



TheState.com | News | Business | Sports | Entertainment | Living | Classifieds | Jobs | Cars | Homes |

State, The (Columbia, SC)

1998-01-10

Section: METRO/REGION

Edition: FINAL

Page: B1

## POLICE'S PROCEDURAL MELTDOWN MAY AFFECT MURDER TRIAL

MICHELLE R. DAVIS

Staff Writer

The melting of a gun that was a key piece of evidence in two Columbia murder cases could save the accused killer from death row, defense attorneys said Friday.

That's despite assurances from prosecutors and Columbia Police Chief Charles P. Austin, whose department destroyed the .38-caliber handgun linked to the 1996 shootings of two people at Kelly's Barbershop and of a taxicab driver. Both say the loss of the main evidence in the cases won't change a thing, and the prosecutor said he'll continue to seek the death penalty. But others aren't so sure.

"I don't think it's a death-penalty case anymore," said Charleston defense lawyer Gedney Howe. "I just don't think the jury is going to put someone in the electric chair when you're missing an essential piece of evidence."

Felix Cheeseboro is charged in the March 14, 1996, shooting deaths of longtime Columbia barber Frank Kelly, 75, and one of his customers, Leon Poole, 73. He's also charged with murder in the Feb. 19, 1996, slaying of Gamecock Cab Co. driver Elvis McDonald, 39. The 5th Circuit solicitor's office, which is prosecuting Cheeseboro, is seeking the death penalty in the barbershop case, scheduled for trial April 27.

Austin and Solicitor Barney Giese have said the case remains strong because they have all results from testing the gun.

But across the state, defense attorneys said Friday the melting of the gun, done accidentally in October during routine destruction of unwanted guns at the Police Department, is a major break for Cheeseboro.

"It's a big old hole in the line for the defense to try to run through," said Columbia attorney Joe McCulloch.

Jurors may be less likely to opt for the death penalty when evidence is missing, he said.

Several attorneys said if they represented Cheeseboro, they'd ask for the case to be dismissed because they could not independently analyze the gun.

However, most said it's unlikely that Circuit Judge Thomas Cooper, assigned to the case, will

scrap the charges. The next step, said Columbia attorney **Jack Swerling**, would be to criticize police at the trial.

**Swerling** said the judge could also instruct the jury to weigh the fact that the defense never got a chance to see the gun while considering the evidence.

But the meltdown also hampers the defense attorneys, **Swerling** said: They'll never know if their own testing of the gun could have helped clear Cheeseboro.

That's exactly what Chief Public Defender Jeff Bloom, who represents Cheeseboro, and his client are worried about.

"I met with Felix and he's concerned it will actually hurt his case because now we can't independently analyze the gun," Bloom said.

Cheeseboro has maintained his innocence, Bloom said.

Bloom said he has concerns about the handling of other pieces of evidence, but would not be specific.

Austin emphasized Friday that the destruction of the gun was accidental. The gun was kept in the police evidence room and was not tagged for destruction, but the person sorting evidence had a form that "indicated that the weapon was to be destroyed," Austin said. "That's what she based her action on."

The employee has not been disciplined, Austin said, because "there was nothing blatant in terms of procedural violations."

Austin said he may strengthen existing procedures by having someone double-check evidence slated for destruction.

Michelle R. Davis covers the state judicial system. She can be reached at 771-8484.

