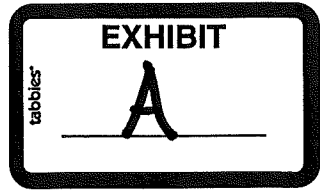
inner \_\_\_\_\_  
 Officers Sent \_\_\_\_\_  
 marks \_\_\_\_\_

**Discharge**

Eligible \_\_\_\_\_ Max. Exp. Date Nov 25, 1941

ACTED ON	DISPOSITION	Date of Discharge

Remarks \_\_\_\_\_



Max Mason: Case No. 6785.

Case Files.

Parole Record.

Petty Cash balance 80.71  
 Exp. 56.61  
 Total Petty Cash 26.31  
 Paid on Parole 26.31  
 Balance Retained 0  
 Discharge Allowed 25.00  
 Paid on Parole 0  
 Balance Retained 0  
 Total Amount Retained 25.00

MAR 18 1922

3/

Date	Payments Amount	Balance Due

NEW CASES.

5702 - MASON, MAX (6785) Convicted June 30th, 1921 in Saint Louis County of Rape, and sentenced to the Prison for 7 - 30 years.

*N*

Age 23 years. "I am not guilty and know nothing about the crime which is alleged to have been committed."

BRIEF FACTS: Mason was working for the John Robinson circus which showed in Duluth on June 15th, 1921. It was claimed that a young man and woman visited the circus this evening and that six colored men, one of them Mason, grabbed this young woman and took her to a ravine and that five of them ravished her, that the young man was kept under control by a revolver held by one of the party. He was arrested that night, but they failed to identify him, and he was released. He was arrested again the next day in Virginia and brought back to Duluth. He was one month later identified. He was convicted but still claims innocence. He says that the people of Duluth were worked up over the matter and that the County Attorney was anxious to secure a conviction. Three men suspected of complicity in the crime were hung by a mob.

PRISON: First grade, conduct and disposition uniformly good; general health - good.

Single; parents dead, One brother and sisters in Alabama.

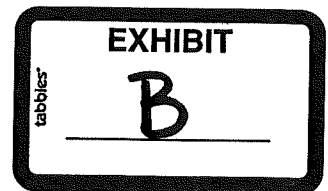
Served 30 days on workfarm at Louisville, Ky. Letters received at prison indicate that otherwise he has a good record, has been steadily employed and considered industrious.

Denied parole in September, 1922.

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 living 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."

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." (Forbes)

*Judge*      *Denied*



Minnesota State Prison (Stillwater, Minn.) [Stillwater State Prison].

2

Max Mason: Case No. 6785.

Case Files.

Letter from Mason M. Forbes to State Board of Parole, July 21, 1925.

MASON M. FORBES  
COUNTY ATTORNEY  
DULUTH, MINN.

OFFICE OF  
COUNTY ATTORNEY  
COUNTY OF ST. LOUIS  
COURT HOUSE  
DULUTH, MINNESOTA

June 12, 1925

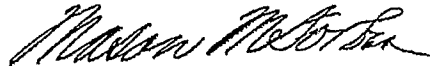
ASSISTANT COUNTY ATTORNEYS  
HARRY E. BOYLE,  
DULUTH, MINN.  
CARL A. ONKKA,  
VIRGINIA, MINN.  
ELLIS J. BUTCHART,  
DULUTH, MINN.  
VICTOR H. JOHNSON,  
HARRING, MINN.  
LOYD J. PALMER,  
DULUTH, MINN.

State Board of Parole,  
St. Paul,  
Minnesota.

Gentlemen: In re Max Mason

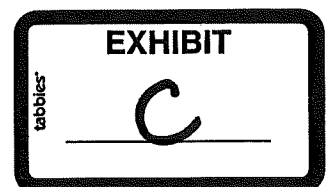
Referring to your inquiry regarding the attitude of this office toward the granting of a parole to the above named defendant, I beg to say that on two occasions in reply to inquiries from the Board of Pardons I advised and recommended the exercise of clemency, and I am of the opinion that if the defendant's 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 have been hopeful that some clemency would have been extended to this defendant long ere now.

Yours very truly,



MASON M. FORBES  
County Attorney

MMF: F



Max Mason: Case No. 6785.

Case Files.

Letter from L. S. Nelson to State Board of Parole, May 25, 1925.

L. S. NELSON, JUDGE

G. FRED CARS, COURT REPORTER

Thirteenth Judicial District

Washington, Minnesota

April 27, 1925.

Mr. H. B. Whittier,  
State Capitol,  
St. Paul, Minnesota.

Dear Sir:

In re Max Mason.

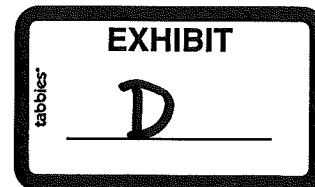
Max Mason, who was tried and convicted in my court in St. Louis county, and sentenced to Stillwater penitentiary - I have always had some doubt about his guilt, and had it not been that his counsel raised some legal questions that I thought should be passed upon by the Supreme Court, I was of the intention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

Yours truly,

*L. S. Nelson*  
Judge



Minnesota State Prison (Stillwater, Minn.) [Stillwater State Prison].  
Max Mason: Case No. 6785.  
Case Files.  
Discharge Order, September 3, 1925.

1

0847 2-24 5275 200

**DISCHARGE ORDER**  
Minnesota State Prison

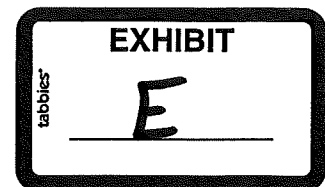
To J. J. Sullivan, Warden:

At a regular meeting of the State Board of Parole,  
held September 3rd, 1925, 192, the conditional discharge of  
Max Mason-6785 No. 6785 was authorized  
to take effect September 3rd, 1925, 192. On condition that you go to  
Decatur, Alabama, leaving not later than Sept 4th, 1925, and to remain out of  
the State of Minnesota until November 25th, 1941.  
By the Board:

Accepted

*Max Mason*

*W. J. Sullivan*  
Chairman.  
*J. J. Sullivan*  
Secretary.



*Copy Letter to + Reply from Adolf Hitler of Germany*

# Minnesota Eugenics Society

Incorporated 1926

OAK GROVE AT W. 15TH STREET - Wesley Temple  
(300 N. NATIONAL LIFE BUILDING)

MINNEAPOLIS, MINNESOTA

August 4-1933.

## FIRST

### EXECUTIVE COMMITTEE

DR. CHARLES F. DIGHT, PRESIDENT  
DR. GEORGE G. EITEL, VICE PRESIDENT  
W. A. LAIDLAW, 2ND VICE PRES.  
DR. WALTER E. LIST, SECRETARY  
C. A. QUIST, TREASURER

Chancellor Adolf Hitler,  
Berlin, Germany.  
Honorable Chancellor;

I inclose a clipping from the Minneapolis Journal of Minnesota, United States of America, relating to, and praising your plan to stamp out mental inferiority among the German people.

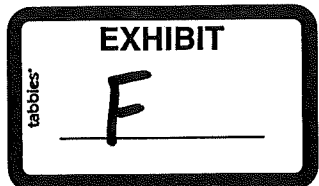
I trust you will accept my sincere wish that your effort along that line will be a great success and will advance the eugenics movement in other nations as well as in Germany.

Sincerely,  
C. F. Dight, M.D.  
President Minnesota Eugenics Society

### LOOKING TO HITLER

To the Editor of The Journal  
The report persistently comes from Berlin that congenital feeble-mindedness, insanity, epilepsy, and some other serious conditions that are inheritable are to be stamped out among the German people. Adolf Hitler is having broad and scientific plans formed for this. If carried out effectively, it will make him the leader in the greatest national movement for human betterment the world has ever seen. The world's two great needs are co-operation in industry for social good and biological race betterment through eugenics.

—C. F. Dight,  
Minneapolis.





Minnesota. Board of Pardons.  
Max Mason: Application No. 5702.  
Pardon Application.  
File no. 5702, 1922-1924.  
Application.

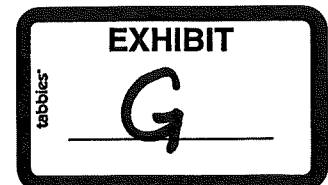
1

No. 5702

Name Max Mason

PRISON

STATE OF MINNESOTA  
BOARD OF PARDONS



*Winters*

# APPLICATION

**To the Board of Pardons  
OF THE STATE OF MINNESOTA**

- The application of Max Mason No. 6785  
(Give name under which convicted)  
for a pardon or commutation of sentence  
(State whether pardon or commutation is desired)
- Placed guilty on the 30<sup>th</sup> day of July 1921 in the District  
Convicted   
Court in and for the County of St. Louis of the crime  
of Rape  
and imprisoned in the State Prison  
on Aug. 8, 1921 for the term of Ind. - Max 90 yrs.; and who is  
now imprisoned pursuant to such sentence.
- The name and postoffice address of the trial judge is Hon. L. S. Nelson,  
Duluth, Minn.  
and of the prosecuting attorney is Mason W. Forbes, Esq.,  
Duluth, Minn.
- Applicant's full and true name is Walter Max Mason  
His age is 22 years and his birth-place was Alabama  
Father's name Deceased Nationality Afro Amer  
Mother's name Deceased Nationality Afro Amer
- I have never been known by any alias except Sonnyboy.
- I was never arrested, indicted or convicted of any other offense except 30 day on work  
farm Louisville Ky. Fined \$10<sup>00</sup> at Pineville Ky.  
Alabama State Prison for Larceny.
- Applicant's occupation and residence during the five years next before conviction of the offense for which he is  
now serving were as follows: Employed as labour and was  
with circus etc. Home at Decatur, Ala.

Minnesota. Board of Pardons.  
Max Mason: Application No. 5702.  
Pardon Application.  
File no. 5702, 1922-1924.  
Application.

8. Attach hereto either a transcript of the evidence introduced at the trial or give a brief statement of the facts leading to conviction of the crime for which you are now serving. [2]

*I implicated with others (who were lynched in Duluth) in ravishing a young woman in Duluth. Alleged to have held a gun on her young man escort while the girl was ravished.*

Minnesota. Board of Pardons.  
Max Mason: Application No. 5702.  
Pardon Application.  
File no. 5702, 1922-1924.  
Application.

9. Your petitioner asks that a Pardon or Commutation be granted upon the grounds and for the reasons following:  
(Pardon or Commutation)

*That I am not guilty and know  
nothing about the crime which is  
alleged to have been committed*

Respectfully submitted,

*Max Mason*

Dated at *Stillwater* this *18<sup>th</sup>* day of *December*, 19*22*

Minnesota State Prison (Stillwater, Minn.) [Stillwater State Prison].  
Max Mason: Case No. 6785.  
Case Files.  
Parole Notice, March 13, 1923.

1

### MINNESOTA STATE PRISON

Stillwater, 3/13 1923  
Name Max Mason No. 6785

After carefully considering your application for parole, the State Board of Parole requests me to inform you that the same has been denied.

F. A. WHITTIER, State Parole Agent.

Per Ed J. Mulloy

4555 S255 7-92 5m



Max Mason: Case No. 6785.

Case Files.

Letter from I. E. Nolte to State Board of Parole, August 19, 1922.

1922  
 INTER-CHURCH BOARD  
 OF DIRECTORS  
 H. A. SEDGWICK  
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 GUST HESLIN  
 BEN OLSON

**The Duluth Mission**

22 Sixth Avenue West  
 Rev. and Mrs. I. E. Nolte, Supts.  
 Duluth, Minn.  
 4525 Cambridge St.

JOSEPH SERVICE NIGHTLY  
 COUNTY JAIL, WORKERS  
 FROM READING ROOM  
 FREE EMPLOYMENT OFFICE  
 Phone 24688 207

*Mason*  
*to 6785 Prison*  
*Max Mason*  
*Repe*  
*Aug 8 - 1921 - Age 22 - S-D*  
*to prison by*  
*Sept calendar*

Duluth, Minn., August 15 1922

Board of Pardon and Parole,  
State Capitol,  
St. Paul, Minn.

Dear Sirs:- I understand that the case of Max Mason (negro) of Duluth, will be called to your attention very soon and I am very interested in this matter.

Having religious services in the County Jail here every Sunday we became well acquainted with Mr. Mason while held here for more than a year. We have every confidence that Mr. Mason is thoroughly reformed through religious influences which we believe will do more than any other influence.

~~While the case on which Mr. Mason was convicted was one of the most villainous ever seen in such prominent touch with him that we could not be more positive of his innocence. I am sure that there can be no danger of Mr. Mason being found in crime again and that a pardon or parole for him could not be a mistake.~~

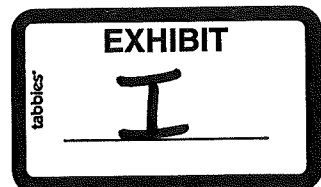
~~Personally I would ask an unconditional pardon as I understand that his sentence was from one to thirty years and he has now completed one year of that sentence. If your Board would prefer to give Mr. Mason a parole I should be glad to act as his parole officer and I am sure that he should be glad to return to Duluth and be under our care. We have nine men and women on parole now from the courts here in connection with our work among the prisoners here. We feel that we can serve both the State and Mr. Mason by acting in this capacity. It will well for him to keep in touch with religious influence while getting back into civil life again under the handicap of being an ex-convict and especially connected with so bad a case.~~

Hoping that you will give this matter the most kindly consideration and thanking you for whatever favor you may give Mr. Mason,

we are,

Yours for Christian Service,

*I. E. Nolte*



Minnesota State Prison (Stillwater, Minn.) [Stillwater State Prison].  
Max Mason: Case No. 6785.  
Case Files.  
Letter from Jerry Mugivan to Frank A. Whittier, July 13, 1922.

1

6785

# John Robinson's Circus

Waterloo, Iowa.  
July 13-1922

PERMANENT ADDRESS AND  
WINTER QUARTERS  
PERU, IND.

Mr. F. A. Whittier  
Stillwater, Minnesota.

Dear Sir:

With reference to your letter regarding Max Mason will say that he had been in our employ for quite a little while and while here was always ready and willing to obey orders, kept his place and his morals and general character and habits about the average.

We will appreciate anything that you may do for him to gain his release and will be pleased to re-employ him should he be released from the institution.

Respectfully Yours.

THE JOHN ROBINSON SHOWS CO.

*Jerry Mugivan* Pres.

JJM.  
FFM.

RECEIVED  
JUL 24 1922  
Parole Department  
Minnesota State Prison.

ADDRESS ALL COMMUNICATIONS TO JOHN ROBINSON'S CIRCUS AND NOT TO INDIVIDUALS

