



Lieutenant General John J. Tolson, Commanding General XVIII Airborne Corps, presents the Silver Star and Bronze Medal posthumously to Gloria Best and Hugh Best Jr., who are receiving the medals on behalf of their deceased son, Hugh E. Best III, who was killed in action in 1969 in the Vietnam War. (Credit: C. Gene Tyree, 20 June 1969)

Lore of the Corps

Justice Was a “Casualty of War” A Kidnapping, Rape, and Murder in Vietnam

By Fred L. Borch III

On 17 November 1966, four infantrymen—Sergeant (SGT) David E. Gervase, and Privates First Class Steven C. Thomas, Cipriano S. Garcia, and Joseph C. Garcia—on a five-man reconnaissance patrol in South Vietnam entered a small village and kidnapped a twenty-year-old Vietnamese woman named Phan Thi Mao. The fifth man in the patrol, Private First Class (PFC) Robert M. Storeby, refused to participate in the abduction. He also refused to take part in the gang rape of Mao that followed the kidnapping. Storeby also had nothing to do with the murder of Mao the following day, when she was stabbed and then shot by

PFC Thomas to cover up crimes committed against her. What follows is the story of this horrific war crime and how, despite the trials by general courts-martial that followed this kidnapping, rape, and murder, justice very much was a casualty of war.¹

On 16 November 1966, the five Soldiers, all members of C Company, 2d Battalion (Airborne), 8th Cavalry Regiment, 1st Cavalry Division (Airmobile), were selected by their platoon leader for an “extremely dangerous” mission: reconnoitering an area in the Central Highlands around Hill 192, where it was thought that the Viet Cong were hiding out in a cave

complex.² The next day, SGT Gervase (the leader of the patrol mission) announced that, for the men to have a good time while on the patrol, “he was going to see that they found themselves a pretty girl and take her along for the morale of the squad.”³

In the early morning of 18 November, when the five Soldiers began their reconnaissance mission, they entered a village of about a half-dozen “hootches.”⁴ After finding Mao in a hootch she shared with her mother and sister, the men bound her wrists with rope, gagged her, and took her on the patrol with them.

Later that same day, after setting up headquarters in an abandoned hootch near Hill 192, Gervase announced that it was “time for some fun.”⁵ Gervase then went into the hut, where Mao was resting, and sexually assaulted her. Private First Class Storeby, who refused to take part in the assault of Mao that day, would later say that during Gervase’s rape of her, “a high, piercing moan of pain and despair came from the girl. After several minutes, the moan turned to a steady sobbing; and this did not cease until, after half an hour, Gervase reappeared.”⁶

Thomas followed Gervase, and found Mao naked. She was lying on a table, her hands bound behind her back; Thomas raped her. The two Garcias, who were cousins, were the last to gang rape Mao. As for Storeby, he had moved away from the entrance to the hut, and remained seated “on the grassy turf to one side of the structure” during the assault on Mao, which lasted about 90 minutes.⁷ Asked later in court what he was thinking about while sat on the grassy turf, Storeby replied: “I was praying to God that if I ever got out of there alive I’d do everything I could to see that these men would pay for what they did.”⁸

After the rape, all five Soldiers went into the hootch together. While Mao—whose hands had been untied and was now dressed—cowered in a corner, Gervase, Thomas, and the Garcias “reminisced about their communal feat, comparing Mao with

other girls they had known and talking about how long it had been since they had a woman.⁹⁹

The next morning, the Soldiers got up shortly before 0600. Gervase and Thomas announced that Mao must be killed. If the patrol should encounter the Viet Cong, the woman would only get in the way. Even if the Americans did not run into the enemy, there was a strong possibility that Army helicopters scouting the area would see the squad and want to know why the girl was accompanying them.¹⁰

Recognizing that Storeby was a danger to himself and the others, Gervase suggested that—after the squad decided how to kill Mao—Storeby must carry out the murder. If Storeby refused, said Gervase, he likely would be reported as K.I.A.—killed in action. After Storeby refused to take part in any killing, Gervase asked the Garcias to commit the crime. When the cousins refused, PFC Thomas volunteered to kill her.¹¹

After deciding that the murder should take place on the summit of Hill 192, so that Mao's body could be disposed of by throwing it off a cliff, the patrol set out. Before Gervase, Thomas, and the Garcias could carry out their plan, however, the patrol ran into some Viet Cong. After the firefight that followed, and with helicopters now heading for their location to assist in the fight against the enemy, Gervase and Thomas became worried that Mao was certain to be seen with the patrol. According to the record of trial, Thomas said, "Let's kill her and get it over with." Gervase replied with, "All right, go ahead."¹²

Thomas then took Mao into some nearby bushes and stabbed her three times with his hunting knife. When she did not die, but tried to flee, Thomas caught her and shot her in the head with his M-16 rifle.¹³

Shortly after the murder, SGT Gervase radioed his platoon leader to report that, in the middle of the firefight with the Viet Cong, "a girl was fleeing up the side of" Hill 192.¹⁴ The platoon leader ordered Gervase to "get the girl."¹⁵ A few minutes later, Gervase radioed back that, as he had been unable to catch the girl, "that he had had to shoot her."¹⁶

Private First Class Storeby, who had refused to take part in any of the criminal activities of his fellow Soldiers, was now

determined to report the crime—despite threats against his life from the other four Soldiers, who insinuated that Storeby would be a combat casualty when on a future mission. When Storeby's chain of command—including his company commander—would take no action, Storeby reported the crime to the chaplain located at Camp Radcliff, where Storeby had been transferred for his own safety. The chaplain, shocked at what Storeby told him, immediately called the Criminal Investigation Command (CID) office; this phone call began the process that resulted in general courts-martial against Gervase, Thomas, and Cipriano and Joseph Garcia.¹⁷

All four men were prosecuted for rape and murder in March and April 1967—with judge advocate Colonel Paul J. Durbin¹⁸ as the law officer and PFC Storeby as the chief witness in all four trials. By the time the four proceedings concluded, Storeby was accused of lying and cowardice. One defense counsel even argued that it was Storeby who had killed Mao.¹⁹ Another defense attorney insisted to the panel members hearing the case that Storeby had "fabricated" the entire story to escape future hazardous assignments, like the reconnaissance mission.²⁰

At the trial of Thomas, who had done the actual stabbing and shooting, the trial counsel asked for the death sentence after the panel found Thomas guilty of both premeditated murder and rape. The court, however, instead sentenced Thomas to a dishonorable discharge and confinement at hard labor for life. Major General John J. Tolson, the convening authority, approved the sentence on 10 June 1967.²¹

Gervase was found guilty of unpremeditated murder, but not guilty of rape—a strange result given his role in organizing the kidnapping and being the first Soldier to sexually assault Mao. The panel sentenced him to a dishonorable discharge and ten years in jail; Tolson approved this sentence on 10 June 1967, the same day he took action in Thomas's case.²² As for the Garcias, Joseph Garcia received fifteen years' confinement and Cipriano Garcia was sentenced by the members to eight years' confinement—a good illustration of the disparate sentencing that frequently occurs at court-martial sentencing by panels.²³

So why was justice a casualty of war? Because the sentences of all four war criminals were drastically reduced after they arrived at the U.S. Disciplinary Barracks (USDB) on 23 August 1967. Thomas, who had been sentenced to life imprisonment, was released on parole on 18 June 1970.²⁴ Gervase never served much of his ten-year sentence either; on 9 August 1969, the Army released him on parole after he had been at the USDB for less than two years.²⁵

And, for the Garcias: On appeal, Joseph Garcia's conviction was set aside by the Army Board of Review on the grounds that Garcia's CID interrogators had failed to properly advise him of his rights under Article 31. While the agents had correctly informed Garcia that he had a right to remain silent and to have a lawyer present during questioning, the agents had failed to tell Garcia that he had the right to "appointed" legal counsel, who would represent him free of charge. At Joseph Garcia's subsequent trial at Fort Leavenworth, he was found not guilty.²⁶

Cipriano Garcia's court-martial verdict also was overturned—but by the Court of Military Appeals. The Army Board of Review examining Cipriano's proceedings decided—contrary to the Board of Review that examined his cousin Joseph's record of trial—that the failure to explain the exact meaning of appointed counsel was harmless error.²⁷ On appeal, however, the Court of Military Appeals disagreed. It determined that the failure to adequately explain the meaning of the right to appointed counsel was a constitutional error that required Cipriano Garcia's findings and sentence to be set aside.²⁸

At his second trial, however, Cipriano Garcia decided to plead guilty to unpremeditated murder. The panel sentenced him to confinement for four years. When the convening authority at Fort Leavenworth took action in his case, however, he reduced his imprisonment to twenty-two months. Cipriano Garcia, now having served more time in prison than his approved sentence, was immediately released from confinement and restored to duty.²⁹

As for Robert M. Storeby—he left Vietnam in November 1967 and was honorably discharged in April 1968, at the age of twenty-four. Colonel Durbin, who

had sat as the law officer in all four trials, remembered Storeby as the “real hero” in the atrocity.³⁰ Major General Tolson,³¹ the convening authority who had taken action in the cases, thought so as well. He signed an official letter of commendation, which one suspects was authored by the 1st Cavalry Division staff judge advocate’s office. It reads in full:

You are to be commended for the important role you played in seeing that justice was done in the recent court-martial cases involving four soldiers charged with the rape and murder of a young Vietnamese woman. Your prompt reporting of this serious incident to your superiors and subsequent testimony in court were essential elements in the apprehension and trials of the men responsible for this brutal crime.

The great pressures you were subject to during these critical months are appreciated. Yours was not an easy task, but you did your duty as an American soldier. You should know that the courage and steadfastness you demonstrated make me proud to have you as a member of this division.³²

What conclusions may be drawn from “The Incident on Hill 192,” as the war crime was known at the time of the courts-martial? It certainly was not the Army’s finest hour, given the reticence of Storeby’s chain of command to investigate the event and bring charges against Gervase, Thomas, and the Garcias. Only Storeby’s persistence and the intervention of an Army chaplain got the process rolling. While the four court-martial panels did return guilty verdicts, the sentences imposed by the members—except in the Thomas trial—were relatively light for a heinous murder and gang rape. But readers familiar with military justice know that panel members are unpredictable at times.

There is only one word, however, to describe the Army’s decision to parole Thomas after he had served fewer than three years of a life sentence: wrong. One wonders if Robert Storeby ultimately de-

cidated that “doing the right thing” was really worth it. After all, justice for Mao was very much a casualty of war. **TAL**

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Notes

1. *Casualties of War* was the title of a *New Yorker* magazine article about this war crime. Published on 18 October 1969, that article was subsequently re-printed as a book with the same title. See Daniel Lang, *Casualties of War*, *NEW YORKER* (Oct. 10, 1969), <https://www.newyorker.com/magazine/1969/10/18/casualties-of-war>. A movie about the crime, directed by Brian De Palma and starring Michael J. Fox (as Storeby) and Sean Penn (as Gervase), was released to critical acclaim in 1989. *CASUALTIES OF WAR* (Columbia Pictures 1989). *The Washington Post* praised it as “a film of great emotional power” and “one of the most punishing, morally complex movies about men at war ever made.” See Hal Hinson, *The Explosive Power of “Casualties of War,”* *WASH. POST* (Aug. 18, 1989), <https://www.washingtonpost.com/archive/lifestyle/1989/08/18/the-explosive-power-of-casualties-of-war/2598c652-e17c-4821-aa9b-b84b762de21f/>.

2. DANIEL LANG, *CASUALTIES OF WAR* 21 (1969).

3. *Id.* at 26.

4. “Hootch” was the slang word used by Americans when referring to the thatched huts that the Vietnamese lived in.

5. LANG, *supra* note 2, at 34.

6. *Id.* at 36–37.

7. *Id.* at 38.

8. *Id.* at 40.

9. *Id.* at 38.

10. *Id.* at 44, 48.

11. *Id.* at 48.

12. *Id.*

13. *Id.*

14. *Id.* at 51.

15. *Id.*

16. *Id.*

17. *Id.* at 62–65.

18. Paul J. Durbin (1917–2012) had a remarkable career as an Army lawyer. Born in Kentucky in 1917, as the youngest of four children, Paul was orphaned at the age of three. However, he always wanted to be a lawyer and worked his way through college and law school at the University of Kentucky. Admitted to the bar in 1940, Durbin served as an Infantry officer in France and Germany during World War II. He entered the Judge Advocate General’s (JAG) Corps in 1948 and served in a variety of assignments. Then-Lieutenant Colonel Durbin was the first Army lawyer to serve in Vietnam; he arrived in Saigon in 1959 and served two years with the Military Assistance Advisory Group. Other postings included: Staff Judge Advocate (SJA), 1st Armored and 4th Armored Divisions; SJA, 82d and

101st Airborne Divisions; SJA, 7th Infantry Division; and SJA, III Field Force. No judge advocate today could duplicate this much time as an SJA—five divisions and one corps-equivalent. Durbin’s last assignment was as a law officer (the forerunner of today’s military judge), U.S. Trial Judiciary, with duty in Vietnam. Colonel Durbin retired in 1968, having been a trial counsel, defense counsel, and law officer in more than 2,000 courts-martial. Paul Durbin then began practicing law as a civilian in Honolulu, Hawaii, where he resided until the time of his death. While in the JAG Corps, Durbin’s high pitched voice and distinctive Kentucky twang earned him the nickname “Squeaky” Durbin. FRED L. BORCH, *JUDGE ADVOCATES IN VIETNAM: ARMY LAWYERS IN SOUTHEAST ASIA, 1959–1975*, at 2–4, 140–41 (2003).

19. LANG, *supra* note 2, at 88–89.

20. *Id.* at 90.

21. Headquarters, 1st Cavalry Division (Airmobile), Gen. Court-Martial Order No. 21 (10 June 1967).

22. Headquarters, 1st Cavalry Division (Airmobile), Gen. Court-Martial Order No. 20 (10 June 1967).

23. Headquarters, 1st Cavalry Division (Airmobile), Gen. Court-Martial Order Nos. 22, 23 (10 June 1967).

24. Email from Peter J. Grande to author (June 10, 2021, 3:21 PM) (on file with author).

25. *Id.*

26. LANG, *supra* note 2, at 112–13.

27. *United States v. Garcia*, 38 C.M.R. 625 (C.M.A. 1967).

28. *United States v. Garcia*, 39 C.M.R. 5 (C.M.A. 1968).

29. *Id.* at 118–19.

30. BORCH, *supra* note 18, at 71.

31. John Jarvis Tolson III (1915–1991) had a stellar Army career, which included more than two years as the commander of the 1st Cavalry Division (Airmobile) in Vietnam. It was during his tenure that the division “helped pioneer the use of helicopters as a leading instrument of modern warfare.” The roughly 400 helicopters in the division were able to quickly move troops and supplies in military operations against the Viet Cong, thus transforming ground combat into a three-dimensional war and freeing troops from the “tyranny of terrain.” Tolson was also a qualified aviator, and logged more than 1,000 hours of combat flying while in command of the 1st Cavalry Division (Airmobile). Tolson was a graduate of West Point (1937) and was decorated with the Distinguished Service Cross for his heroism in the Philippines in World War II. He was the commanding general, XVIII Airborne Corps, when he retired as a lieutenant general. Bruce Lambert, *Gen. John J. Tolson, 76, Dies; Pioneered Army’s Helicopter Use*, *N.Y. TIMES*, Dec. 6, 1991, at D21.

32. LANG, *supra* note 2, at 105.