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DISTRICT III

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Appeal No. 2019AP1209 CR

STATE OF WISCONSIN,

Plaintiff-Respondent

v.

TODD N. TRIEBOLD,

Defendant-Appellant

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**On appeal from the Circuit Court for Pierce County,  
The Honorable Joseph D. Boles, presiding**

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**REPLY BRIEF AND SUPPLEMENTAL APPENDIX OF  
THE DEFENDANT-APPELLANT**

**TODD N. TRIEBOLD**

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### III. Argument.

#### A. In Triebold's case, none of the constituent *mens rea* and *actus reus* elements, necessary for territorial jurisdiction under section 939.03(1)(a), occurred in the State of Wisconsin.

“‘It is elementary that a court may act only upon crimes committed within the territorial jurisdiction of the sovereignty seeking to try the offense.’ Without jurisdiction, criminal proceedings ‘are a nullity.’” *State v. Anderson*, 2005 WI 54, ¶ 32, 280 Wis.2d 104, 695 N.W.2d 731, quoting, *State v. Randle*, 2002 WI App 116, ¶ 18, 252 Wis.2d 743, 647 N.W.2d 324, quoting, *Hotzel v. Simmons*, 258 Wis. 234, 240–41, 45 N.W.2d 683 (1951)). In Wisconsin, the limits of territorial jurisdiction over a crime are defined by Wisconsin Statutes, Section 939.03.

The State argues that it had territorial jurisdiction over Triebold under section 939.03(1)(a), Wisconsin Statutes, which provides for territorial jurisdiction if “[t]he person commits a crime, any of the *constituent elements* of which takes place in this state[.]” (emphasis added) (State’s Brief, page 10). The phrase “constituent elements” is a legal term of art. *Anderson*, 280 Wis. 2d 104 at ¶ 33. “[T]he ‘constituent elements’ . . . are those elements of the criminal offense that the State is required to prove beyond a reasonable doubt in the prosecution of the offense.” *Id.* “A constituent element of a criminal offense may be either an *actus reus* element or a *mens rea* element.” *Id.* at ¶ 51.

The elements of the crime for which Triebold was tried were as

follows:

- 1. The defendant was a person who was required to provide information under section 301.45. A person who [describe the applicable criterion set forth in subs. (1g) of § 301.45] is required to provide information under section 301.45.
- 2. The defendant failed to provide information as required. Section 301.45\_\_ provides that persons required to provide information under section 301.45 must [describe the requirement set forth in subs. (2)-(4) of 301.45]
- 3. The defendant knowingly failed to provide the required information. This requires that the defendant knew that (he) (she) was required to provide the information.

Wis. JI-Criminal 2198 “Failure to Comply with Sex Offender Registration Requirement - § 301.45.”

In this case, the State asserts that the “constituent element” which took place in the State of Wisconsin was that: “Triebold was a person ‘required to provide information under section 301.45.’ ” (State’s Brief, page 11). According to the State, “[t]his threshold constituent element, both the sexual offense itself and the conviction for it in 1994, occurred in Wisconsin and made Triebold subject to the mandatory reporting statute for the rest of his life.” *Id.* The State never identifies this “constituent element” as being either a *mens rea* element, or an *actus reus* element, of the crime.

*Mens rea* is “[t]he state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime.” *Mens Rea*, Black’s Law Dictionary (11th ed. 2019). “*Mens rea* describes the state of mind or inattention that, together with its accompanying conduct, the criminal law defines as an offense. In more technical terms, the *mens rea* of an offense consists of those elements of the offense definition that describe the required mental state of the defendant at the time of the offense.” Paul H. Robinson, “*Mens Rea*,” in *Encyclopedia of Crime & Justice* 995, 995–96 (Joshua Dressler ed., 2d

ed. 2002). The *actus reus*, on the other hand, is: “1. The wrongful deed that comprises the physical components of a crime and that generally must be coupled with mens rea to establish criminal liability; a forbidden act ... 2. The voluntary act or omission, the attendant circumstances, and the social harm caused by a criminal act, all of which make up the physical components of a crime.” *Actus reus*, Black’s Law Dictionary (11th ed. 2019).

With regard to the crime of failing to comply with sex offender registration requirements, the *mens rea* component of this crime is clearly the third element, namely, “[t]he defendant knowingly failed to provide the required information.” *Id.* The second element, “[t]he defendant failed to provide information as required,” would obviously constitute the *actus reus*. But the element which has been identified by the State as *the* constituent element which occurred in the State of Wisconsin, was the first, namely, that “[t]he defendant was a person who was required to provide information under section 301.45.” This is neither a *mens rea* element nor an *actus reus* element of the crime. Rather, it denotes a status of the offender. As such, it is not a constituent element of the crime upon which territorial jurisdiction can be based. “In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity ..., that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment.” *United States v. Scales*, 367 U.S. 203, 224-25 (1961). Or to put it another way, a person cannot be punished for simply having a certain status, but

must commit certain acts while having a certain mental state. Territorial jurisdiction under section 939.03(1)(a) cannot be maintained when both the *mens rea* and the *actus reus*, which together form the “constituent elements” of a crime, have occur wholly outside the territorial boundaries of Wisconsin.

Triebold was charged with a crime that occurred “on Friday, January 3, 2014.” (R.1:2). On that date, Triebold was in the State of Minnesota. Consequently, any mental state he may have formed would have been formed in the State of Minnesota. He could not have formed the *mens rea* to commit this crime while in the State of Wisconsin. Likewise, any acts or omissions committed by Triebold on January 3, 2014, were committed wholly within the State of Minnesota. He did not commit the *actus reus* in the State of Wisconsin. Neither of the constituent elements of this crime, the *mens rea* element and the *actus reus* element, were formed or committed in the State of Wisconsin. As for the 1994 conviction, upon which the State bases its claim for territorial jurisdiction under section 939.03(1)(a), the status that conviction conferred was personal to Triebold and would have travelled with him to Minnesota. A conviction from 1994 cannot fulfill the constituent *mens rea* and *actus reus* elements for a crime which was alleged to have been committed “on Friday, January 3, 2014.” (R.1:2).

**B. The identified purposes of the Wisconsin sex offender registration statutes reinforce the argument that Triebold’s acts, all committed in the State of Minnesota, caused no consequences in the State of Wisconsin, sufficient to support territorial jurisdiction under section 939.03(1)(c).**

Wisconsin Statutes, Section 939.03(1)(c), provides that “[a] person is subject to prosecution and punishment under the law of this

state if ... [w]hile out of this state, the person does an act with intent that it cause in this state a consequence set forth in a section defining a crime.”

The State correctly observes that the purpose behind the notification requirements of the sexual offender registration statutes is to ensure that “... the public and law enforcement officers have accurate information about the whereabouts of known sex offenders so that they can be monitored.” *State v. Dinkins*, 2012 WI 24, ¶ 45, 339 Wis. 2d 78, 810 N.W.2d 787. (State’s Brief, page 8). Any consequences in Wisconsin of Triebold’s acts must therefore be analyzed in the context of the identified purposes of the statute. In this case the purpose of the statute is to warn members of the Wisconsin public and Wisconsin law enforcement of the presence of convicted sexual offenders in their respective communities. These purposes simply reinforce Triebold’s argument that his acts had no consequence in Wisconsin, much less that he performed an act with the intent that it cause a consequence in Wisconsin. Triebold moved from one address in the City of St. Paul, Minnesota, to another address in the same city. (R.73:28, 54-56 and R.36). This was an act which without question had a consequences in the State of Minnesota. Interested persons, including law enforcement, within the vicinity 259 English Street, St. Paul, Minnesota, were denied notice that a sex offender had relocated into their community. But Triebold’s action had no consequences in Wisconsin, and the State of Wisconsin presented no evidence to show that Triebold intended to cause any consequence in Wisconsin. There were no schools in Wisconsin deprived of notice that a sexual offender had moved into their community. Local law enforcement in Wisconsin was not

deprived of notice that a known sexual offender had relocated into their community. There were no concerned citizens in Wisconsin who were not alerted that a sexual offender had moved into their neighborhood. All the consequences of Triebold's acts were confined to the State of Minnesota. And for those consequences Triebold was properly punished by the State of Minnesota. He does not need to be punished again by the State of Wisconsin for acts which had no consequences in Wisconsin.

**C. Claims of a lack of jurisdiction for crimes committed wholly outside the territorial jurisdiction of Wisconsin cannot be waived or forfeited, and may be raised at any time.**

It should be noted at the outset that whether jurisdiction for crimes committed wholly outside the territorial jurisdiction of Wisconsin can be waived, is an issue that has never been resolved by a Wisconsin appellate court. In *State v. Randle, supra*, this Court held that a defendant may waive territorial jurisdiction in the limited circumstances where territorial jurisdiction existed under the original charge, but became questionable when the defendant accepted a plea agreement to a lesser-included charge. *Randle*, 2002 WI App 116, ¶ 15. But *Randle* declined to address the issue of whether territorial jurisdiction can be waived altogether. *Id. See also, State v. Smith*, 2018 WI App 21, ¶ 15, 380 Wis.2d 509, 913 N.W.2d 515. (“Whether territorial jurisdiction can be waived altogether, and how that waiver is accomplished, are undecided questions of state law”; unpublished decision; Suppl. App. 3). Other authorities which have examined the issue have opined that “territorial jurisdiction goes to the very essence of the state’s power to prosecute and the lack of territorial jurisdiction

may never be waived.” 21 Am. Jur. 2d *Criminal Law* § 425, “Nature of jurisdiction; territorial jurisdiction,” *citing, People v. Cespedes*, 9 Misc. 3d 705, 799 N.Y.S.2d 703 (Sup. 2005).

“‘Territorial’ jurisdiction is sometimes mentioned as a third jurisdictional requirement, in addition to subject matter and personal jurisdiction. Because the state only has the power to enact and enforce criminal laws within its territorial borders, there can be no criminal offense unless a court has territorial jurisdiction.” 21 Am. Jur. 2d *Criminal Law* § 425 (footnotes omitted). In that sense, a lack of territorial jurisdiction is similar to a lack of subject-matter jurisdiction, in that a complaint without territorial jurisdiction would allege a non-crime, that is, a crime unknown to law. *See, Mack v. State*, 93 Wis.2d 287, 295, 286 N.W.2d 563 (1980) (“The failure to charge any offense known to law has also been termed jurisdictional”), *citing Champlain v. State*, 53 Wis.2d 751, 754, 193 N.W.2d 868 (1972) and *State v. Lampe*, 26 Wis.2d 646, 648, 133 N.W.2d 349 (1965). “A court’s own jurisdiction is fundamental, and a court may not ignore its lack of jurisdiction. A court cannot act outside its jurisdiction, even when the parties are willing to agree to such an arrangement. A court may sua sponte address the issue of subject matter jurisdiction, and issues related to subject matter jurisdiction may be raised at any time.” 21 Am. Jur. 2d *Criminal Law* § 425 (footnotes omitted); See also, *State ex rel. La Follette v. Raskin*, 30 Wis.2d 39, 45, 139 N.W.2d 667 (1966) (“... subject matter is derived from law and cannot be waived nor conferred by consent ...”).

Inextricably bound with the question of territorial jurisdiction in this case is the Federal Sex Offender Registration and Notification Act

(SORNA), 34 U.S.C.A. § 20901 et. seq. Whether the State of Wisconsin can exercise territorial jurisdiction over Triebold for his failure to provide notification for a wholly intra-state change in residency in another state, requires a determination of whether the State of Wisconsin can exercise such territorial jurisdiction in the face of the Federal SORNA. The State argues that Triebold forfeited his argument that liability under Wis. Stat. § 301.45 is preempted by federal law. (State's Brief, pages 21-22). And it is true that trial counsel did not specifically argue federal preemption below.<sup>1</sup> But trial counsel *did* argue territorial jurisdiction.

What the State fails to recognize that this is an *appeal de novo*. An *appeal de novo* is “[a]n appeal in which the appellate court uses the trial court’s record but reviews the evidence and law without deference to the trial court’s rulings.” *Appeal de novo*, *Black’s Law Dictionary* (11th ed. 2019). At issue in this case is the law, not the facts. And one of the laws that needs to be considered is the Federal SORNA. It is the elephant in the room. As stated previously, the issue of preemption by the Federal SORNA is inextricably bound to the question of territorial jurisdiction. If the Federal SORNA preempts state statutes from commanding citizens of another State to perform notifications in conflict with the requirement of the federal SORNA, then the State of Wisconsin is without territorial jurisdiction to enforce its preempted

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<sup>1</sup> Given the trial counsel’s extensive briefing to the trial court, and the total lack of case law addressing the issue of whether the Federal SORNA preempts conflicting state regulations, the undersigned counsel felt that a post-conviction motion asserting that trial counsel was ineffective for failing to argue the preemption issue would be inappropriate and probably frivolous. See, *State v. McMahon*, 186 Wis.2d 68, 84-85, 519 N.W.2d 621 (1994) (“We think ineffective assistance of counsel cases should be limited to situations where the law or duty is clear such that reasonable counsel should know enough to raise the issue.”).

statute. It is Triebold's position that his claim, that the State of Wisconsin lacked jurisdiction to prosecute him for crimes committed wholly outside territorial jurisdiction of Wisconsin, could not be waived or forfeited, and may be raised at any time. It is therefore necessary and appropriate that this Court address Triebold's claims that the registry requirements for sex offenders who reside in another state are controlled by the Federal SORNA, for that preemption would strip the State of Wisconsin of territorial jurisdiction to issue commands to citizens of other states which are in conflict with the Federal SORNA.

**D. Even if Triebold's federal preemption argument was forfeited, this Court should address the issue because it is a question of law that has been briefed by the opposing parties and is of sufficient public interest to merit a decision.**

Forfeiture is a rule of judicial administration, which this Court may apply, or not apply, in its discretion. *State v. Kaczmariski*, 2009 WI App 117, ¶ 7, 320 Wis.2d 811, 772 N.W.2d 702; *State ex rel. Universal Processing Serv. of Wis., LLC v. Cir. Ct. of Milwaukee Cty.*, 2017 WI 26, ¶53, 374 Wis.2d 26, 892 N.W.2d 267. While this Court will not generally decide issues that are raised for the first time on appeal, this Court has the authority to do so *State v. Armstrong*, 2014 WI App 59, ¶ 20, 354 Wis.2d 111, 847 N.W.2d 860. It is particularly appropriate for this Court to do so when the issue involves a question of law which has been briefed by the parties, and is of sufficient importance to merit a decision. *Id.*, see also, *State v. Moran*, 2005 WI 115, ¶ 31, 284 Wis.2d 24, 700 N.W.2d 884. This is just such a case.

The State has taken the position that “[p]ublication may be of benefit with regard to the issues because they may recur, especially in border counties such as Pierce County.” (State's Brief, page 2). Triebold

agrees. For much the same reason this Court should also address the preemption issue. The preemption issue is likely to recur for the exactly the same reasons that the territorial jurisdiction issue is likely to recur. The State of Wisconsin has taken the position that it can require sex offenders who reside outside of the State of Wisconsin to make continuing direct notifications to the Wisconsin Sex Offender Registry. The State has further taken the position that this authority extends to wholly intra-state changes of residency of sex offenders who have long ceased having any contacts with Wisconsin. Having taken this position, it is inevitable that the State Wisconsin will seek to prosecute other persons similarly situated to Mr. Triebold. When those cases arise, the preemption issue will arise again with them. This case offers an appropriate vehicle for this Court to resolve questions concerning territorial jurisdiction, and preemption by the Federal SORNA, concerning sex offenders who are convicted in Wisconsin, and who later move to other states. These two issues are inextricably entwined with one another. Given this case involve questions of law, and not of facts; and that the issue of federal preemption has been briefed by the parties, this Court should address the issue.<sup>2</sup>

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<sup>2</sup> Triebold believes the briefs submitted have adequately presented the arguments regarding section 939.71, Wisconsin Statutes, and while conceding no arguments, will offer no additional argument in this reply brief.

#### IV. Conclusion.

Wherefore, Mr. Triebold respectfully requests that this Court vacate his Judgment of Conviction on the charge of Felony Sex Offender Registry Violation, in violation of Wisconsin Statutes, section 301.45(6)(a)1, and remand this case to the circuit court for the entry of a Judgment of Acquittal on that same charge.

Respectfully submitted November 25, 2019.

This brief has been electronically  
signed by:

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## V. Certifications.

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2972 words.

I further certify that I received mailed service of Plaintiff-Respondent's brief, by United States mail, in an envelope post-marked November 11, 2019, and by my calculations this brief is due by November 29, 2019. *See*, Rules 809.19(4) and 801.15(5).

I further certify that I personally served the State of Wisconsin, Plaintiff-Respondent, with three copies of this brief the same day it was filed with this court.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Finally, I further certify that pursuant to Rule 809.19(12)(f) I have submitted an electronic copy of this brief, excluding the appendix. The text of the electronic copy of the brief is identical in content and format to the text of the paper copy of the brief. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated November 25, 2019.

This brief has been electronically  
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## CERTIFICATION OF MAILING

I certify that this brief and appendix was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by priority mail on November 25, 2019. I further certify that the brief was correctly addressed and postage was pre-paid.

Date: November 25, 2019.

Signature: \_\_\_\_\_