

Karra J. Porter, 5223  
J. D. Lauritzen, 14237  
CHRISTENSEN & JENSEN, P.C.  
257 East 200 South, Suite 1100  
Salt Lake City, Utah 84111  
Telephone: (801) 323-5000  
[Karra.Porter@chrisjen.com](mailto:Karra.Porter@chrisjen.com)  
[JD.Lauritzen@chrisjen.com](mailto:JD.Lauritzen@chrisjen.com)  
*Attorneys for Plaintiffs Samuel P. Newton*

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH, NORTHERN DIVISION

<p>LAW OFFICE OF SAMUEL P. NEWTON, P.C. and SAMUEL P. NEWTON, an individual,</p> <p style="text-align: center;">Plaintiffs,</p> <p>v.</p> <p>WEBER COUNTY, a political subdivision of the state of Utah; JAMES H. HARVEY, KERRY W. GIBSON, and CHARLES J. EBERT, in their official and individual capacities,</p> <p style="text-align: center;">Defendants.</p>	<p style="text-align: center;"><b>COMPLAINT</b></p> <p style="text-align: center;"><b>AND JURY DEMAND</b></p> <p style="text-align: center;">Civil No.</p> <p style="text-align: center;">District Judge</p>
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Plaintiffs Law Office of Samuel P. Newton, P.C., and Samuel P. Newton (hereinafter collectively “Newton” and “his” unless otherwise indicated) hereby complain against the defendants as alleged below.

**PRELIMINARY STATEMENT AND INTRODUCTION**

Few things have greater import in our society than guaranteeing a citizen his right to due process before the government takes his life. The death penalty is the harshest and most controversial punishment in the American justice system. As such, public discourse about the death penalty is especially deserving of protection under the First Amendment to the

United States Constitution. This case is about the defendants' termination of an attorney's contract for calling attention, through petitions to a court and communications with the media, to important issues in how Utah handles death penalty cases.

### **PARTIES**

1. Plaintiff Samuel P. Newton is an attorney licensed in Utah, Colorado, and Montana.

2. Plaintiff Law Office of Samuel P. Newton, P.C., is a law firm incorporated by Samuel P. Newton in the state of Montana.

3. Defendant Weber County is a political subdivision organized under the laws of the state of Utah.

4. James H. Harvey is an individual who resides in Weber County, State of Utah. Defendant Harvey currently is, and at all times relevant to this Complaint was, a Weber County commissioner.

5. Kerry W. Gibson is an individual who resides in Weber County, State of Utah. Defendant Gibson currently is, and at all times relevant to this Complaint was, a Weber County commissioner.

6. Charles J. Ebert is an individual who resides in Weber County, State of Utah. Defendant Ebert currently is, and at all times relevant to this Complaint was, a Weber County commissioner.

### **JURISDICTION AND VENUE**

7. This action raises questions under the Constitution of the United States and 42 U.S.C. § 1983, and thus this Court has jurisdiction under 28 U.S.C. §§ 1331 and 1343.

8. Venue is proper in this Court under 28 U.S.C. §§ 1391(a)(2) and 1391(b), as the events or omissions alleged occurred in Weber County, Utah, and all defendants reside in this District and the State of Utah.

### **FACTUAL BACKGROUND**

9. Sam Newton is a well-known and respected appellate attorney who has practiced in Utah and surrounding states since 2003. During his career, Newton has worked for federal and state prosecutors and as a public defender. He is a former professor of criminal justice at Weber State University and, in addition to co-writing a criminal law textbook and other academic publications, regularly speaks on criminal law topics. In 2017, the Utah Association of Criminal Defense Lawyers gave Newton its Distinguished Service Award.

10. Under the Sixth Amendment to the United States Constitution, criminal defendants, both at trial and on the first appeal of right, are entitled to the basic tools of an adequate defense. Weber County is one of only five counties in Utah that does not fulfill its Sixth Amendment obligation by contributing to a statewide indigent defense fund. Instead, Weber County self-funds indigent defense appeals. Accordingly, it is both the entity obligated to fund a constitutionally proficient defense and the entity out of whose budget that funding comes, dollar for dollar.

11. In furtherance of its Sixth Amendment obligations, for several years Weber County contracted with Newton to handle indigent defense appeals. Newton's Agreement for Indigent Defense Attorney Appeals (hereinafter "general appellate contract") was last renewed on January 1, 2017. A copy of the general appellate contract in effect at the time of

the events herein occurred is attached as Exhibit A. The contract was to pay \$81,900 annually, and run through December 31, 2019.

12. On October 26, 2017, Weber County terminated Newton's contract. The County's termination notice did not cite any dissatisfaction with Newton's performance. Rather, the notice stated that Newton's termination was in retaliation for unspecified statements Newton had made during the past year "to the media and to the court."

13. Although the notice did not identify specific statements, Newton is unaware of any potential statements to which it could be alluding to other than discussions relating to a death penalty case involving Douglas Lovell as well as Utah's death penalty in general, discussed further below.

14. On April 1, 2015, a jury sentenced Douglas Lovell to death for the murder of Joyce Yost. As is common after a trial, Lovell was appointed new counsel (Newton) for his appeal. This representation was pursuant to a separate, case-specific contract entered into with Weber County (hereinafter "the Lovell contract").

15. In May 2016, Newton submitted an 89-page Motion for Remand to the Utah Supreme Court. The motion alleged that one of Lovell's court-appointed trial attorneys had failed to prepare (and in some cases even to contact) critical trial witnesses, as required for an adequate defense under the Sixth Amendment. Newton asked for an evidentiary hearing to address the allegations, and submitted two dozen affidavits in support thereof.

16. The affidavits included testimony from mitigation expert Marissa Sandall-Barrus. Among other things, Ms. Sandall-Barrus testified that she had been hired late in the process to replace a previous mitigation expert who had quit for non-payment, that financial

constraints prevented Sandall-Barrus from following her standard practice, and that she had agreed to work on the case “against my better judgment . . . because Weber County has a reputation for non-payment.”

17. In his motion to the Supreme Court, Newton asked for “the opportunity and the funding to conduct an investigation into all potential claims of ineffective assistance of counsel.” Newton asked “that the court order funding to conduct constitutionally adequate investigations, without which Mr. Lovell may not be able to entirely show on appeal the prejudice from the defense team’s ineffective assistance.”

18. In December 2016, the Utah State Bar issued a preliminary determination that Lovell’s court-appointed trial counsel had violated several rules of Professional Conduct, including Rules 1.1 (competence), 1.3 (diligence), 1.16(d) (declining or terminating representation), 8.4(c) (misconduct (dishonesty, fraud, deceit or misrepresentation), and 8.4(d) (misconduct; conduct prejudicial to the administration of justice). The Bar later filed a formal complaint against counsel on May 17, 2017.

19. In March 2017, the Utah Supreme Court remanded Lovell’s case to the district court for an evidentiary hearing to determine whether Lovell’s court-appointed trial attorney performed deficiently by failing to adequately prepare witnesses, by not calling certain witnesses to testify on Lovell’s behalf, and by not objecting to purported interference by lawyers representing some of those witnesses. The Supreme Court’s ruling was the subject of media coverage. *See, e.g.*, “Ineffective trial attorney? Appeal for Utah death row inmate sent back to trial court for evidence hearing,” *The Salt Lake Tribune*, March 12, 2017.

20. On March 20, 2017, Newton filed a Motion for Payment of Attorney Fees and Litigation Expenses in the Second District Court in and for Weber County, State of Utah (hereinafter “the Lovell court”). The motion followed various emails on the subject between Newton and Weber County personnel.

21. Weber County successfully moved to intervene and filed an opposition to Newton’s motion on March 31, 2017, including attaching the emails between Newton and county personnel. Newton filed a reply memorandum on April 17, 2017, along with an additional exhibit on May 1, 2017.

22. The parties’ briefings laid out their competing factual and legal arguments for the court’s review. Among other things, the parties set forth varying interpretations of emails received by Newton from County personnel. The parties’ filings included arguments (by Newton) that courts have a constitutional responsibility to guarantee that indigent defenses are adequately funded, and (by Weber County) that a county has no obligation to ensure adequate funding beyond entering into a contract with a qualified attorney. This was an issue of first impression in Utah.

23. On May 24, 2017, the trial court ruled that it lacked subject matter jurisdiction to address the merits of Newton’s motion. The court ruled that neither Utah’s Indigent Defense Act nor the Utah constitution confers jurisdiction upon a trial court to ensure adequate defense funding if a contract exists between counsel and the funding entity.

24. On June 9, 2017, Newton filed a motion to withdraw as counsel for Lovell in the Second District Court. In connection with the motion, Newton submitted affidavits to the court. Among other things, Newton opined that Weber County was underfunding Mr.

Lovell's case in light of the Utah Supreme Court's ruling, that the County had threatened to terminate his appellate contract in response to his expressions of concern about the adequacy of Lovell's defense, that the County had created conflicts of interest in the case, and that his health had been compromised as a result of these circumstances.

25. Weber County disputed Newton's assertions regarding funding, but did not oppose the motion to withdraw.

26. On July 16, 2017, *The Salt Lake Tribune* published an article regarding the funding issues in Lovell's and other cases. The article's headline read, "Attorney representing Utah death row inmates says he's not being paid adequately – and he's not the first to raise concerns." *The Tribune* noted that Newton was citing this and prior funding disputes to urge abolition of the death penalty:

Newton... said that defense attorneys are not being given enough money to support thorough death penalty case reviews – and in the cases for two Utah death row inmates Newton represents, he said he has had trouble getting paid.

Newton points to a 2008 Utah Supreme Court opinion for death row inmate Michael Anthony Archuleta in which the high court expressed concern that there was a diminishing pool of competent attorneys to work on capital cases. The justices wrote then that if qualified attorneys could not be found, the court might be forced to overturn death penalties and send the cases back to district court for imposition of life-without-parole sentences.

"This court should end the punishment [of execution] in this state once and for all," Newton wrote in his motion on behalf of Lovell.

27. The July 16, 2017, *Tribune* article discussed funding issues in other Utah death penalty cases. For example, the article stated:

Newton is not the first attorney to raise concerns about payment in Utah death penalty appeals. A decade ago, as an appeal for death row inmate Ralph Menzies was underway, no qualified attorneys would take the case for the amount of money

offered. It got to the point where a judge briefly appointed defense attorney Richard Mauro to represent Menzies, though the lawyer said he took the case unwillingly.

In an amicus brief filed by the Utah Association of Criminal Defense Lawyers in Menzies' case in 2007, several well-known defense attorneys wrote affidavits detailing the financial difficulties they encountered by accepting death penalty appeals. One lawyer wrote that his hourly wage came to under \$17 an hour, though he normally bills at a rate about ten times higher than that. Another said he made \$19 an hour representing a death row inmate in a state appeal ....

28. The *Tribune* article discussed other calls for abolition of the death penalty due to funding issues. For example, it stated:

Robert Dunham, executive director for the national non-profit organization Death Penalty Information Center, said underfunding for defense in capital cases happens in every state where the death penalty is used – especially in places where counties are expected to foot the bill, as in Utah.

When county budgets are tight, Dunham said, officials generally want to spend money earmarked for public safety on police and fire services, not on defense lawyers and experts for those accused of capital crimes.

“Underfunding defense lawyers is bad for the criminal justice system,” Dunham said. “Not just because it risks unfair and unconstitutional trials, but because it costs taxpayers in the long-run when the cases have to be re-done.”

29. The July 16, 2017, *Tribune* article discussed estimated overall costs to Utah of its death penalty, and recent steps toward abolishing capital punishment:

Legislative fiscal analysis estimated in 2012 that it costs an additional \$1.6 million to handle all the appeals and costs of a death sentence over 20 years, compared to a sentence of life without parole.

During the last legislative session, lawmakers considered studying the costs of the death penalty more in-depth – but the bill never came up for a final Senate vote. State lawmakers came close to abolishing capital punishment altogether in 2016, but the bill never reached the House floor before the midnight deadline on the last night of the session.



30. On August 29, 2017, the trial judge in Lovell's case (the Hon. Mark DeRida) granted Newton's motion to withdraw. No subsequent filings were made by Newton in the Lovell case. Newton's withdrawal related only to his representation of Lovell (the Lovell contract); Newton's general appellate contract with Weber County remained in effect.

31. On September 2, 2017, following the order granting Newton's motion to withdraw from the Lovell case, *The Salt Lake Tribune* published an article regarding the case, Newton's withdrawal, and the underlying allegations of ineffective assistance of counsel. In that article, the following statements were attributed to Newton:

Newton told the Tribune on Friday, "It is unfortunate that I was placed in a position where I had to cho[o]se between supporting my family and representing Mr. Lovell."

"I hope that the state of Utah and Weber County will commit in the future to adequately and fully paying for these necessary appellate reviews in such serious matters."

\* \* \*

"On appeal, we discovered that Mr. Lovell's trial attorney committed serious errors when he failed to interview and call dozens of witnesses who would have testified that Mr. Lovell has tried to change his life," Newton said, "that he feels tremendous remorse, and that he has tried, to the best he is able, to repay some of the debt he owes to society and to the Yost family."

32. On September 18, 2017, *The Salt Lake Tribune* published an article headlined, "Two death row inmates need new attorneys – but will anyone sign up?" The article discussed the need for replacement counsel for death row inmates Floyd Maestas and Lovell. The article cited a public exchange that had occurred in court between Lovell and the trial court judge at the August 29, 2017, hearing on Newton's motion to withdraw:

At an August hearing, Lovell asked the judge in his case to order the county and Newton to renegotiate the contract. But Judge Michael DiReda said he couldn't involve himself in a contract dispute.

In his remarks to the judge, Lovell echoed a sentiment that critics of Utah's public defender system have been voicing for years: [f]lat-fee contracts incentivize attorneys to do less work.

"It's to his advantage to do as little work as possible, to talk to me as little as possible," Lovell says in an audio recording of the Aug. 29 hearing. "Because it's getting into that money thing. That's happened time after time after time on this case. That's why I was hoping the court would ..."

Lovell takes a long pause before the judge says: "Step in and —"

"Say enough's enough," Lovell finishes.

"Well, it's not that I don't feel enough is enough," DeRida tells Lovell. "There is a difference between feeling it and being able to articulate it in terms of an order. I don't think this scenario is a good scenario. But it is the statutory scenario that our Legislature has created."

33. The September 18, 2017, *Tribune* article included a discussion of the state of Utah's handling of death penalty cost and whether the penalty should be abolished in Utah, including the following:

Funding for the defense in death penalty cases has been a problem in Utah for decades, according to attorney Ralph Dellapiana, who is the chairman of UACDL's capital case committee. Experienced attorneys aren't going to work for free, he said, and oftentimes those who do take the contracts don't understand the complexity of a death penalty review.

"That's a problem, the state refusing to pay qualified counsel to do the necessary work for appeals in death penalty cases," Dellapiana said. "And the solution is either to pay for it or end the death penalty."

34. This September 18, 2017, *Tribune* article included one statement attributed to Newton:

Newton and others have expressed concern that state and county officials so far have disproportionately funded prosecutors' offices who are seeking an execution and have not done the same for the defense.

“The state gives enormous resources to the prosecution,” Newton told The Tribune in an email. “The state must similarly commit to equally and adequately support criminal defense attorneys, which is a right guaranteed by the United States Constitution. The defense attorney, especially a solo practitioner, should not have to personally bear and front the financial cost for the enormous review required in a capital case.”

35. On September 26, 2017, Weber County contracted with another attorney to represent Douglas Lovell in the appeal and post-trial evidentiary hearing ordered by the Supreme Court. The appointment of replacement counsel for Lovell generated further public interest. *See, e.g.* “Weber County officials pick new defense lawyer in Lovell death penalty case,” *Standard-Examiner*, September 26, 2017.

36. On October 2, 2017, the *Standard-Examiner* Editorial Board gave a “thumbs down” to the Weber County Commission and the Weber County Attorney’s Office “for their slow, clumsy handling of funding for Doug Lovell’s capital defense case.” The editorial stated:

Capital defense cases are expensive. But the Sixth Amendment guarantees the right to counsel.

Sam Newton was on Doug Lovell’s case for more than a year, amassing thousands of pages of research, interviews and case material. He was initially given \$75,000, with a clause to request more but the money ran out in December. He removed himself from the case after saying Weber County was not paying him enough – or at all.

Now, newly selected Colleen Coebergh, a Salt Lake City attorney, has to study that material and effectively start over on the 32-year-old case.

Court documents show Newton was asking for an additional \$37,000, which would have brought the county’s total to a little over \$100,000. Instead, the county will be spending at least \$174,000 with no guarantees Coebergh will be able to catch up with and surpass Newton’s work before the money runs out.

This is inept management of tax dollars and bad stewardship of the Constitution.

37. On October 21, 2017, *The Salt Lake Tribune* published an editorial advocating for abolition of the death penalty. The *Tribune* editorial, quoted herein in its entirety, mentioned Newton and the Lovell case in the context of this larger issue:

*“Many that live deserve death. And some that die deserve life. Can you give it to them? Then do not be too eager to deal out death in judgment.”*

— J.R.R. Tolkien, *The Fellowship of the Ring*

Criminal justice reform has been a worthwhile, bipartisan effort by both state and federal officials over the past few years. In 2014 state lawmakers passed the Justice Reinvestment Initiative, which reduced penalties for drug crimes. The reforms have led to a significant reduction in the state prison population.

Next up on the chopping block for reform advocates: the death penalty.

The Legislature heard a bill during the 2017 legislative session that would have ended capital punishment in Utah, but it failed to reach the House floor before the session ended. Similar legislation will be renewed during the 2018 session.

We have argued previously that eliminating the death penalty would save money and save souls.

At a hearing Tuesday night, advocates for abolishing the death penalty argued that it is “too expensive,” it “unfairly targets minorities,” is “too risky,” and “too arbitrary” as applied.

We agree. Capital cases are expensive. Stephen Crutcher, whose trial is in November, has already pleaded guilty to aggravated murder, yet will go to trial next month so that a jury can determine whether he will receive the death penalty. If there was no death penalty, a judge could simply, and efficiently, sentence Crutcher to life in prison, what many call “the other death sentence.”

Complicating that cost analysis is the fact that there are too few attorneys in Utah competent and willing to try them. Attorney Samuel Newton recently withdrew from representing Doug Lovell when he developed stress-related heart problems from battling with the county over inadequate payment.

Utah has executed seven people since 1976, and currently has nine inmates on death row. The last prisoner to be put to death in Utah was Ronnie Lee Gardner, who chose to be executed by firing squad. Utah is the only state in the modern era to use the firing squad. It’s not a great quirk to be known for.

Pope Francis recently reiterated the Catholic Church's strong stance against capital punishment and said it was "inadmissible" under any circumstances. Pope Francis said, "It's necessary to repeat that no matter how serious the crime, the death penalty is inadmissible because it attacks the inviolable dignity of the person."

Nineteen states have abolished the death penalty, as well as most of Europe and South America. It's time for Utah to become the 20th.

38. Five days after this *Tribune* editorial was published, Weber County fired Newton. On October 26, 2017, Weber County Commissioner James Harvey sent Newton a letter terminating the county's general appellate contract with him, firing Newton from all other pending and future appeals.

39. Harvey's letter did not cite any issues with Newton's performance. (To the contrary, the letter asked Newton to continue handling appeals for another three months until a new attorney would start on February 1, 2018.) The County's sole reason for terminating Newton's contract was punishment for "statements" made by Newton "to the media and to the court." No statements had been attributed to Newton in the media regarding appeals that Newton was handling under the general appellate contract. Newton was thus, fired for comments attributed to him regarding an unrelated case and contract.

40. Harvey's October 26, 2017, letter terminating Newton's general appellate contract stated, in its entirety:

Over the past several years, you have provided representation to indigent defendants on behalf of the County. While we have appreciated your hard work and dedication, this past year you have made various representations to the media and to the court that have been untruthful and harmful to the County's reputation. As a result, we have made the decision to terminate your contract and seek new appellate counsel.

This letter constitutes notice under paragraph 27 of your contract that we intend to terminate the contract. We would like you to continue your work as appellate counsel for indigent defendants through January 31<sup>st</sup> with the expectation that the

new attorney will begin work on February 1<sup>st</sup>. Please let me know if you are willing to continue through January 31<sup>st</sup> or if we will need the new attorney to start sooner.

We wish you the best in your future endeavors.

41. The letter was cc'd to the other two Weber County Commissioners Defendants Kerry Gibson and James Ebert, and to Weber County Attorney Christopher Allred.

42. Harvey told *The Salt Lake Tribune* that the decision to terminate Newton's general appellate contract was a "team effort" between the Weber County Commission and the county's lead prosecutor, Weber County Attorney Allred. At the time of Newton's firing, Allred was the prosecutor in two of Newton's pending appeals.

43. On October 29, 2017, *The Salt Lake Tribune* published an op-ed by Newton titled, "Capital punishment system unfair to defendants and attorneys." Citing funding issues on another death penalty case (Maestas), Newton criticized the effect of such issues on the capital punishment system overall. Among other things, Newton wrote:

In capital cases, states provide counsel to the lowest bidder and encourage attorneys to do little work and then get out. And courts don't fix the problems either. They have refused to find that a defendant was deprived an effective attorney, even if he sleeps or is drunk during trial. In my case, the state believes my client has no right to an effective attorney at all and that he should be grateful they even gave him someone.

The system is full of errors. Since 1976, we have executed 1,452 nationally but exonerated 159, a shocking number for so serious a penalty. An astonishing 47 of 100 death sentences are reversed at some point. These reversals happen because of good lawyering, but this safety net is often lacking. Nationwide, public defenders work under enormous pressure, with massive caseloads and have seen little sign of reprieve.

Our capital punishment system is a charade. We provide a "defense lawyer" but either give someone with no experience or refuse to give the necessary resources to experienced attorneys. In Utah, a state with one of the lowest death penalty

populations in the United States, which has not executed a defendant since 2010, almost every attorney to take a death penalty case has suffered extreme personal loss. The result is a crisis-level lack of qualified attorneys willing or able to take on capital cases.

If we have the death penalty, we must commit to protecting the innocent from execution. We must also commit to adequately support the attorneys who are called upon to perform these difficult tasks.

44. On November 6, 2017, *The Salt Lake Tribune* published an article regarding the termination of Newton's general appellate contract that was headlined, "Appellate attorney fired for speaking about lack of funding in Utah death penalty case." As with other coverage, the article addressed the Lovell case in the context of the death penalty debate generally. For example, after discussing the termination of Newton's contract, the article stated:

Anyone who is charged with a crime that includes a possibility of time – in Utah, that is anything more serious than an infraction – is entitled to an attorney, even if they can't afford one. For death penalty cases, those attorneys must be experienced and qualified under court rules.

Utah is one of several states in the nation that delegates the responsibility to provide defense lawyers to individual counties and cities.

Most counties in Utah pay into a state-managed fund for death penalty cases, a sort of insurance policy from which officials can request if they have a death-penalty eligible case in their county.

Weber County, however, is one of five counties that does not participate in this fund – instead, it uses its own money to contract with individual attorneys.

According to a 2015 report by the Sixth Amendment Center, which was contracted by the state to review its public defender system, this setup can oftentimes lead to a number of conflicts. First, flat-fee contracts incentivize lawyers to do less work. But it can also cause problems when the lawyers are selected by, and contract directly with, county officials.

In Weber County, while a civil attorney drafts contracts and a criminal attorney prosecutes a case, they are all employed by the county attorney's office – and ultimately have the same boss: Weber county Attorney Christopher Allred.

\* \* \*

Lawmakers in 2016 created an Indigent Defense Commission to help address these and other problems with the state's public defender system. The commission was also given money to dole out to counties in need, to help them fund indigent defense properly.

But because Weber County has not asked for any of that grant money, neither the Indigent Defense Commission nor any other state entity has authority over how it contracts with its public defenders.

“This situation stresses the importance of having independent in the public defender function,” said Joanna Landau, executive director of the Indigent Defense Commission. “[It is] a constitutional obligation that should not be funded or controlled by prosecutor or judiciary.”

Newton said his contract illustrates the problems with public defenders being funded at a county-level.

“Criminal defendants are entitled to independent attorneys who aren't afraid they will lose their livelihood if they advocate for their clients,” he told *The Tribune*. “We can't have a fair system of justice unless both sides are totally independent of each other.”

45. The *Standard-Examiner*, a daily newspaper covering Weber and surrounding counties, also published an article about the termination of Newton's contract. *See* “Attorney fired for making statements in death penalty case,” November 6, 2017.

46. On November 9, 2017, *The Salt Lake Tribune* published an editorial, illustrated with a photograph of Newton, titled “Indigent defense should be independent of county pursestrings.” The *Tribune* editorial discussed the termination of Newton's contract in the context of the ongoing death penalty debate. Among other things, the *Tribune* stated:

Weber County only has itself to blame for the bad publicity it's about to receive. County officials recently terminated a contract with Samuel Newton, an appellate attorney who had represented indigent defendants in the county for the past seven



years. Why? Because Newton had the gall to publicly complain that the county wasn't sufficiently funding the appeal of a capital murder case. Newton withdrew from the case after he suffered stress-related health problems caused by handling the capital murder case with inadequate funding....

In the letter that terminated Newton's contract, Weber County Commissioner James Harvey wrote, "While we have appreciated your hard work and dedication, this past year you have made various representations to the media and to the court that have been untruthful and harmful to the county's reputation."

It is not Newton's duty to protect Weber County's reputation, especially if the county's actions are making it harder to provide fair and competent representation. The county bemoans Newton's efforts to build relationships with his clients. Commissioner Harvey admitted the county just "wants to know ... if the appropriate decision has been made."

The very fact that the county doesn't want its defense lawyers to create relationships with clients reveals the need for attorneys to do just that. The appellate process is not a rubber stamp. At least it shouldn't be.

Even worse, the county commission consulted with the county attorney before ending Newton's contract. There is an inherent conflict of interest when the prosecution gets to choose who it goes up against.

The fact that a county can micromanage a defense attorney's case by limiting interaction with the client and placing a cap on hours spent demonstrates the problems created when cities and counties fund their own indigent defense programs.

The Constitution requires that criminal defendants have access to adequate representation. Utah delegates that responsibility to cities and counties. The Legislature attempted to improve the system by creating the Indigent Defense Commission in 2016, which aims to provide adequate funding to severely underfunded county indigent defense programs across the state. But Weber county didn't ask the commission for funds to help with its program. Perhaps the Legislature needs to re-imagine the commission's role for counties that prefer quick and easy, and cheap, indigent defense representation.

Joanna Landau, executive director of the Indigent Defense Commission, says that the public defender function is "a constitutional obligation that should not be funded or controlled by prosecutor or judiciary."

She's right.

47. Shortly thereafter, the *Standard-Examiner* mentioned the Lovell funding issues again in a discussion of death penalty costs in Utah. Among other things, an article headlined “Layton lawmaker wants deeper look at Utah death penalty costs,” published November 27, 2017, stated:

A legislator is proposing an in-depth study of death penalty costs so the state will have unambiguous answers at hand as Utah’s capital punishment debate continues. A bill filed by Rep. Stephen Handy, R-Layton, for the 2018 legislative session would order research of all costs associated with the prosecution and execution of a death penalty case and an expected 25 years of appeals. The data would be compared with the costs of a capital murder convict serving life without parole.

\* \* \*

Handy’s proposal comes as Wasatch Front counties continue to wrestle with the costs of death row appeals, such as Doug Lovell’s ongoing battle against his sentence in the 1985 murder of Joyce Yost of South Ogden.

\* \* \*

The U. S. Bureau of Justice Statistics says 33 states and the federal Bureau of Prisons held 2,881 inmates under death sentence at the end of 2015. Utah has nine inmates on death row today, said Maria Peterson, Utah Department of Corrections spokeswoman.

Handy said he realizes his request for a cost study may run against the grain in the capital punishment-friendly Utah Legislature, which reinstated the firing squad option for executions in 2015. Lawmakers also have rejected periodic bills that aimed to drop the death penalty.

Most law enforcement officials support the death penalty, Handy said, recalling an occasion when Weber County Sheriff Terry Thompson “came at me like a house afire,” during a public discussion of capital punishment....

48. Newton raised these important issues as a citizen and not pursuant to his ordinary job responsibilities. The speech was not commissioned by the county, was not a routine act, and was outside any potential “chain of command.” Newton sought to bring to light actual or potential malfeasance by public officials, including their violation of Sixth

Amendment rights of a third party (Lovell), along with constitutional infirmities of the state's capital punishment system. As stated in the defendants' termination letter, the speech for which Newton was punished was not internal communication with county personnel; rather, the defendants cited court filings, which included sworn testimony (affidavits), and communications with news media. Newton had no contractual obligation to make these communications, nor was he speaking on behalf of the defendants. News coverage on the issues included statements from a wide range of concerned citizens unassociated with the Lovell case, including other lawyers, law enforcement officials, death penalty abolitionists, a state legislator, and *Tribune* and *Standard-Examiner* editors. The Lovell court itself made public statements expressing concerns about the statutory system. Furthermore, any statements attributed to Newton after August 29, 2017, regarding Lovell would have been after Newton's withdrawal as counsel, when Newton had no role beyond that of a concerned citizen.

49. The speech for which Weber County punished Newton was on a matter of public concern, relating to matters of political, social, and economic concern to the community. Newton's speech raised important issues regarding the constitutional rights of a third party (Lovell), operation of the courts, and perceived deficiencies in the system by which Weber County and the State of Utah impose the death penalty. Newton's speech was on a subject of legitimate news interest, as evidenced by media coverage not only of Newton's speech but the writing of editorials by local media outlets. Newton's speech was valuable in the ongoing public discussions of the death penalty and its associated costs, sparking a renewal of efforts to study those costs by a state legislator. Statements attributed

to Newton were true, were opinion and/or competing interpretations of identified documents. Furthermore, as stated by *Standard-Examiner* editors, Newton's and the county's court filings raised questions not only about the county's "stewardship of the constitution," but also its "management of tax dollars." Newton's filings pointed out the additional costs resulting when convictions or sentences are reversed, citing such economic inefficiency as one reason to abolish the death penalty.

50. Defendants did not claim, and could not show, that the county's interests in promoting efficiency of the public service would outweigh Newton's right to speak on issues of public concern and to petition courts for redress of grievances. Newton is an independent contractor with no confidential relationship or duties of loyalty to the county and no role in the county's internal operations. Unspecified "harm" to a county's "reputation" would not outweigh the importance of an independent contractor's First Amendment rights, particularly when the speech involved rights of a third party and a case unrelated to Newton's general appellate contract. The county was able to respond to the speech and Newton's petitions, including offering differing interpretations of events, communications, and the law. The court (and other members of the public and media) were thus fully informed of the parties' views on the issue. The county was similarly able (when it chose) to respond to inquiries from the media. The defendants were able to hire replacement counsel on the Lovell case despite any speech by Newton or adverse media coverage.

51. Defendants' October 26, 2017, letter admitted that Newton's protected speech was a motivating factor – indeed, the only motivating factor – in terminating Newton's contract.

52. Defendants do not claim, and could not show, that they would have reached the same decision in the absence of Newton's protected conduct. Not only was the termination letter clear as to the sole motivating factor, but Newton had been handling Weber County's indigent appeals for several years, and county officials had stated earlier in 2017 that they were not unhappy with his job performance.

53. Newton's First Amendment rights were clearly established at the time of his termination. *See, e.g., Pickering v. Board of Education*, 391 U.S. 563 (1968); *Board of County Commissioners v. Umbehr*, 518 U.S. 668 (1996); *Garcetti v. Ceballos*, 547 U.S. 410 (2006); *Borough of Duryea, Pa. v. Guarnieri*, \_\_\_ U.S. \_\_\_ (2011); *Eisenhour v. Weber County*, 744 F.3d 1220 (10<sup>th</sup> Cir. 2014); and *Lane v. Franks*, \_\_\_ U.S. \_\_\_, 134 S.Ct. 2369 (2014).

54. As a result of the defendants' unconstitutional retaliation, the Law Office of Samuel P. Newton was deprived of an appellate contract that had provided a substantial portion of Newton's income. Samuel P. Newton has also suffered emotional distress and other personal injury from the violation of his personal constitutional rights.

55. Newton has been required to retain the services of an experienced civil rights attorney to vindicate these constitutional harms.

### **FIRST CLAIM FOR RELIEF**

(First Amendment – defendants Harvey, Gibson, and Ebert)

56. The foregoing allegations are incorporated by reference as though fully set forth herein.

57. Defendants violated Newton's clearly established right under the First Amendment not to be penalized for exercising their right to speak on matters of public concern as described above.

58. Defendants violated Newton's clearly established right under the First Amendment not to be penalized for exercising their right to petition the government for redress, which includes a right of access to the courts as described above.

59. Defendants operated in concert to violate Newton's rights, both among each other and in concert with the Weber County Attorney.

60. Defendants are jointly and severally liable for these constitutional violations under 42 U.S.C. § 1983 and 42 U.S.C. § 1985(2).

61. As a result of these violations, Newton has suffered economic and other harm described above.

## **SECOND CLAIM FOR RELIEF**

(First Amendment - Weber County)

62. The foregoing allegations are incorporated by reference as though fully set forth herein.

63. Defendants Harvey, Gibson, and Ebert, as members of the Board of County Commissioners of Weber County, made the decisions complained of herein and were final policymaking authorities for Weber County on said decisions.

64. Weber County is liable under 42 U.S.C. § 1983 for the actions taken by its Board of County Commissioners described herein, and the harm resulting therefrom.

**PRAYER FOR RELIEF**

WHEREFORE, plaintiffs request the entry of a judgment in their favor and against defendants as follows:

A. A declaratory judgment, pursuant to 28 U.S.C. § 2201, declaring that defendants' actions violated plaintiffs' First Amendment rights to speak on matters of public concern and to petition the government for redress.

B. A judgment awarding compensation to plaintiffs for their economic loss, emotional distress and other personal injury resulting from the violation of their constitutional rights.

C. A judgement assessing punitive damages against the individual defendants if so found by the jury.

D. A judgment awarding plaintiffs their costs of suit, including reasonable attorney fees and litigation expenses, under 42 U.S.C. § 1988.

E. A judgment awarding plaintiffs interest on economic losses to the extent permitted by law.

F. A judgment awarding such other and further relief, including equitable relief, to which plaintiffs may be entitled.

DATED this 31<sup>st</sup> day of January, 2018.

CHRISTENSEN & JENSEN, P.C.

/s/ Karra J. Porter

Karra J. Porter

J. D. Lauritzen

*Attorneys for Plaintiffs Samuel P. Newton and Law  
Office of Samuel P. Newton, P.C.*

JURY TRIAL DEMANDED

Plaintiff's requests a jury trial under the  
Seventh Amendment of the United States Constitution.