

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JACK DARRELL HEARN;

DONNIE LEE MILLER; and,

JAMES WARWICK JONES

Plaintiffs

V.

CAUSE NO. 1:18-cv-00504-LY

VINCENT CASTILLEJA, in his 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; and,

Defendants

**PLAINTIFFS' SUR-REPLY IN OPPOSITION ON
DEFENDANTS' MOTION TO DISMISS**

COME NOW Plaintiffs Jack Darrell Hearn (“Plaintiff Hearn”), Donnie Lee Miller (“Plaintiff Miller”) and James Warwick Jones (“Plaintiff Jones”), and, pursuant to Local Rule CV-7(f)(1) of the U.S. District Court for the Western District of Texas, timely files this *Sur-Reply in Opposition on the Motion to Dismiss* filed by Defendants Vincent Castilleja and Steven McCraw (Dkt.#6), and in this connection would show unto the Court as follows:

SUR-REPLY ARGUMENT

1.

In their *Reply to Plaintiffs' Response in Opposition the Motion to Dismiss* (Dkt.#8), Defendants contend the U.S. Supreme Court's decisions in *Santobello v. New York*, 404 U.S. 257 (1971) and *Mabry v. Johnson*, 467 U.S. 504, 509 (1984) "[d]id not create a substantive due process right in the context of a plea agreement."¹ In a technical sense Defendants are correct; the U.S. Supreme Court itself does not "create" substantive constitutional rights. Rather, as Plaintiffs have previously observed,² in those two decisions the Court did "recognize" a substantive due process right of constitutional dimension, where other constitutionally protected trial rights are at stake, under the Fourteenth Amendment. See, *Mabry v. Johnson*, *supra*, 467 U.S. at 509 ("when it develops that the defendant [has not been] fairly apprised" of the "consequences" of his negotiated plea, the plea can be "challenged under the Due Process Clause."), *citing Santobello v. New York*, *supra*, 404 U.S. at 262.

The Fifth Circuit has naturally adhered to the U.S. Supreme Court's recognition of a substantive due process right, available to criminal defendants, to challenge the fundamental fairness and voluntariness of their pleas of guilty or no-contest. Thus, in *Petition of Geisser*, 627 F.2d 745, 749 (5th Cir. 1980), the Court explained:

"The Supreme Court [in *Santobello v. New York*] 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."

¹ *Defs.' Reply on Motion to Dismiss*, 1 (Dkt.#8).

² *Plaintiffs' Response in Opp. to Defs.' Motion to Dismiss*, 7-8 (Dkt.#7).

Other U.S. Courts of Appeals have similarly recognized the Supreme Court’s decision in *Santobello* involved recognition of a “substantive” due process right.³ Furthermore, at least two State courts of last resort have applied “substantive” due process analysis to claims, such as Plaintiffs’ claims, which have challenged, on the basis of *Santobello*, the enforcement or temporal extension of the duty to register as sex offenders under amended State laws.⁴ The Plaintiffs have stated a claim upon which relief may be granted and Defendants’ motion to dismiss must be denied.

2.

In a footnote of their Reply, Defendants also assert Plaintiffs’ original complaint contains no “indication that it is in fact Castilleja or McCraw who are requiring the Plaintiffs’ [sic] to actually register as sex offenders.”⁵ As Plaintiffs have specifically alleged in their original complaint however:

“Current Texas statutory law requires **Defendants Castilleja and McGraw**, in their official capacities, to maintain a computerized central database (‘database’) which is readily accessible online to the public-at-large. The database identifies persons required to register as ‘registered sex offenders’ and contains extensive personal information of such persons. *See*, Section 62.005, Texas Code of Criminal Procedure. Current Texas statutory law also requires that, upon expiration of a person’s duty to register as a ‘sex offender,’ **Defendants Castilleja and McGraw** shall ‘automatically’ remove from the registry and the database the names and identifying information of persons whose duty to register has expired. *See*, Section 62.251, Texas Code of Criminal Procedure.”⁶

³ *Cooper v. United States*, 594 F.2d 12, 19 (4th Cir. 1979)(referring to “this general constitutional framework of substantive due process”), *overruled on other grounds, Mabry v. Johnson, supra*, 467 U.S. at 506-507 n. 2.; *Johnson v. Mabrey*, 707 F.2d 323, 326 (8th Cir. 1983)(“The source of the fairness requirement is constitutional, presumably substantive due process”), *overruled on other grounds, Mabry v. Johnson, supra*, 467 U.S. at 511.

⁴ E.g., *Commonwealth of Pennsylvania v. Martinez*, 147 A.3d 517, 527 (Pa. 2016)(applying *Santobello, supra*, to invalidate sex offender registration requirement); *see also, People v. Temelkoski*, 905 N.W.2d 593, 593 (Mich. 2018)(applying *Santobello, supra*, to invalidate sex offender registration requirement where “statute offered [criminal defendant] potential benefits for pleading guilty that he could not otherwise have obtained had he exercised his constitutional right to a trial.”).

⁵ *Defs.’ Reply on Motion to Dismiss*, 1 n. 1 (Dkt.#8).

⁶ *Plaintiffs’ Original Complaint*, 9 ¶ 4 (Dkt.#2).

Texas statutory law explicitly designates Defendants Castilleja and McCraw, when acting in their official capacities, to be agents of the same “sovereign” (the State of Texas).⁷ The Plaintiffs’ claims against Defendants Castilleja and McCraw in their official capacities must be treated as an action against the State of Texas itself;⁸ and in view of the duties to which they have been assigned by the State of Texas,⁹ Defendants Castilleja and McCraw have been properly named in their official capacities as defendants in the present case.¹⁰

Additionally, although not *directly* raised by Defendants, there can be no reasonable dispute that the State of Texas, acting through its prosecutors in each of Plaintiffs’ criminal cases, was “in privity” with the plea agreements Plaintiffs accepted.¹¹ Moreover, there can be no reasonable dispute that Defendants Castilleja and McCraw, when acting in their official capacities as agents of the State of Texas, “caused” the violations alleged by Plaintiffs in their original complaint.¹²

⁷ Section 411.002, Texas Gov’t. Code (“The Department of Public Safety of the State of Texas is an agency of the state”).

⁸ *Lewis v. Clarke*, --- U.S. ---, 137 S.Ct. 1285, 1290-1291 (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.”)

⁹ *See*, Section 62.010, Texas Code of Criminal Procedure (“[T]he [D]epartment [of Public Safety] may adopt any rule necessary to implement [Chapter 62].”); *id.*, Section 62.003 (statutory authority to make determinations about whether a person is required to register as a sex offender); *id.*, Section 62.006 (same).

¹⁰ *Cf.*, *Meza v. Livingston*, 623 F.Supp.2d 782, 785 n. 7 (W.D.Tex.2009)(deeming claims against named individuals, when sued in their official capacities for actions undertaken for State agencies, assignable to the State of Texas itself).

¹¹ The Texas Constitution provides that the duties of State District Court prosecutors shall be “regulated by the Legislature.” Tex. Const. Art. V, Sec. 21. Texas statutory law, in turn, provides that [e]ach district attorney shall represent the State in all criminal cases in the district courts of his district.” Article 2.01, Texas Code of Criminal Procedure.

¹² *Littlepage v. Trejo*, --- F.Supp.3d ---, 2017 WL 3611773, *5 (W.D. Tex., Aug. 21, 2017)(rejecting Defendants Castilleja and McCraw’s claims that they did not “cause” the unconstitutional sex offender registration of plaintiff).

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray Defendants' motion to dismiss will in all things be DENIED.

Respectfully submitted,

/s/ Richard Gladden
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CERTIFICATE OF COMPLIANCE

This is to certify that this response is 5 pages in length, and that it therefore complies with the 10-page limitation provided by Local Rule CV-7(f)(3) of the Rules of the U.S. District Court for the Western District of Texas.

/s/ Richard Gladden

CERTIFICATE OF SERVICE

This is to certify that I have delivered a true copy of this document to Defendants Vincent Castilleja and Steven McCraw, using the electronic CM/ECF filing system, via their Attorney of Record Seth Dennis (email: seth.dennis@oag.texas.gov), on this 31st day of July, 2018.

/s/Richard Gladden