IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JACK DARRELL HEARN, DONNIE LEE MILLER, AND, JAMES WARWICK JONES, PLAINTIFFS,	§	
V.	§	
SHEILA VASQUEZ, IN HER OFFICIAL CAPACITY AS MANAGER OF THE TEXAS DEPARTMENT OF PUBLIC SAFETY-SEX OFFENDER REGISTRATION BUREAU, AND STEVEN MCCRAW, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE TEXAS DEPARTMENT OF PUBLIC SAFETY, DEFENDANTS.	§	CAUSE NO. 1:18-CV-504-LY

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BE IT REMEMBERED that on August 27, 2019, the court called the above-styled and numbered cause for bench trial. Plaintiffs Jack Darrell Hearn, Donnie Lee Miller, and James Warwick Jones and Defendants Sheila Vasquez and Steven McCraw (collectively, the "Department"). All parties appeared in person or by attorney. After the close of evidence, the parties submitted post-trial briefs. Having carefully considered the evidence presented at trial, the parties' stipulations and briefs, the arguments of counsel, and the applicable law, the court concludes that current law forecloses the relief sought by the Plaintiffs. In so deciding, the court makes the following findings of fact and conclusions of law.[1]

[1] All findings of fact contained herein that are more appropriately considered conclusions of law are to be so deemed. Likewise, any conclusion of law more appropriately considered a finding of fact shall be so deemed.

I. Jurisdiction and Venue

The court has original jurisdiction over this action because the Plaintiffs assert claims arising under the United States Constitution and federal law. 28 U.S.C. § 1331. Venue is proper because the events related to the Plaintiffs' claims arose within this district. 28 U.S.C. § 1391(b).

II. Background

Each Plaintiff received deferred-adjudication community supervision by virtue of a plea bargain connected to state criminal charges of aggravated sexual assault. *See* Tex. Penal Code Ann. § 22.011. At the time of the Plaintiffs' plea bargains (between August 12, 1992, and May 18, 1995), Texas law permanently discharged "disqualifications and disabilities"—such as the requirement to register as a convicted sex offender under Texas's Sex Offender Registration Program (the "Program")—once the requirements of deferred-adjudication community supervision had been performed and charges were dismissed.[2] For Plaintiff Hearn, Texas law at the time also excluded deferred adjudication from the list detailing what required registration under the Program. *See* Act of May 25, 1991, 72nd Leg., R.S., ch. 572, § 1, 1991 Tex. Gen. Laws 2029 (1991) (defining "reportable conviction or adjudication," requiring registration, to exclude "deferred adjudication" community supervision placement).

Since then, the Texas Legislature has defined deferred adjudication in the Texas Code of Criminal Procedure (the "Code") as a "reportable conviction or adjudication" for purposes of registration under the Program. In 1997, the Code was amended to require 10 years of registration after a community-supervision discharge. *See* Act of June 1, 1997, 75th Leg., R.S., ch. 668, § 1,

[2] For Hearn, *see* Act of May 29, 1989, 71st Leg., R.S., ch. 785, § 4.17, 1989 Tex. Gen. Laws 3471, 3501 (1989) (former Article 42.12, § 5(c), Tex. Code Crim. Pro. Ann.); for Miller and Jones, *see* Act of May 29, 1993, 73rd Leg., R.S., ch. 900, § 4.01, 1993 Tex. Gen. Laws 3586, 3720 (1993)(former Article 42.12, § 5(c), Tex. Code Crim. Pro. Ann.).

1997 Tex. Gen. Laws 2253, 2261 (1997). The effect of the amendment was to require Hearn to register under the Program for the first time and to prolong the duration of Plaintiffs Miller and Jones's duty to register. In 2005, the Code was again amended to require deferred-adjudication supervisees to register for life. Tex. Code Crim. Pro. Ann. art. 62.101, § (a)(1). Consequently, each Plaintiff has been required to continue registering as a sex offender on a public "computerized central database" despite being previously discharged. The parties stipulate to the following:

> (1) In accordance with Article 62.005 of the Texas Code of Criminal Procedure, the Texas Department of Public Safety, continuously since 1997, has published on the online computerized central database it maintains, information which Plaintiffs Hearn, Miller and Jones were (and are) required to report pursuant to their duties to register under Chapter 62 of the Texas Code of Criminal Procedure; and,
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> (2) The information which Plaintiffs Hearn, Miller and Jones have individually reported pursuant to their duties to register under Chapter 62 of the Texas Code of Criminal Procedure, will not be removed from the Texas Sex Offender Registry, as to each Plaintiff, unless or until the Texas Department of Public Safety has verified the particular Plaintiff's duty to register has expired.[3]

Plaintiffs are suing the Department for alleged constitutional and federal-law violations, seeking equitable declaratory and injunctive relief. U.S. CONST. amend. XIV, § 1; 28 U.S.C. § 1343(a)(4); 42 U.S.C. §§ 1983, 1988. The facts are generally uncontested, and resolution of this case turns chiefly on legal disputes. The Plaintiffs principally rely on the Supreme Court decision *Santobello v. New York*, 404 U.S. 257 (1971) in support of their constitutional claims.

Specifically, the Plaintiffs seek: (1) a declaratory judgment that the State's breach of the negotiated plea-bargain agreement it entered with each Plaintiff violated Plaintiffs' substantive-due-process rights; (2) specific performance under the terms of Plaintiffs' plea-bargain

[3] According to Hearn's plea bargain, his duty to register would have expired on August 21, 1998. Miller was discharged from community supervision early on April 21, 2004. Jones was discharged for completing community supervision on May 3, 2004.

agreements, by issuing a permanent injunction which prohibits requiring Plaintiffs to register under Chapter 62 of the Code; (3) a permanent, mandatory injunction which compels Texas to remove Plaintiffs' identifying information from the publicly-accessible database maintained by the Department under Article 62.005 of the Code; and (4) reasonable costs and attorney's fees.

III. Analysis

Plaintiffs make two overarching claims against the Department: (1) the Department violated (and will continue to violate) Plaintiffs' substantive-due-process rights by breaching the negotiated plea bargains, (2) the continuing applications of the Program to Plaintiffs are both part of an ongoing unconstitutional common practice and separately-actionable constitutional violations applied individually to each Plaintiff since 1997.

The Department responds that Plaintiffs should take nothing because: (1) the Department is not a party to the plea agreements and therefore is not the proper party to be sued; (2) there is not a substantive-due-process right to be free from ongoing registration under the Program; (3) a writ of habeas corpus, not Section 1983, is the proper vehicle for Plaintiffs' claims; (4) the statute of limitations for Plaintiffs' claims has run; and (5) Plaintiffs' claims are barred by the doctrine articulated in *Heck v. Humphrey*, 512 U.S. 477, 486 (1994).

The court must determine whether Plaintiffs have enforceable contract rights arising out of their negotiated plea bargains, and, separately, the extent to which those claims are barred. As a threshold matter, the court will analyze whether the Department is a proper party, whether Plaintiffs' substantive-due-process rights were violated, and if Plaintiffs have pleaded the proper vehicle for relief. The court will then turn to determine whether the Plaintiffs' claims are nevertheless barred by the statute of limitations or the *Heck* doctrine.

A. Enforceability of Plaintiffs' plea bargains

"Although the analogy may not hold in all respects, plea bargains are essentially contracts." *Puckett v. United States*, 556 U.S. 129, 137 (2009). Contract-law principles are helpful for analyzing plea bargains, "but surely they cannot be blindly incorporated into the criminal law in the area of plea bargaining." *United States v. Ocanas*, 628 F.2d 353, 358 (5th Cir. 1980).

In Texas, "[a]n award of community supervision is not a right, but a contractual privilege, and conditions thereof are terms of the contract entered into between the trial court and the defendant." *Speth v. State*, 6 S.W.3d 530, 534 (Tex. Crim. App. 1999). The Code provides that "[e]ach district attorney shall represent the State in all criminal cases in the district courts of his district." Tex. Code Crim. Pro. Ann. art. 2.01. As an initial matter, the court concludes that each of Plaintiffs' plea bargains is to be understood as having been made with the State of Texas.

1. Proper party to be sued

It follows that the Plaintiffs claims against the Department, due to the duties assigned to it by Texas,[4] are treated as an action against the State of Texas. *Lewis v. Clarke*, 137 S.Ct. 1285, 1290–91 (2017) ("lawsuits brought against employees in their official capacity represent only another way of pleading an action against an entity of which an officer is an agent"); *see also, Echols v. Parker*, 909 F.2d 795, 801 (5th Cir. 1990) ("[T]he State cannot dissociate itself from actions taken under its laws by labeling those it commands to act as local officials."). In *Meza v. Livingston*, this court noted that although state agencies "perform different functions," in "the final analysis" sex-offender conditions of parole "are imposed and implemented by the State." 623 F.Supp.2d 782, 785 n. 7 (W.D. Tex. 2009) (deeming claims against named individuals, when sued

[4] Articles 62.003 and 62.006 of the Code provide the Department authority to make determinations about whether a person is required to register as a sex offender. Article 62.010 of the Code provides that "the [Department] may adopt any rule necessary to implement [Chapter 62]."

in official capacities for actions undertaken for state agencies, assignable to state itself). On appeal, the Fifth Circuit affirmed that holding and clarified that state actors from related government agencies, even if not "the entity that makes the final decision," were proper parties to be sued "and thus should be accountable for any constitutional violations that may exist." *Meza v. Livingston*, 607 F.3d 392, 412 (5th Cir. 2010). The court therefore concludes that the Department's contention that it is not the proper party to be sued because it was not a party to the plea agreements is without merit. *See also*, *Littlepage v. Trejo*, 1:17-CV-190-RP, 2017 WL 3611773, at *5 (W.D. Tex. 2017) (rejecting Department's defensive claims that they did not "cause" sex-offender registration).

2. Substantive Due Process

The Supreme Court has described the "fundamental" rights protected by substantive due process as "those personal activities and decisions that this Court has identified as so deeply rooted in our history and traditions, or so fundamental to our concept of constitutionally ordered liberty, that they are protected by the Fourteenth Amendment." *Washington v. Glucksberg*, 521 U.S. 702, 727 (1997). "The protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity." *Albright v. Oliver*, 510 U.S. 266, 272 (1994).

The Department asserts that (1) the Fifth Circuit and Texas courts have already foreclosed any argument that the application of Chapter 62 to Plaintiffs violated Plaintiffs' substantive-due-process rights by virtue of a plea agreement, (2) the Supreme Court has not created a substantive-due-process right to be free from the requirement that one register as a sex offender if not provided for in a plea agreement, and (3) that this court need not create a new substantive-due-process right.

The court finds the first assertion dispositive and, therefore, need not consider the other two. For the proposition that the Fifth Circuit has foreclosed relief on these facts, the Department cites *King v. McCraw*, 559 Fed. Appx. 278 (5th Cir. 2014) (unpublished). In *King*, Reginald King was placed on deferred adjudication for indecency with a child in November of 1990, before the enactment of the Sex Offender Registration Act (the "Act"). *Id.* at 279–80. As is the case here, the Act was amended in 2005 to include deferred adjudications for indecency with a child in the definition of "reportable conviction or adjudication," thus making King's offense reportable. *Id.* at 280. King brought suit, arguing that the Act violated his procedural and substantive-due-process rights under the Ex Post Facto Clause. *Id.* at 280-81; U.S. CONST. art. I, § 9, cl. 3. The district court denied King relief. *Id.* On appeal, the Fifth Circuit stated that "in unpublished opinions, this court has repeatedly affirmed a district court's dismissal as frivolous the claim that the retroactive application of Texas law requiring sex offender registration and notification violates the Ex Post Facto Clause." *Id.* at 281. These unpublished opinions rely on *Smith v. Doe*, 538 U.S. 84 (2003), which held that retroactive application of Alaska's sex-offender-registration statute did not violate the Ex Post Facto Clause because seeking to create a civil regulatory scheme is not punitive.

Though Plaintiffs here take care to state they are not suing pursuant to the Ex Post Facto Clause, the court concludes that the Code is similarly non-punitive and instead seeks to create a civil regulatory scheme. Plaintiffs argue there is no punitive requirement for claims brought for breach of negotiated plea agreements under *Santobello*, as the case is instead focused on the inducement to enter the plea. *See* 404 U.S. at 257. Additionally, Plaintiffs point to the Fifth Circuit's adherence to Supreme Court's recognition of a substantive-due-process right to challenge the fundamental fairness and voluntariness of pleas of guilty or no-contest in *Petition of Geisser*, 627 F.2d 745, 749 (5th Cir. 1980), where the court explained:

> "The Supreme Court [in *Santobello*] held that a plea of guilty induced by a promise of the government in a plea bargain is a binding obligation contractual in nature on the government. If a court's decision is made in response to such a plea of guilty, and then the United States government does not carry out its promises in the plea bargain, the constitutional due process rights guaranteeing a fair trial are violated."

Plaintiffs also insist that even if given undue precedential weight to unpublished opinions, contrary to Rule 47.5.4 of the Fifth Circuit, those cases did not consider or decide the narrow question of whether enforcement of a plea bargain applied in this specific context.

Though the opinions are unpublished, their reasoning is persuasive, and the court concludes that there is not a "fundamental" substantive-due-process right to be free from registering with the Program. Because the court concludes that no constitutional violation occurred, the court need not analyze whether a writ of habeas corpus or Section 1983 is the proper vehicle for Plaintiffs' claims.

B. Are the Plaintiffs' claims nevertheless barred?

1. Statute of Limitations

Even if the court is incorrect in its assessment of Plaintiffs' claims and the right not to register with the Program meets the "fundamental" standard, the claims are nevertheless time barred for the reasons to follow.

Because no specified federal statute of limitations exists for Section 1983 claims, federal courts borrow the forum state's general or residual tort limitations period. *Rodriguez v. Holmes*, 963 F.2d 799, 803 (5th Cir. 1992). In Texas, the applicable period is two years. Although state law controls the limitations period for Section 1983 claims, federal law determines when a cause of action accrues. *Brummett v. Camble*, 946 F.2d 1178, 1184 (5th Cir. 1991). Accrual begins "when the plaintiff knows or has reason to know the injury which is the basis of the action." *Burrell v. Newsome*, 883 F.2d 416, 418 (5th Cir. 1989).

Plaintiffs present an innovative argument concerning the "continuing violation" doctrine in an attempt to bypass Texas's two-year statute of limitations. The fight is distinguishing between a continuing violation and a single violation with continuing impact. The Department insists that Plaintiffs should not be permitted to advantageously raise claims that sound in contract to attempt circumventing caselaw that definitively forecloses their case and then seek to avoid accrual of the statute of limitations by temporarily reframing their claim as being about each new updated registration that occurs.

In *Mann*, the plaintiff also challenged the Act under Section 1983 as a breach of the plea bargain he had entered into five years before his suit. 364 Fed. Appx. at 882. The Fifth Circuit affirmed the district court's dismissal of the plaintiff's suit as, among other things, time barred. *Id.* Specifically, the circuit court found that the accrual began when he signed his plea agreement, and then ran until he filed suit five years later. *Id.* The court reached its conclusion even though the plaintiff was still "suffering" from the event that he claimed gave rise to the breach. *Id.*

Though *Mann* is unpublished, the court finds its reasoning compelling and concludes that the Plaintiffs' claims are similarly time barred. Because the court has concluded that Fifth Circuit precedent forecloses the Plaintiffs' claims based both on their substance and timing, the court need not analyze arguments concerning the *Heck* doctrine.

IV. Conclusion

Having determined the Plaintiffs' constitutional and federal claims are barred, the court will conclude that the Plaintiffs shall take nothing by this action.

SIGNED this 27th day of May, 2020.

LEE YEAKEL
UNITED STATES DISTRICT JUDGE