United States Court of Appeals
for the Fifth Circuit

No. 20-50581

JACK DARRELL HEARN; DONNIE LEE MILLER;
JAMES WARWICK JONES,

Plaintiffs—Appellants,

versus

STEVEN MCCAW, *in his Official Capacity as Director of the Texas Department of Public Safety;* SHEILA VASQUEZ, *in her Official Capacity as Manager of the Texas Department of Public Safety-Sex Offender Registration Bureau,*

Defendants—Appellees.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:18-CV-504

(Filed Apr. 15, 2021)

Before KING, SMITH, and HAYNES *Circuit Judges.*

PER CURIAM:*

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* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

Over two decades since plaintiffs-appellants were first made aware of their lifetime obligation to register with the State of Texas as known sex offenders, they now challenge that obligation as violative of their substantive due process rights under the Fourteenth Amendment of the U.S. Constitution through a 42 U.S.C. § 1983 suit. Following a bench trial, the district court found, *inter alia*, that the challenge was time-barred. For the reasons that follow, we AFFIRM.

I.

Plaintiffs-appellants Jack Darrell Hearn, Donnie Lee Miller, and James Warwick Jones (each individually, "Plaintiff' and collectively, "Plaintiffs") pleaded guilty or no contest to charges of sexual assault in the early 1990s. Each Plaintiff accepted a deferred adjudication agreement subject to a period of community supervision or probation. According to Plaintiffs, they entered into these agreements with the understanding that they would either not have to register with the state at all as sex offenders or that such a requirement would cease after their periods of community supervision ended. But in 1997, the Texas legislature amended the law, requiring anyone with a conviction or deferred adjudication for sexual assault to register for life. And each Plaintiff was apprised of this change by late 1997 or early 1998.

Approximately two decades later, Plaintiffs seek relief through a suit under 42 U.S.C. § 1983 against the Director of the Texas Department of Public Safety

and the Manager of the Texas Department of Public Safety's Sex Offender Registration Bureau (collectively, "Defendants "). Specifically, Plaintiffs allege that this registration requirement constitutes a breach of their deferred adjudication agreements and a violation of their substantive due process rights under the Fourteenth Amendment of the United States Constitution, entitling them to specific performance of their agreements.

After a bench trial, the district court dismissed Plaintiffs' suit as untimely and foreclosed by precedent.[1] Plaintiffs timely appealed.

II.

"The standard of review for a bench trial is well established: findings of fact are reviewed for clear error and legal issues are reviewed de novo." *One Beacon Ins. Co. v. Crowley Marine Servs., Inc.*, 648 F.3d 258, 262 (5th Cir. 2011) (quoting *Water Craft Mgmt. LLC v. Mercury Marine*, 457 F.3d 484, 488 (5th Cir. 2006)). This court "may affirm a judgment following a bench trial upon any basis supported by the record." *Meche v. Doucet*, 777 F.3d 237, 244 n.5 (5th Cir. 2015).

III.

Because § 1983 does not provide a statute of limitations, courts borrow from state law. *Wallace v. Kato*,

[1] Because we agree that the suit is time-barred, we do not address the merits of Plaintiffs' suit.

549 U.S. 384, 387 (2007). And typically, courts look to a state's statute of limitations for personal-injury torts. *Id.* In Texas, this is two years. TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(b) (West 2005); *see also Redburn v. City of Victoria*, 898 F.3d 486, 496 (5th Cir. 2018). But although state law governs the statute of limitations period, federal law determines when the action accrues. *Piotrowski v.* City *of Hous.*, 237 F.3d 567, 576 (5th Cir. 2001). Accrual begins when a plaintiff is aware that he has been injured or has sufficient information to know as much. *Id.*; *see also Montgomery v. La. ex rel. La. Dep't of Pub. Safety & Corr.*, 46 F. App'x 732, 2002 WL 1973820, at *2 (5th Cir. Aug. 2, 2002).

In this case, no one disputes that the law was amended in 1997 to require annual lifetime registration, and no one disputes that Plaintiffs were made aware of this change, at the latest, by 1998. As Plaintiffs have framed their argument, that change in the law constituted a breach of their agreements. Applying the two-year statute of limitations, then, these claims were time-barred by 2000.

But Plaintiffs argue that the continuing violation doctrine, which is typically applied in employment discrimination cases, saves their claims. Plaintiffs are mistaken. To be sure, the continuing violation doctrine is simply a federal doctrine governing accrual of an action in certain circumstances. *Heath v. Bd. of Supervisors for S. Univ. and Agric. and Mech. Coll.*, 850 F.3d 731, 739–40 (5th Cir. 2017). In support of their argument, Plaintiffs point to *Heath v. Board of Supervisors*, but that case does not alter the general understanding

of accrual, that is, that a claim accrues when a plaintiff is (or should be) aware of his injury. *Id.* (discussing accrual generally and then discussing the availability of the continuing violation doctrine). Rather, *Heath* explains that in limited circumstances—not present here—a claim will accrue within the limitations period so long as the plaintiff can show that some of the "continuous conduct" occurred within the limitations period. *Id.* at 740. To do so, a plaintiff must show that (1) there are separate-but-related acts at issue; and (2) the violation is continuing. *Id.* at 738. But even if a plaintiff can show as much, this doctrine can be tempered by the court's equitable powers. *Id.*; *Stewart v. Miss. Transp. Comm'n*, 586 F.3d 321, 328 (5th Cir. 2009). In other words, "the continuing violation doctrine extends the limitations period when a violation manifests itself over time, rather than as discrete acts." *Doe v. United States*, 197 F. Supp. 3d 933, 939 (S.D. Tex. 2016), *aff'd*, 853 F.3d 792 (5th Cir. 2017), *as revised* (Apr. 12, 2017).

Against that backdrop, we first look to when Plaintiffs' claims accrued. And plainly, as discussed above and as Plaintiffs frame their injury, the answer to that question is 1997 (or 1998 at the latest) when the law changed (and the alleged breach occurred), and Plaintiffs learned of the change. *See Doe v. United States*, 853 F.3d 792, 802 (5th Cir. 2017) (observing that the harm occurred when the accusations were made in a case where a plaintiff sought " expungement of a[ ] [criminal] accusation" years after the records he sought to have expunged had been publicly available

and that " [t]he continuing violation doctrine [was] inapplicable "); *Gorelik v. Costin*, 605 F.3d 118, 122–23 (1st Cir. 2010) (finding that republishing an alleged disciplinary action on a website did not constitute "a continuing tort, but rather the continuing effects of an alleged harm" and thus that the continuing violation doctrine did not apply).

Having determined the accrual date, we next look to whether Plaintiffs can show that the suit is nevertheless timely because continuous conduct has occurred within the limitations period (2016 to 2018—as the suit was filed in 2018). Plaintiffs cannot do so. Simply, there is only one act at issue—the alleged breach. *See Gorelik*, 605 F.3d at 122–23 (rejecting the argument that each republication of an alleged disciplinary action on a website constituted a continuing tort and declining to apply the continuing violation doctrine). The fact that Plaintiffs must register annually is not "a continuing tort, but rather the continuing effects of an alleged harm," that is, the alleged breach. *See id.* at 123; *see also Heath*, 850 F.3d at 737 (noting that the continuing violation doctrine applies when the claim "is based on the cumulative effect of a thousand cuts, rather than on any particular action taken by the defendant") (quoting *O'Connor v. City of Newark*, 440 F.3d 125, 128 (3d Cir. 2006)). In other words, the subsequent yearly registration requirements are not properly understood as separate breaches of their agreements.

Further still, at this point, the evidence of the content of the plea negotiations, which would be crucial to

understanding what promises were part of the consideration for the agreements, is limited to affidavits made decades later about what was probably or likely discussed. And courts have tended to avoid adjudicating claims where crucial evidence is missing. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 125 (2002) (O'Connor, J., concurring) (noting that statutes of limitations are "designed" to "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared" (quoting *R.R. Tele'rs. v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944))). So, even if the continuing violation doctrine applied, there is good reason for us temper its application in this case where Plaintiffs have all sworn that they were made aware of the change in the law—and thus the alleged breach—over two decades ago and yet never challenged the alleged breach until this suit.

Therefore, the continuing violation doctrine does not save Plaintiffs' suit. We agree with the district court that the suit is time-barred.

IV.

For the foregoing reasons, we AFFIRM.

United States Court of Appeals
for the Fifth Circuit

No. 20-50581

JACK DARRELL HEARN; DONNIE LEE MILLER;
JAMES WARWICK JONES,

Plaintiffs—Appellants,

versus

STEVEN MCCAW, *in his Official Capacity as Director of the Texas Department of Public Safety;* SHEILA VASQUEZ, *in her Official Capacity as Manager of the Texas Department of Public Safety-Sex Offender Registration Bureau,*

Defendants—Appellees.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:18-CV-504

Before KING, SMITH, and HAYNES *Circuit Judges.*

JUDGMENT

(Filed Apr. 15, 2021)

This cause was considered on the record on appeal and was argued by counsel.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.

IT IS FURTHER ORDERED that appellants pay to appellees the costs on appeal to be taxed by the Clerk of this Court.

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

ORDER

(Filed Jun. 19, 2020)

Before the Court is Plaintiffs' Motion for New Trial or to Alter and Amendment Judgment filed June 10, 2020 (Doc. #83). Having carefully reviewed the motion, the entire record, and the applicable caselaw, the court is of the opinion that the motion should be denied.

Federal Rule of Civil Procedure 60(b)(1) allows a court to provide relief in the case of "mistake,

inadvertence, surprise, or excusable neglect" on the part of the court or a party. *United States v. Fernandez*, 797 F.3d 315, 319 (5th Cir. 2015). "A Rule 59(e) motion must clearly establish either a manifest error of law or fact or must present newly discovered evidence and cannot raise issues that could, and should, have been made before the judgment issued." *United Nat. Ins. Co. v. Mundell Terminal Servs., Inc.*, 740 F.3d 1022, 1031 (5th Cir. 2014). However, it "cannot be used to raise arguments which could, and should, have been made before the judgment issued and cannot be used to argue a case under a new legal theory." *Elementis Chromium L.P. v. Coastal States Petroleum Co.*, 450 F.3d 607, 610 (5th Cir. 2006).

The Federal Rules of Civil Procedure "favor the denial of motions to alter or amend a judgment." *S. Constructors Grp., Inc. v. Dynalectric Co.*, 2 F.3d 606, 611 (5th Cir. 1993). "Reconsideration of a judgment after its entry is an extraordinary remedy that should be used sparingly." *Templet v. HydroChem Inc.*, 367 F.3d 473, 479 (5th Cir. 2004).

Plaintiffs' motion asserts the following four arguments as grounds for relief:

(1) the court's legal conclusion that *Santobello v. New York*, 404 U.S. 257 (1971) requires a consequential "punitive" effect.

(2) the court's application of the continuing violation doctrine after *Heath v. Bd. Of Supervisors for S. Univ. & Agric. & Mech. Coll.*, 850 F.3d 731 (5th Cir. 2017).

(3) the uncontroverted evidence presented at trial in support of Plaintiffs' claims under *Santobello*.

(4) the remaining issue concerning application of *Heck v. Humphrey*, 512 U.S. 477 (1994).

Plaintiffs pray that the court grant them a new trial, or alter and amend the final judgment entered by the court on May 27, 2020 (Doc. #82), and to thereafter enter a new final judgment in Plaintiffs' favor which grants the relief they have requested in their first amended complaint.

However, the court finds that Plaintiffs have not clearly established either a manifest error of law or fact or presented newly discovered evidence and that all of the arguments asserted in Plaintiffs' motion were previously raised, considered, and ruled upon by the court when it issued findings of fact and conclusions of law on May 27, 2020 (Doc. #81). Therefore, the court will deny Plaintiffs' motion to alter or amend judgment or, alternatively, for new trial. Accordingly,

IT IS ORDERED that Plaintiffs' Motion for New Trial or to Alter and Amendment Judgment filed June 10, 2020 (Doc. #83) is **DENIED**.

SIGNED this 19th of June, 2020.

/s/ Lee Yeakel
LEE YEAKEL
UNITED STATES
DISTRICT JUDGE

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	§	CAUSE NO.
DEPARTMENT OF PUBLIC	§	1:18-CV-504-LY
SAFETY-SEX OFFENDER	§	
REGISTRATION BUREAU,	§	
AND STEVEN MCCRAW,	§	
IN HIS OFFICIAL CAPACITY	§	
AS DIRECTOR OF THE	§	
TEXAS DEPARTMENT	§	
OF PUBLIC SAFETY,	§	
DEFENDANTS.	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed May 27, 2020)

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]

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

[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.

(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, 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

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[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.).

"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,
>
> (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 Plaintiffs 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.

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[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.

§§ 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 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"

[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]."

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 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.

/s/ Lee Yeakel
LEE YEAKEL
UNITED STATES
DISTRICT JUDGE

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

FINAL JUDGMENT

(Filed May 27, 2020)

On this date, the court held that Plaintiffs Jack Darrell Hearn, Donnie Lee Miller, and James Warwick Jones should take nothing by this action against Defendants Sheila Vasquez and Steven McCraw. Accordingly, the Court renders the following Final Judgment pursuant to Federal Rule of Civil Procedure 58.

IT IS ORDERED that that Hearn, Miller, and Jones **TAKE NOTHING** by their claims against Vasquez and McCraw.

IT IS FUTHRER ORDERED that Vasquez and McCraw are awarded their costs of court.

IT IS FINALLY ORDERED that the case is hereby **CLOSED**.

SIGNED this 27th day of May, 2020.

/s/ Lee Yeakel
LEE YEAKEL
UNITED STATES
DISTRICT JUDGE

United States Court of Appeals
for the Fifth Circuit

No. 20-50581

JACK DARRELL HEARN; DONNIE LEE MILLER;
JAMES WARWICK JONES,

Plaintiffs—Appellants,

versus

STEVEN MCCAW, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE TEXAS DEPARTMENT OF PUBLIC SAFETY; SHEILA VASQUEZ, IN HER OFFICIAL CAPACITY AS MANAGER OF THE TEXAS DEPARTMENT OF PUBLIC SAFETY-SEX OFFENDER REGISTRATION BUREAU,

Defendants—Appellees.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:18-CV-504

ON PETITION FOR REHEARING EN BANC

(Filed May 11, 2021)

(Opinion 4/15/21, 5 CIR., ___, F. 3d ___)

Before KING, SMITH, and HAYNES, *Circuit Judges.*

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.