

## ALAMOSA CITY COUNCIL COUNCIL COMMUNICATION

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**Subject/Title:**

First reading, Ordinance No. 5-2022, an ordinance amending Section 5-42 of the local Fair Campaign Practices Act to permit expenditure on non-municipal recall elections under the same circumstances as non-municipal ballot issues; and approval of actions to address malfeasance of the District Attorney.

**Recommended Action:**

(1) Approve Ordinance No. 5-2022 on first reading and set for public hearing on March 16, 2022, at 7:00 p.m. or as soon thereafter as the matter may be heard.

(2) Approve sending a letter to the Attorney General concerning D.A. Payne's malfeasance in office and direct staff to further investigate potential ethics violations.

**Background:**

Since the swearing in of District Attorney Alonzo Payne on January 12, 2021, staff has become increasingly concerned with the professionalism of the office, the potential violations of the Victim's Rights Act, the unprecedented use of sweetheart plea deals for serious crimes, the lack of response both in carrying out regular duties and communicating as a community partner, and the risk our law enforcement officers are under due to emboldened criminals. Staff has made every effort to meet with the District Attorney in an attempt to share these concerns and those efforts have been fruitless. The District Attorney has made it abundantly clear that the philosophical platform that he ran on applies to all levels of crimes and that he does not believe jail is productive. He also made it very clear during his meetings with staff that he does not take the City's concerns seriously.

Our justice system is predicated on the balance of a three-tiered system: law enforcement, prosecution/defense, and unbiased judiciary. For it to be effective and fair for defendants and victims, all three must work. DA Payne, through the extreme and inappropriate application of his philosophy, has essentially gone beyond his prosecutorial scope and taken over the job of judges and juries.

It is important to note that staff shared with DA Payne the City's commitment to its diversion programs for youth and adults, the LEAD program, and the soon-to-come Co-Responder program. It is also common knowledge that City Council decriminalized a majority of its municipal violations and removed jail as an option. The City is clear in its belief that for lower-level offenses, such as those prosecuted through municipal court or those that have an underlying addiction and/or mental health component, jail is not the most appropriate tool. The City has taken concrete actions to implement alternatives to arrest and to jail in such situations through the programs listed above. Where the City and the District Attorney appear to differ is on the higher level offenses where there is a significant threat to the public such as crimes against persons, for example murder, sexual assaults, domestic abuse, drug distribution and continuous disregard towards law enforcement, which is a direct result of the lack of consequences from criminal actions.

Here are a sample of plea deals that highlight the threat to our community:

- Alamosa Police Department has conducted over 40 narcotic operations in the past 9 months. Not one of these cases has resulted in a trial – they have all been dismissed or pled to less serious offenses with very minimal jail time. These operations include significant amounts of seized drugs, money, and weapons. When the City partnered with Federal agencies to have 3 cases tried in federal court, the outcomes were dramatically different: 10 years, 15 years, and 15 years.
- Eric Gibbs - Charge of Murder pled down to Criminal Attempt/Tampering with a Deceased Body. Due to the plea being a non-violent felony, Gibbs has the possibility to be eligible for parole after 3 years. Mr. Gibbs allegedly shot and killed a person in his home, buried the body under his house, and booby-trapped the house with explosives. An entire block had to be evacuated while waiting for the Pueblo Bomb Squad to secure the scene.
- Richard Newton - Officers made contact in a parking lot in Alamosa for an active arrest warrant. Newton refused to exit his vehicle and accelerated, dragging a state patrol trooper through the parking lot causing injury to the officer. Newton was charged with Assault 1 serious bodily injury with a deadly weapon (an F3 felony punishable by 10-30 years in prison, resisting arrest, obstructing government operations, reckless endangerment and reckless driving). Case pleaded to Assault 2 (an F4 felony punishable by 5-16 years), but under the plea deal he received a deferred sentence for 36 months and 60 hours community service. All other charges dismissed.
- Trea Howell and Apryl Behrens - Murder of a 16 month old baby who had trauma to the brain due to being smashed into a door. Howell pled to accessory to crime and got a 72 months deferred sentence with terms and conditions of probation. Behrens pled to child abuse negligently causing serious bodily injury attempt and received 2 years Community Corrections with 369 days credit time served.

Here is information on the violations of the Victims' Rights Act (VRA):

- As of February 9th, the Colorado Crime Victim Advisory Board has received 8 complaints under the VRA. For the first time ever since the existence of the Board (30 years), the Board found that the DA's Office was non-compliant in regards to four of the complaints and voted to refer the matter to the Governor's Office. The remaining 4 complaints that were received more recently

are scheduled for review on February 25, and staff can update Council at the meeting concerning those.

- In comparison, staff learned from a records request to the Colorado Division of Criminal Justice, Department of Public Safety that no VRA complaints were filed against previous District Attorneys for the last 5 years (as far back as their records go). That is zero complaints for the 4 years prior to DA Payne and 8 within his first year alone.
- The first complaint was filed in February of 2021, approximately one month after DA Payne was sworn in.
- The complaints include allegations of not being treated with fairness, respect, and dignity; lack of information related to plea deals and hearings; requests for information being ignored; refusals to meet with victims; and explosive and confrontational behavior.
- The Colorado Division of Criminal Justice had made multiple attempts to contact the District Attorney's Office (email, mail, and certified mail) on the first 4 complaints and these attempts were ignored by the District Attorney.
- Several comments were made during the Colorado Crime Victim Advisory Board meeting that caught staff's attention:
  - Of one of the complaints being forwarded to the Governor's Office, a reviewer noted that in their over 10 years of experience, it was "the most egregious complaint ever reviewed."
  - When describing the environment that trainers encountered when they were onsite at DA Payne's office for the VRA mandatory training:
    - Two staff members were dressed inappropriately: one in sweats and another in super hero shorts and a t-shirt.
    - One attendee would have an outburst almost every 40 minutes causing the training to pause.
    - Even though the training was required and scheduled in advance, the District Attorney missed over an hour and when present, spent a significant amount of time on his phone disengaged from the training.
    - Trainers indicated that it was the most "hostile" and "unhealthy environment" they had ever encountered. There was a clear "lack of respect and professionalism."
- Approximately a month following the VRA training, the Colorado Division of Criminal Justice was made aware that another 20+ cases were dismissed or pleaded out without contact with the victims - a confirmation that the training was not taken seriously.

Beyond the dangerous plea deals and violations of the VRA, staff has also found the office to be non responsive to communication efforts, dismissive and combative during meetings, and lacking in timely performance of duties. For example, in December it was brought to the Police Chief's attention that over 20 warrants had not been processed, which means 20 different cases with victims had sat on the DA's desk without action for weeks. These included Domestic Violence, 3rd Degree Assault, 2nd Degree Assault, 2nd Degree Forgery, Theft, Second Degree Burglary, and Felony Menacing.

Such a delay can have serious consequences. OMS student Jayden Cruz had been bullied at school and on Friday, October 1, 2021, was assaulted by other students. Alamosa PD had the charges to the DA the following Monday. The charges sat without action on the DA's desk. On December 21, 2021, Jayden tragically took his own life. The DA's office finally filed charges on January 11, 2022. His guardians assert that without that abandonment by the DA's office, Jayden would not have killed himself.

It is important to make clear that the excuses and narrative provided by the District Attorney are not relevant and do not explain away the actions or lack of actions of his office. The District Attorney will say that his office is underfunded and the workload is hard to keep up with. For at least the last decade, the District Attorney's Office has been underfunded. That has been true for every District Attorney who has held the office, yet previous District Attorneys have prosecuted high level offenses and sought jail time. Additionally, by seeking jail time for higher level offenses, not only does that eliminate additional potential victims while the perpetrator is in jail, but it also means the District Attorney's Office will not have to handle additional offenses during that time.

Staff has been made aware of requests to County Commissioners to reduce the funding for the District Attorney's Office. Given the historical lack of funding for the District Attorney's Office, staff believes that reducing funding would only further weaken any prosecution and most likely would not motivate DA Payne to change his philosophy. In fact, with less money, the District Attorney will only have another excuse for why he cannot aggressively prosecute. A reduction in funding is not a good long-term strategy.

The District Attorney has also indicated that staff changes (the departure of Deputy DA Alex Raines) should address the concerns related to the VRA violation complaints. However, these patterns of purported violations have been occurring for over a year, have involved more than just one attorney, including the District Attorney himself, and speak directly to his leadership of the office. City staff in no way feels that these staff changes will address the real threat to our community, which is DA Payne.

Through DA Payne's efforts to avoid jail sentences, there has been an increase in the use of the 12th Judicial District Probation Office for more serious offenses. Currently the Office has 14 certified probation officers. These PO's are responsible for over 700 probation clients to date (about 50 per officer). None of the certified PO's carry a sidearm. As of lately, the new clients being referred to the probation office are too high risk and it is dangerous for the probation officers who are not equipped, thus putting the lives of the officers more at risk. One might ask if they are too dangerous for probation officers, why are the cases being pleaded down and jail not being utilized?

When staff first began looking into these concerns, one of the questions we had was what was the role of the judges. DA Payne has

also tried to dodge his accountability by indicating the plea deals and dismissals are okay since the judges have allowed them. What staff has learned is that this relationship is complicated. There is a general discomfort among some judges about the plea deals, dismissals, and veracity of the District Attorney's word when it comes to working with victims. For a dismissal, all that the prosecutor has to show is a legal reason for the dismissal which is often that they cannot prove the case beyond a reasonable doubt or the victim will not cooperate. Since the Judges do not have access to the evidence nor are they privy to communication with the victims, they must rely on the word of the prosecutor. It is also similar for a plea deal in that the Judges do not have access to all the evidence that would present a clear picture of the crime unless they request the presentence investigation, which is only done for the most serious cases. For bond hearings, the judges get even less information. There have been a few instances where judges have denied a plea deal and/or dismissal. In one instance when a judge was hesitant to accept a plea, the prosecutor made the comment that they would just dismiss the case then, thus resulting in no penalties.

Staff has learned that there have been multiple instances where the District Attorney's Office had told the court that they had

communicated with the victim when in fact, the victims claimed otherwise. Staff is submitting a CORA request for court documents to identify these instances of inconsistencies since they would constitute very serious ethical violations.

In District Attorney Payne's own words, "overzealous and unwarranted prosecutions have put such a strain on our criminal justice system that it is at a breaking point." Staff would argue that applying the oversimplified don't put them in jail philosophy to ALL levels of crime is simply irresponsible and contrary to the role of the prosecutor. There is a difference between someone who is shoplifting because of an underlying substance use condition and someone who is distributing pounds of drugs with assault weapons and thousands of dollars in drug money. There is a difference between low level offenses and murder. The inappropriate plea deals have left victims feeling helpless and often revictimized and have sent a clear message to those considering breaking the law that the valley is a safe haven for criminals. Police have literally had arrestees laugh as they are handcuffed.

We put our officers' lives at risk every time they have to make an entry on a narcotic operation. Our neighborhoods and residents are at risk when criminals are allowed to avoid jail time and walk around our community. These are our victims whose voices are being ignored.

There is a current movement afoot to petition for a recall election. Under Section 5-42 of the Code, Council can direct the city to spend up to \$10,000 on ballot issues in elections, but not on candidates or recall of persons holding office. This distinction was made when the ordinance was originally enacted to prevent spending on specific candidates for state or local office. Current circumstances involving the incompetence and misguided policy of the District Attorney for the 12th Judicial District make clear that the City has an interest in participating in recall elections for persons other than City Council Members who have demonstrated an unfitness for office, when such persons have an impact on the financial or operational condition of the City in the same way it has an interest in participating in election issues that have an impact on the financial or operational condition of the City. Ordinance 5-2022 would allow the City to spend funds on recall efforts for non-City recall elections. The expenditures are limited to recall elections, as those present particularly dire circumstances that could justify City involvement. A redline showing the changes to section 5-42 is attached.

Staff recommends approving Ordinance 5-2022 that would then allow Council to consider a resolution authorizing staff to dedicate time and resources to a recall election at their March 16th meeting. Additionally, staff recommends submitting a letter to the Attorney General's Office requesting a meeting to discuss concerns and requesting an investigation, a draft is also attached. Staff further recommends Council authorize staff to investigate whether any of DA Payne's actions relating to cases he reviews, and representations to the court concerning facts surrounding those cases, violate his ethical obligations under the Colorado Rules of Professional Conduct which govern all lawyers, violations of which are reviewed by the Colorado Supreme Court.

Given the overwhelming breakdown of the judicial process because of poor performance/management and the extreme application of a philosophy, staff does not feel that our community will be safe under the leadership of DA Payne, and another three years is not sustainable.

**Issue Before the Council:**

(1) Does Council wish to approve Ordinance No. 5-2022 on first reading?

(2) Does Council wish to authorize the Mayor to send a letter to the Attorney General concerning the DA's malfeasance in substantially the form attached?

(3) Does Council wish to authorize staff to further investigate potential ethics violations on the part of the DA?

**Alternatives:**

**On Ordinance No. 5-2022:**

a) approve the ordinance on first reading and set for second reading and public hearing on March 16, 2022, at 7:00 pm or as soon thereafter as the matter may be heard

thereafter as the matter may be heard.

- b) approve the ordinance with changes, such as to allow for expenditure of City funds for other candidate races beyond recall elections.
- c) decline to approve the ordinance. This would mean that the City could not spend funds on a DA recall election, as doing so is prohibited under Section 5-42 as currently written.

**On other actions to address the DA's malfeasance:**

- a) authorize the Mayor to send a letter to the Attorney General concerning the DA's malfeasance in substantially the form attached, and authorize staff to further investigate potential ethics violations by the DA.
- b) authorize one, but not the other, of the actions set forth in (a).
- c) decline to authorize further actions, and give staff further direction.

**Fiscal Impact:**

Ordinance No. 5-2022 does not change the \$10,000 cap on expenditure of City funds for election purposes, just broadens its scope. There could be up to a \$10,000 expense (most of which would be staff time, but there could also be expenses for petition circulators and other election related expenses) for the recall effort.

**Legal Opinion:**

The City Attorney will be available at the meeting to address any legal questions.

**Conclusion:**

Our community is not safe under the leadership of DA Payne, and another three years is not sustainable. Ordinance No. 5-2022 and the other actions proposed will provide the City with means to attempt to rectify the situation.

**ATTACHMENTS:**

Description	Type
<input type="checkbox"/> Ordinance 5-2022 FCPA amendment	Ordinance
<input type="checkbox"/> redline of changes to section 5-42	Backup Material
<input type="checkbox"/> Draft letter to AG	Backup Material
<input type="checkbox"/> Photos	Backup Material

**REVIEWERS:**

Department	Reviewer	Action	Date
Attorney	Schwiesow, Erich	Approved	2/23/2022 - 7:02 PM
City Manager	Brooks, Heather	Approved	2/24/2022 - 3:38 PM
Attorney	Schwiesow, Erich	Approved	2/24/2022 - 7:24 PM