

## SUMMARY OF MINUTES

### SPECIAL MEETING OF THE PUBLIC SAFETY COMMITTEE

5:30 P.M., MONDAY, FEBRUARY 25, 2008

COUNCIL CHAMBER

ROOM 230, CITY HALL

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*MEMBERS PRESENT:*            *Mayor Allen Joines*  
   *Council Member Vivian H. Burke, Chair*  
   *Council Member Molly Leight, Vice Chair*  
   *Council Member Wanda Merschel*  
   *Council Member Nelson L. Malloy, Jr.*

*OTHERS PRESENT:*            *Council Member Robert C. Clark*  
   *Council Member Dan Besse (in at 5:44 p.m.)*  
   *Council Member Joycelyn V. Johnson*

Chair Burke called the meeting to order and introduced Mayor Allen Joines and members of the Public Safety Committee. She recognized that Mr. Calvin Smith's attorney, Mr. David Pishko was in attendance, and pointed out that District Attorney Tom Keith had been invited.

1.        **PRESENTATION BY MS. KENDRA MONTGOMERY-BLINN, EXECUTIVE DIRECTOR OF THE NORTH CAROLINA INNOCENCE INQUIRY COMMISSION.**

Mr. Lee D. Garrity, City Manager, explained that this meeting was scheduled to allow public input in the matter as well as allow Ms. Montgomery-Blinn to make a presentation regarding the possible involvement of the North Carolina Innocence Inquiry Commission (NCIIC) in this investigation.

Police Chief Patricia D. Norris introduced Ms. Kendra Montgomery-Blinn, explaining that she has a background in criminal law and served for over three years as an Assistant District Attorney in Durham, NC. While in law school, she served as the Student Director of the Duke Law Innocence Project.

Mayor Joines welcomed Ms. Montgomery-Blinn to the City and thanked her and her staff for their efforts.

Ms. Montgomery-Blinn introduced Mr. Mike Epperly, a staff attorney with NCIIC and asked him to distribute handouts outlining her presentation, as well as the North Carolina General Statutes (NCGS) and Rules of Procedure regarding the NCIIC. She explained that the NCGS governing the NCIIC was written into law, Commissioners appointed and staff made operational in 2006. Anyone can make a referral to the organization in the form of a written request, and in the event the investigation is pursued, the convicted person must consent and waive all safeguards and privileges. The referral must document new evidence of innocence, and the convicted person

will have the right to an attorney. She noted that most of those persons remain in custody and are deemed indigent, requiring a court-appointed attorney. Every case is different and handled depending on its specific facts and every piece of evidence is followed by the organization as a neutral fact-finding agency. The NCIIC has subpoena power as well as standing to seek court orders. After the investigation is complete, the case will go before the NCIIC for a closed hearing and records are excluded from the Public Records Laws.

*(Council Member Besse entered the meeting at 5:44 p.m.)*

Ms. Montgomery-Blinn indicated that the Commission decides whether to refer the case to a three judge panel, which is in the form of hearing in the county of original conviction and the judges appointed by the Chief Justice of the North Carolina Supreme Court. At that point, the three judge panel determines whether or not to exonerate an individual. She pointed out that the NCIIC has no familiarity with facts of the State versus Calvin Michael Smith case, other than what has been in the newspaper.

Ms. Montgomery-Blinn further explained that the waiver signed by the convicted person waives all rights not to have to testify, spousal privilege, medical privilege, penitent privilege, as well as attorney-client privilege. She stated that the NCIIC only considers new evidence of innocence that has never been presented in a hearing. If evidence of a procedural violation is discovered, it will be brought to the attention of the Commission to decide if it needs to be referred to the proper authority.

Council Member Besse inquired if the signed waiver includes the right to seek additional judicial review subsequent to this process.

Ms. Montgomery-Blinn indicated that the convicted person can continue to pursue other relief that may be available after this review is complete, and noted that any procedural violations discovered during their investigation can be used by the defendant at that time. She noted that anything previously heard before a judge would not be considered new evidence, and the NCIIC cannot recommend a new trial on the basis of procedural violations.

Council Member Merschel thanked Ms. Montgomery-Blinn for attending the meeting. She inquired if a case can be withdrawn after the process begins.

Ms. Montgomery-Blinn stated that only a convicted person can withdraw the case and if that person quits cooperating with the NCIIC, that action is determined to be a sign of withdrawal. She further pointed out that, if discovered, any new evidence of guilt would also be turned over to the authorities.

Ms. Montgomery-Blinn explained the composition of the NCIIC Commissioners, and noted that if at any time a Commissioner cannot be present for a hearing, an alternate will attend in their place. She explained that in order to be accepted a case must have been heard in North Carolina, it must have been a felony, the applicant must be living and claiming complete factual innocence of any responsibility of the crime, credible and verifiable evidence exists, and the current claim has not previously been heard at trial or in a post-conviction hearing. Ms. Montgomery-Blinn further noted that the case could be rejected at any step in the process.

Council Member Leight inquired if the Duke Law Innocence Project had followed these same steps and if so, would that permit the NCIIC process to be shortened.

Ms. Montgomery-Blinn noted that, although it may speed up the process, it is likely the investigation would be redone due to uncertainty in the procedures used by the Duke Law Innocence Project. In response to Council Member Clark's questions, she stated that there are currently three cases under investigation by the NCIIC and one forthcoming. She could not provide a tentative timeframe for this case, but noted it could be anywhere from weeks to a year.

Council Member Clark inquired if Mr. Smith or the Duke Law Innocence Project has requested an investigation by the NCIIC.

Ms. Montgomery-Blinn stated that she could not comment on anyone specifically making a request, but indicated that they are not currently investigating the State versus Calvin Michael Smith case. She further explained that once a case goes to the Commission, it could be opened to the public by the Chairman in the interest of justice. The only individuals with the right to attend the hearing are the Commission members, Commission staff, and the victim with one person in support of the victim. The Commission votes by majority requiring five of the eight members' votes. If there was a guilty plea in the case, however, the Commission vote must be unanimous. The three judge panel hearing is quasi-judicial with arguments and sworn witnesses. The convicted person has a right to be present at this hearing and the vote of the three judge panel must be unanimous. If it is not, no appeals are allowed to be made to the NCIIC. All records become public record following the proceedings.

Chair Burke thanked Ms. Montgomery-Blinn for her time and asked if any citizens had comments regarding the presentation.

Mr. Larry Little, 2342 Okalina Avenue, inquired if information could be provided to the Citizen Committee if it were to request it from the NCIIC.

Ms. Montgomery-Blinn explained that due to public records Statutes, it could only be released if the case moves on to the three judge panel stage. She further responded that only factual innocence could be investigated and not potential procedural errors or policies of the Winston-Salem Police Department. Although the NCIIC would not be looking for that type of information, if a duty is discovered to have been violated and a crime committed, the information could be passed on to the District Attorney.

Mr. Little noted that if procedural violations were present, the convicted person might not benefit from an investigation by the NCIIC.

Mr. Mark Rabil, 4244 Alistair Road, inquired if the process would be put on hold in the event that a convicted person was not willing to waive his rights at this time.

Ms. Montgomery-Blinn indicated that the case could be revisited at some point in the future at the decision of the convicted person. She noted that the referring entity does not receive a written report at the end of the process and no recommendations would be included. The NCIIC can only rectify wrongful convictions and a trial must be conducted.

Mr. Rabil inquired as to the point at which the NCIIC has subpoena rights to the records of the case.

Ms. Montgomery-Blinn explained that although staff is currently studying the Statutes, the rights most definitely exist after the waiver is signed by the convicted person. She indicated that the NCIIC could issue a subpoena and a loophole found based on document location. However, they will pursue the records to the fullest extent of the rights available. She noted that if someone does not comply with a request, the Commission Chair, who is a Superior Court judge, will conduct a hearing. In further response to Mr. Rabil's questions, she stated that if the Citizen Committee were to locate records and identify witnesses to bring forth, it would be beneficial to the efforts of the investigation by the NCIIC.

Council Member Merschel inquired about the difference between waivers requested by the Duke Law Innocence Project and the NCIIC.

Ms. Montgomery-Blinn stated that although they are not the same, she was unsure about the difference. She noted that the Duke Law Innocence Project does not have subpoena power nor do they have a standing right to court orders.

Chair Burke requested that Ms. Montgomery-Blinn obtain information concerning the difference in the two organizations.

In response to Council Member Merschel's question, Ms. Montgomery-Blinn stated that no request has been made to date for this case. She noted that the Duke Law Innocence Project can work with a defendant to pursue trial.

Mr. Mike Epperly, NCIIC, explained that there could be no policy evaluations of the Winston-Salem Police Department (WSPD) unless it plays a role leading to evidence and it would only be studied for investigative purposes, without pointing out violations. The scope of remedies available to the NCIIC under NCGS are subpoena power, with the ability to conduct inspections, depose witnesses, conduct interrogatories, and seek court orders to pursue DNA testing or identification orders, as dictated by the facts of each case.

Council Member Besse asked if a claim of innocence includes reference to WSPD policy violations in early portions of the case, would it be among available remedies to the NCIIC to subpoena an individual if they were unwilling to be interviewed.

Mr. Epperly stated that they could take a court reporter and place the person under oath, have them appear at a hearing, or give a sworn statement.

Ms. Montgomery-Blinn pointed out, however, that process would only be pursued if it may lead to evidence of innocence.

2. RESOLUTION AMENDING THE CITIZEN REVIEW COMMITTEE FOR THE SILK PLANT FOREST REVIEW.

Ms. Angela Carmon, City Attorney, referred to her memo indicating that she is recommending City Council approve the resolution with her recommended language changes referring to the NCGS giving the City Manager the authority to appoint and suspend employees, as well as direct and supervise the administration of all City departments. She noted that this language should also protect the City Council.

Council Member Merschel thanked Ms. Carmon for her proactive opinion during this process.

Mayor Joines recognized City staff for its efforts in working with the citizens group and noted that most concerns and issues appear to have been addressed.

Council Member Leight expressed her appreciation for staff's work on the latest version of the resolution and noted that she agrees with the suggestion that subpoena power with City Council should not be given to the Citizen Committee. She noted that she has the greatest of confidence in City staff's ability to assist the Committee with its deliberations and bringing the information to City Council.

Council Member Merschel stated she would prefer the resolution require any funding requests on behalf of the Committee be routed to City Council through the Finance and Public Safety Committees.

Mr. Garrity stated that would be possible, but no requests could be approved without formerly appropriated funds. In further response to her concerns, he noted that an ending date could be imposed for the Committee with the option of an extension if needed.

In reference to language in Section 5(g), Council Member Merschel expressed concern over City Council's authority not to allow mandatory editing by a State office or agency. Also, on Page 6, Section 1, she expressed concern that the reference to the Committee looking into other cases they determine that "plausibly may be related" should be more clearly defined.

In response to Council Member Malloy's question, Mr. Garrity indicated that as the resolution is worded, there are no residential requirements for the members of the Committee.

Council Member Leight noted that considering similar cases was important for the work of the Sykes Committee and that option should also be a part of this Committee's scope.

Council Member Johnson requested that the Committee membership be broad-based and members should come from several zip codes within the area. She noted also that staff should ensure prospective members are aware there may a significant time commitment involved with becoming a member of the Committee.

Council Member Clark indicated his concern over the need for a definite timeframe with an option for extension. He also stated that the NCIIC should not become involved until after the Citizen Committee finishes its work and noted it may not be a good idea for the Committee to look into every case investigated by the detectives involved in this case as it could become an extremely time-consuming project. He stressed the need for the process to remain sensitive to the victim, and noted that her health is delicate, and the Committee and staff should respect her rights and condition at all times.

Council Member Besse referred to Section 7(a) and asked for elaboration on the authority of City Council under NCGS and the purposes for which subpoena power can be used as it relates to duties assigned to the Citizen Committee.

Ms. Carmon stated that although the Committee could request that City Council exercise it subpoena power, City Council would be the recognized entity exercising that authority. At that time, City Council or a Committee of City Council would need to ask the questions and staff does not recommend that be done by the Citizen Committee as it may not be allowed under NCGS. She noted that the NCGS provides the authority to City Council to be used to investigate the affairs of the City.

At this time, Chair Burke asked if any citizens wished to be heard in the matter and indicated that each speaker would be allowed a total of three minutes to speak.

Mr. Larry Little congratulated Council and staff for keeping their minds open to resolving this issue, and noted that it was difficult for former City Council Members to adequately address these types of problems. He commended the Mayor for his efforts to make appointments to the Committee in the spirit of working together with citizens toward the same end. He stated that although the work of the NCIIC is important and a good effort, the process may be too slow to effectively handle this situation, and the City should handle its own housekeeping.

Mr. Mark Rabil indicated that he was impressed with the efforts of City staff. He expressed support for the resolution, but indicated that the City should hold off on involving the NCIIC until this process complete. He noted that the Citizens Committee can ask a lot of questions and pointed out how much was learned from the Sykes Committee investigation. On the question of subpoena power, he suggested it may be more effective for the resolution to designate representatives to ask questions in the event it is used so that the entire City Council does not have to become involved in a cumbersome, time-consuming process. Mr. Rabil also pointed out that he has good information that the detective involved in this case has a pattern of using questionable tactics to obtain questionable confessions, and he asked that the Citizens Committee be given the authority to look into that allegation.

Mr. Jet Hollander, 5020 Brookmere Lane, indicated that discussions with staff have been very honest and productive. He noted that the July 15, 2008 date referred to in the resolution came from

the citizens in an effort to impose some kind of timeframe but there are no objections to changing that date. Mr. Hollander requested that the resolution contain language allowing the Citizen Committee to choose the detectives that will be involved in the process and that the detectives report directly to the City Manager instead of information being filtered through the Police Department. He also pointed out the importance of recording all information obtained by the detectives, including witness testimony, and asked that the Committee be given the ability to compel testimony.

Mr. Garrity explained that the selection process can be included in the resolution and the Citizen Committee could recommend qualities they desire in the detectives. Staff could then bring biographical information on prospective officers for City Council's selection. The detectives would not work through the Police Department and would need some administrative and authoritative support from the City Manager's office, which would not exercise veto power but would offer professional opinions. All interviews could be recorded and the Committee could have the authority to administer oaths. He noted that as the Sykes Committee investigation progressed, it became necessary to fine tune their process as it may become necessary with this process as well.

Ms. Carmon pointed out the importance that the City Manager be allowed to exercise his authority as outlined in the Statutes to ensure that this is a smooth process.

Chair Burke commended everyone for their efforts, noting that City Council and staff will ensure citizens have confidence in the Council and its concern for public safety and welfare. She indicated that the Police Chief and City Manager are committed to obtaining the trust and all findings of the investigation will be made public.

Ms. Carmon inquired of Ms. Montgomery-Blinn if a motion for appropriate relief is filed on behalf of a convicted person and the judge rules unfavorably, could the defendant move forward with requesting NCIIC assistance at that time.

Ms. Montgomery-Blinn noted that anything presented at the hearing could not be heard by NCIIC. However, if the motion is received and dismissed without a hearing, the information could be considered as new evidence.

Council Member Malloy noted that it was implied at the previous Public Safety Committee meeting that Mr. Smith would likely not waive his rights. If that is his position, it could affect the result of tonight's vote.

Mr. David Pishko, 743 Oaklawn Avenue, indicated that he is Mr. Smith's attorney and stated that a decision has not been made yet whether or not a motion would be filed for appropriate relief. He noted that if the motion is made and issues are raised regarding Mr. Smith's representation at trial, it would require a waiver of attorney-client privilege at that time.

Council Member Johnson inquired if Mr. Pishko plans to ask Mr. Smith if he would like the City to pursue an investigation by NCIIC.

Mr. Pishko stated that although they have not asked for an investigation by the NCIIC, they could not make a decision on whether or not Mr. Smith would waive his rights unless someone else requests the investigation. He stated that it is his intent at this time, however, to proceed with a

motion for appropriate relief.

In response to Council Member Leight's question, Mr. Pishko explained that motions for appropriate relief are filed in Superior Court to ask for new trials and can be done for a variety of reasons including failure of the prosecution to turn over exculpatory evidence and ineffective assistance by the trial counsel, however, not including the question of innocence.

Council Member Merschel asked Chief Norris if she feels there is new evidence to warrant asking the NCIIC to pursue an investigation.

Chief Norris indicated that although she has not received any new evidence to warrant the request, she could make the request at the urging of community members.

Ms. Montgomery-Blinn noted that would not be a sufficient reason for the NCIIC to proceed with an investigation. She pointed out, however, that Chief Norris could make the request based on the fact that the Duke Law Innocence Project has indicated new evidence exists.

Chief Norris stated that she has not met with representatives of the Duke Law Innocence Project and is not aware that they have new evidence either.

In response to Chair Burke's question, Mr. Garrity indicated that the language barring edits by State offices was added at the suggestion of the citizen's group and Mr. Hollander stated that they requested the language due to prior interference by the District Attorney's office with the Sykes Committee investigation.

Ms. Carmon noted that the report given to District Attorney's office during the Sykes Committee investigation was done so in an effort to release it to the public and to avoid procedural issues by having the District Attorney's office file a motion to get an order to release the report. She stated that the language in this resolution could be changed to indicate only City staff could pursue mandatory edits but she was unsure whether or not the City could legally prevent a State agency from doing the same.

Council Member Merschel expressed concern that the City may be exposed to the possibility of legal action if personnel records and information are exposed through editing of the report by another agency.

Mr. Carmon stressed that staff will ensure that if personnel records are disclosed to the Committee, they could only be discussed in Closed Session. She noted that prior to disseminating the report from the Sykes Committee, the City obtained a motion requiring release of the report, and the same process could be used in this case. She pointed out that staff will deal with procedural issues in the best manner to ensure there are no violations of law, which is why it is important that a member of the City Attorney staff be present at all of their meetings.

In response to concerns about the timeline, Mr. Garrity stated that the deadline for the Citizens Committee could be changed to December 15, 2008, with the option for an extension as needed. In response to Council Member Malloy's question about interim reports, he noted that the Committee minutes would be distributed to City Council on a regular basis.

Council Member Merschel pointed out that the language regarding funding requests also needs to be changed requiring all requests be heard by the Finance and Public Safety Committees.

Council Member Leight inquired if the language regarding “plausibly related” cases should be changed to refer to “plausibly related to the timeframe and characteristics of the Silk Plant Forest case.”

Council Member Besse noted that the Citizen Committee may need to instead look for similar flaws in investigations.

Ms. Carmon suggested that may be an action to be pursued by the City Council.

Council Member Merschel expressed concern that if Mr. Rabil knows of possibly 40 cases in which there could have been procedural errors, he should be requested to turn over that information to the City Manager for discussion with City Council as soon as possible.

Chair Burke pointed out that if personnel issues are involved, it is possible that the City Manager is already working on those issues.

Ms. Carmon stated that the resolution should be acceptable to address those types of issues that may be germane to the Silk Plant Forest case if the additional language she suggested is added to allow the City Manager to exercise his authority as directed under the Statutes.

Council Member Merschel requested that the language be changed to state, “plausibly may be related to Silk Plant Forest case.”

In response to Council Member Malloy’s question about Mr. Hollander’s recommendations for inclusion in the resolution, Ms. Carmon stated that the City Manager has committed to certain actions not listed in the resolution, but in the event reasons are found to deviate from that course, it is her recommendation that specific language not be included in the resolution. She noted that the City Manager fully intends to carry out those actions.

Discussion ensued over the need to delete language referring to the involvement of the NCIIC.

Mr. Garrity restated the changes suggested for the item, including the deletion of the sixth and seventh paragraphs on Page 5 referring to the NCIIC. On Page 6, Section 1, the first sentence should read, “. . .case and other cases that the committee determines plausibly related to the Silk Plant Forest case and to make appropriate recommendations to the City Council, consistent with G.S. 160A-146, G.S. 160A-148 and any other statutes that might apply,” and delete the next sentence. Page 7, Section 5(c), should indicate funding requests go through the Finance and Public Safety Committees.

Chair Burke called for a vote on whether or not to change the language on Page 7, Section 5(g).

Council Member Merschel made a motion to amend that language to, "...mandatory editing by City staff." The motion was defeated with one in favor and three opposed. Voting in favor was Council Member Merschel, with Council Members Leight, Burke and Malloy opposed.

The vote to leave the language as it currently reads carried with three in favor and one opposed, with Council Members Leight, Burke and Malloy voting in favor and Council Member Merschel opposed.

Mr. Garrity further explained that that Section 5(h) would be changed to read, "...final report to the Public Safety Committee and to the City Council by December 15, 2008."

Council Member Merschel made a motion to approve the resolution with the requested changes.

The motion was duly seconded by Council Member Malloy and unanimously carried.

Mr. Garrity pointed out that the revised resolution would be on the March 3, 2008 City Council meeting agenda.

Chair Burke thanked everyone for their participation and recognized a citizen for comments.

Reverend Richard Fordham, 1704 Huntington Woods Court, spoke on behalf of the Ministers' Conference and thanked City Council for the public forum. He thanked the citizens group for its work, and noted that everyone appreciates the efforts of City Council to show citizens that someone does care about their concerns.

ADJOURNMENT: 8:30 p.m.