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CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN
IN SUPREME COURT
Appeal No. 2019AP1209 CR

STATE OF WISCONSIN,

Plaintiff-Respondent

v.

TODD N. TRIEBOLD,

Defendant-Appellant-Petitioner

**PETITION FOR REVIEW AND APPENDIX
OF THE DEFENDANT-APPELLANT-PETITIONER
TODD N. TRIEBOLD**

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III. Statement of issues presented for review.

This petition presents the following issues for review:

First, did the State of Wisconsin have territorial jurisdiction to prosecute Triebold for failing to provide notification of his change in residence from one Minnesota address to another Minnesota address?

The circuit court held that the State of Wisconsin had territorial jurisdiction to prosecute Triebold for his alleged crime, and the Court of Appeals affirmed.

Second, are Wisconsin's registry requirements concerning the intrastate movements of sex offenders who reside in another state preempted by the Federal Sex Offender Registration and Notification Act, 34 U.S.C.A. § 20901 *et. seq.*?

Triebold federal preemption arguments were not presented to the circuit court. The Court of Appeals, considered Triebold's federal preemption arguments and held that Wisconsin's registry requirements for sex offenders who reside in another state are not preempted by the Federal Sex Offender Registration and Notification Act, 34 U.S.C.A. § 20901 *et. seq.*

Third, was Triebold's prosecution barred by Wisconsin Statutes, section 939.71, after his conviction in Minnesota for a registry violation involving the same change in residence from one Minnesota address to another Minnesota address?

The circuit court held that Triebold's successive prosecution in Wisconsin was not barred by Wisconsin Statutes, section 939.71, and the Court of Appeals affirmed.

IV. Statement of Rule 809.62 Criteria Relied Upon For Review.

Mr. Triebold believes that there are special and important reasons for this Court to exercise its discretion to review the decisions of the circuit court and the Court of Appeals. The question of whether the State of Wisconsin has territorial jurisdiction to prosecute a citizen of another state for a sex offender registry violation, when his violation consists of a failure to provide the State of Wisconsin with notice of a purely intrastate change in residence in another state, is a question that has never previously been addressed by the Wisconsin courts. Thus, this appeal addresses a question which “is a novel one, the resolution of which will have statewide impact § 809.62(1r)(c)2, Wis. Stats. Further, answering this question also requires consideration of whether Wisconsin’s application of its sex offender registry laws interferes with, is contrary to, or is otherwise preempted by the Federal Sex Offender Registration and Notification Act, 34 U.S.C.A. § 20901 et. seq.¹ Thus, this appeal is one in which “a real and significant question of federal or state constitutional law is presented.” § 809.62(1r)(a), Wis. Stats. Finally, this case also raises a novel issue concerning whether factually identical violations of Wisconsin and Minnesota sex offender registry laws, are identical “acts” for purposes of Wisconsin Statutes, section 939.71.

V. Statement of Case and Facts.

On May 5, 1994, Todd N. Triebold was convicted of 2nd Degree Sexual Assault of a Child, in violation of Wisconsin Statutes, section

¹ *formerly cited* as 42 U.S.C.A. § 16901, enacted July 27, 2006 (Pub.L. 109-248, Title I, § 102).

948.02(2). (R.73:25; *See also* CCAP entries for Pierce County Case no. 1993CF27).² As a consequence of his conviction, Triebold is a lifetime registrant under the Wisconsin Sex Offender Registration law. (R.75:25; *See also*, Wis. Stats §§ 301.45(1g)(a) and (5)(b)1m).

On September 22, 2014, Triebold was charged with knowingly failing to comply with sex offender registry notification requirements, in violation of Wisconsin Statutes, section 301.45(6)(a)1. (R.1 and R.7). A bench trial was held on September 20, 2017. (R.73:1). At the bench trial the following facts were established:

Triebold had been convicted of a registrable offense in 1994, in Pierce County, Wisconsin. (R.73:28). It was further established that, among other things, he was required to provide the Wisconsin Sex Offender Registry with information concerning his place of residence. (R.73:25; *see also* Wis. Stat. § 301.45(2)(a)5). Testimony was presented that he was also required to provide notifications to the Registry within ten days of any change in his residence. (R.73:25; *see also* Wis. Stat. § 301.45(4)(a)).³ Because he had a period of incarceration to serve, he was not actually required to provide information to the Registry until he was released from prison in 1999. (R.73:28 *See also*, Wis. Stats § 301.45(3)(a)2). Triebold apparently refused to sign the initial registration form, however, he was informed at that time about a ten-

² This court may take judicial notice of facts which are contained on CCAP. *See*, Wis. Stat. § 902.01; ***Kirk v. Credit Acceptance Corp.***, 2013 WI App 32, ¶ 5 n.1, 346 Wis. 2d 635, 829 N.W.2d 522.

³ The statute also requires ten days *prior* notice of changes from a Wisconsin residence to an out-of-state residence, to be given to both the Wisconsin Department of Correction and the appropriate department in the state to which the registrant is moving. Wis. Stats. § 301.45(4m).

day notification requirement concerning any changes in his residence. (R.73:38-39 and 45-46; *See also*, Wis. Stats § 301.45(3)(b) subdivisions 2, 3m, and 4). Triebold also received yearly warnings concerning a ten-day notification requirement in annual confirmation letters from the Registry demanding that he confirm his current address. (73:40 and 44-45 and R.36; *See also*, Wis. Stats. § 301.45(3)(b)1). Triebold apparently received and returned these confirmation letters from 1999, after his release from prison, through August 20, 2013. (R.73:38-39).

At some point prior to 2013, Triebold had moved from the State of Wisconsin to the State of Minnesota.⁴ (R.73:30-31). On August 20, 2013, Triebold returned the annual confirmation letter, reporting to the Wisconsin Sex Offender Registry that he was residing 750 Point Douglas Road, St. Paul, Minnesota. (R.73:28 and R.36).

On May 20, 2014, Officer Patrick Daly of the City of St. Paul, Minnesota, Police Department, executed an Internet Crimes Against Children (ICAC) search warrant on a residence located at 259 English Street, St. Paul, Minnesota. (R.73:54). At that residence he found Triebold. (R.73:54). Triebold presented to Officer Daly a Minnesota state identification card which listed his address as being 259 English Street, St. Paul, Minnesota. (R.73:55). The card was issued in March of 2014. *Id.* Officer Daly also observed that Triebold had a bedroom in the residence. (R.73:56). During the execution of the search warrant, a St. Paul police officer assisted Triebold in preparing a notice of address change to the Minnesota Bureau of Criminal Apprehensions (BCA).

⁴ Sarah Aho, the Department of Corrections program specialist who testified at trial, was unable to put a specific date on the move to Minnesota, but confirmed that Triebold had been in Minnesota since at least December of 2012, and possibly for years before that. (R.73:31-33 and R.30:2).

(73:56-57). Triebold did not send a notification to the Wisconsin Sex Offender Registry informing it of the move to 259 English Street. (73:44).

On June 18, 2014, Sarah Aho, a Department of Corrections Sex Offender Registry program specialist, received a report from Officer Daly that Triebold had moved from his last reported address of 750 Point Douglas Road, St. Paul, Minnesota, to 259 English Street, St. Paul, Minnesota. (R.73:29 and 44-45). Ms. Aho testified that Triebold had gone approximately five months without reporting his change of address. (R.73:53).⁵

On June 17, 2014, prior to Triebold's Wisconsin prosecution, a criminal complaint was filed in the Ramsey County, Minnesota, District Court, Case No. 62-CR-14-4390. That complaint charged Triebold with violation of the Minnesota Predatory Offender Registration Act, Minn. Stat. § 243.166.5(a), for "knowingly fail[ing] to register an address or change of information as required." (R.30:1). The timeframe alleged in the criminal complaint was "on or about the 24th day of December 2013 to the 20th day of May 2014." *Id.* The statement of probable cause attached to the complaint alleged that Triebold was required to register his address with the Minnesota BCA, for the duration of his life, owing to the Pierce County, Wisconsin, conviction for second degree sexual assault of a child. (R.30:2). The statement alleged that Triebold began registering with the BCA on May 5, 1994, and around April 10, 2013, Triebold submitted a change of address with the BCA indicating his address was 750 Point Douglas Road, St. Paul, Minnesota. *Id.* The

⁵ The probable cause section of the criminal complaint indicates that Triebold reported that he moved from 750 Point Douglas Road to 259 English Street on December 24, 2013. (R.81:4). However, that specific fact was not offered in testimony at the bench trial.

statement further alleged that on May 20, 2014, law enforcement executed a search warrant at 259 English Street, St. Paul, Minnesota, during which “Sergeant Keller and Officer Daly spoke to Triebold in a non-custodial interview outside of the residence. Triebold said he had been living at 259 English Street since December 24, 2013. He admitted he knew he was supposed to change his address and said it was on his to-do list. Triebold said 750 Point Douglas Road is his mother's address and he said he goes over there sometimes.” *Id.* On March 3, 2015, Triebold entered a plea of guilty to the charge. (R.30:12-13). And on April 14, 2015, Triebold was convicted of the charge and sentenced to fourteen months prison with credit of 188 days served. (R.30:8-9).

The criminal complaint in the case *sub judice* was filed in Pierce County, Wisconsin, on September 22, 2014. Triebold was charged with knowingly failing to comply with Sex Offender Registry notification requirements, in violation of Wis. Stat. § 301.45(6)(a)1. (R.1:2). The timeframe alleged in this complaint was “on Friday, January 3, 2014,” that is, ten days after December 24, 2014. *Id.* The probable cause portion of the criminal complaint alleged that Triebold had violated the requirements of the Wisconsin Sex Offender Registry law by failing to provide notice within ten days of his change in residence from 750 Point Douglas Road, St. Paul, Minnesota, to 259 English Street, St. Paul, Minnesota. (R.1:3-4). Prior to the bench trial, Triebold filed two motions which are relevant to this appeal.

First, Triebold filed a motion to dismiss for lack of jurisdiction. (R.23). Triebold’s argument was, in essence, that the State of Wisconsin lacked territorial jurisdiction to prosecute this crime because none of the acts complained of occurred or had consequences within the State of

Wisconsin. (R.23:5). Triebold actions, and the consequences thereof, he argued occurred solely within the State of Minnesota. *Id.* Triebold further contested Wisconsin's personal and territorial jurisdiction to require him to continue registering in Wisconsin after he had become a citizen and resident of Minnesota. (R.34:7). Triebold also contested whether Wisconsin's criminal jurisdiction statute, Wis. Stats. § 939.03, covered "omissions" to act while outside the boundaries of the State of Wisconsin. (R.71:37-39).

Second, Triebold filed a motion to dismiss for statutory double jeopardy under Wisconsin Statutes, section 939.71. (R.29). Triebold argued that the crime for which he was convicted in *State of Minnesota v. Todd Neil Triebold*, Ramsey County Case No. 62-CR-14-4390, was identical in law and fact with the crime charged in *State of Wisconsin v. Todd N. Triebold*, Pierce County Case No. 2014CF158. (R.29:4). Triebold argued that:

Both States [had to] prove that the Defendant was a person required to register by proving the fact of the Defendant's prior conviction of Second-Degree Sexual Assault of the Child in Pierce County. Wisconsin, case 1993 CF 27, and by proving that he was still subject to the registration requirement between the dates of December 24, 2013 and May 20, 2014.

(R.29:4). And further:

Both States [had to] prove that the Defendant knowingly violated any of the requirements to register by showing that he had knowledge of the requirement to provide information, as well as by showing that he knew he did not comply with the requirement. In each case, this is shown by Mr. Triebold's alleged statements to law enforcement that he moved to 259 English Street in St. Paul on December 24, 2013; that knew he was supposed to report his new address, and that he knew he had not reported the change of address so as of the date of his contact with law enforcement on May 20, 2014.

(R.29:4-5).

On September 27, 2017, the circuit court, the Honorable Joseph D. Boles presiding, denied both motions in an oral ruling. (R.74; Appx. 2). Regarding the jurisdictional arguments the court held that the fact Triebold committed an act which required him to register in the state of Wisconsin, was “... sufficient, I believe, to meet all the jurisdictional requirements that would require every person, not just Mr. Triebold, but every person that’s convicted of an offense required for registration to continue to comply with that when they move out of state. ... I deny the motion to dismiss based on lack of jurisdiction. ... I do believe that the Court and the State of Wisconsin has jurisdiction over Mr. Triebold, frankly, for the rest of his life. He can’t avoid it by moving.” (R.74:8-9; Appx. 9-10). With regard to the double jeopardy claims, the circuit court held that the failure to update his registration information in Minnesota was a separate and distinct offense from his failure to update his registration information in Wisconsin. (R.74:10-11; Appx. 11-12). ”So because they're separate and require providing information to two separate, distinct law enforcement entities in each state, that they're different legal requirements in terms of providing proof and different facts, that these are two separate offenses, and so the double jeopardy argument also fails.” *Id.* The circuit court then found Triebold guilty of the crime of knowingly failing to comply with sex offender registry notification requirements, in violation of Wisconsin Statutes, section 301.45(6)(a)1. (R.74:15; Appx. 16).

Triebold subsequently appealed his conviction.⁶ On appeal Triebold renewed his arguments that the circuit court lacked territorial

⁶ At the sentencing hearing the circuit court withheld sentence and placed the Triebold on probation for two (2) years, which he has since completed successfully.

jurisdiction and argued that his conviction is barred by the statutory double jeopardy principles elucidated in Wis. Stat. § 939.71. (COA Decision ¶ 9; Appx. 27).

The Court of Appeals rejected Triebold arguments that the circuit court lacked territorial jurisdiction, holding that:

Triebold's intentional act of omission had the consequence of depriving Wisconsin authorities of information concerning the location of his residence, a consequence expressly prohibited by Wis. STAT. § 301.45. Section 301.45(4)(a), in conjunction with § 301.45(2)(a)5., requires a person subject to the sex offender registry to update the Wisconsin Department of Corrections with his or her address information within ten days after it changes, and the knowing failure to do so is criminalized by § 301.45(6)(a)1.

(COA Decision ¶ 13; Appx. 29).

As part of his arguments concerning territorial jurisdiction, Triebold also invoked concepts of federal law preemption to argue that Wisconsin's sex offender registry law conflicted with the Federal Sex Offender Registration and Notification Act (SORNA), 34 U.S.C.A. § 20901 *et. seq.*, by regulating the purely intrastate movements of sex offenders who reside in another state.⁷ (COA Decision ¶ 16-17; Appx. 30-31). In a footnote, the Court of Appeals acknowledged that "Triebold's contention that he need not provide registration updates to the state of conviction has support in the language of 34 U.S.C. § 20913(a)." and accepted "for purposes of this appeal Triebold's assertion that the state in which the defendant is convicted is not a 'jurisdiction

Sentencing was not raised as an issue in this appeal. Triebold is currently confined under a civil commitment in the State of Minnesota.

⁷ The State argued the Triebold had forfeited his federal preemption arguments. Assuming the State to be correct in its position, the Court of Appeal nonetheless declined to apply the forfeiture rule in the interests of judicial economy because the issue is likely to recur. (COA Decision ¶ 19; Appx. 32).

involved’ for purposes of updating registry information under § 20913(c).” (COA Decision ¶ 17 fn. 11; Appx. 31). The Court of Appeals, however, rejected Triebold contention that federal law preempted Wisconsin’s statutory scheme, concluding that:

Congress's enactment of SORNA sets a "floor" for state registration laws, but the law leaves states free to regulate in ways that are consistent with the federal purpose. Wisconsin's requirement that sex offenders convicted in this state update their registry information whenever it changes, even if that change occurs in another state, poses no obstacles to the accomplishment of the federal objectives.

(COA Decision ¶ 22; Appx. 34).

The Court of Appeals also rejected Triebold’s claims of statutory double jeopardy, concluding that “Wis. STAT. § 301.45(6)(a)1. and MINN. STAT. § 243.166, subd. 5(a) require proof of different facts. Criminal liability under either statute is predicated upon a failure to comply with the applicable registration requirements of the particular state—here, the failure to update address information to the relevant state agency.” (COA Decision ¶ 25; Appx. 35).

Triebold now petitions this Court to review the decisions of the circuit court and the Court of Appeals.

VI. Argument

A. **The State of Wisconsin lacked territorial jurisdiction to prosecute Triebold for failing to provide notification of his intrastate change in residency from one Minnesota address to another Minnesota address.**

1. The registry requirements for sex offenders who reside in another state are controlled by the Federal Sex Offender Registration and Notification Act, 34 U.S.C.A. § 20901 *et. seq.*, which does not require dual notifications for intrastate changes in residency.

The State of Wisconsin has taken the position, and the Court of Appeals has affirmed, that Wisconsin can require sex offenders who reside outside the State of Wisconsin, to make continuing direct notifications to the Wisconsin Sex Offender Registry, even though the offender may have ceased for years to have any contacts with the State of Wisconsin. It is Triebold's assertion that the notification requirements for sex offenders who relocate from one state to another state are controlled by the Federal Sex Offender Registration and Notification Act, 34 U.S.C.A. § 20901 *et. seq.*, which does not require dual notifications for purely intrastate changes in residence. This is a real and significant question of federal law which is novel and has statewide impact. It merits review by this Court. §§ 809.62(1r)(a) and (c)2, Wis. Stats.

The Federal Sex Offender Registration and Notification Act, 34 U.S.C.A. § 20901 *et. seq.*⁸ was enacted by Congress for the purpose of “protect[ing] the public from sex offenders and offenders against children” by “establish[ing] a comprehensive national system for the registration of those offenders.” 34 U.S.C.A. § 20901. The Act requires

⁸ *formerly cited* as 42 U.S.C.A. § 16901, enacted July 27, 2006 (Pub.L. 109-248, Title I, § 102).

that “[e]ach jurisdiction shall maintain a jurisdiction-wide sex offender registry conforming to the requirements of this subchapter.” 34 U.S.C.A. § 20912(a).

Laws of the United States, made pursuant to the United States Constitution, are the “supreme law of the Land; and the Judges in every State shall be bound thereby.” U.S. Const. Art. VI cl. 2, the “Supremacy Clause.” “The states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by congress to carry into effect the powers vested in the national government.” *McCulloch v. Maryland*, 17 U.S. 316, 317 (1819). “State laws that ‘interfere with, or are contrary to the laws of congress, made in pursuance to the constitution,’ are invalid.” *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 604 (1991) quoting *Gibbons v. Ogden*, 22 U.S. 1 (1824).

Contrary to the decision of the Court of Appeals, Triebold asserts that the language of the Federal Sex Offender Registration and Notification Act does expressly preempt state statutes which do not “conform[] to the requirement of this subchapter.” 34 U.S.C.A. § 20912(a); *See also Wisconsin Public Intervenor*, 501 U.S. at 604-05 (“Congress’ intent to supplant state authority in a particular field may be expressed in the terms of the statute”). Moreover, the expressed purpose of the Act, “to establish a comprehensive national system for the registration of those offenders,” 34 U.S.C.A. § 20901, is such that any regulatory scheme which did not conform with the requirements of the Act, would “stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Wisconsin Public Intervenor*, 501 U.S. at 605, quoting *Hines v. Davidowitz*, 312 U.S. 52

(1941). In short, Triebold contends that Wisconsin statutes must conform to the Federal Sex Offender Registration and Notification Act.

That Act requires that each state's sex-registry laws conform with following requirements:

A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.

34 U.S.C.A. § 20913(a) (emphasis added). Thereafter, with regard to “keeping the registration current,” the Act requires that:

A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry. That jurisdiction shall immediately provide that information to all other jurisdictions in which the offender is required to register

34 U.S.C.A. § 20913(c). The Act further requires that “[e]ach jurisdiction, other than a Federally recognized Indian tribe, shall provide a criminal penalty that includes a maximum term of imprisonment that is greater than 1 year for the failure of a sex offender to comply with the requirements of this subchapter.” 34 U.S.C.A. § 20913(e). When a sex offender fails to comply:

An appropriate official shall notify the Attorney General and appropriate law enforcement agencies of any failure by a sex offender to comply with the requirements of a registry and revise the jurisdiction's registry to reflect the nature of that failure. The appropriate official, the Attorney General, and each such law enforcement agency shall take any appropriate action to ensure compliance.

34 U.S.C.A. § 20924.

To summarize, the Act requires an “initial registration” in every state where the offender resides, is an employee, or a student; and in the

state where the offender committed the crime. 34 U.S.C.A. § 20913(a). The requirement to “keep the registration current,” however, applies only to those “jurisdiction[s] where the offender resides, where the offender is an employee, and where the offender is a student.” *Id.* The offender is not required to “keep the registration current” in the state where he was convicted, but is only required to provide information to that state “for initial registration purposes only.” *Id.* Under the Act, a non-residence sex offender is not required to provide dual notifications for subsequent intrastate changes in residence. Rather the offender is required inform “at least one jurisdiction” of any changes in “name, residence, employment, or student status.” *Id.* The jurisdiction so notified is then required to “provide that information to all other jurisdictions in which the offender is required to register.” *Id.* To enforce the requirements of the Act, each jurisdiction (other than a Federally recognized Indian tribe), is required to provide a criminal penalty that “includes a maximum term of imprisonment that is greater than 1 year for the failure of a sex offender to comply” with registry requirements. 34 U.S.C.A. § 20913(e).

In Triebold’s case, he could only be charged with failing to keep his “registration current” in the State of Minnesota, because the Federal Sex Offender Registration and Notification Act, only requires that registration be kept “current” in jurisdictions “where the offender resides, where the offender is an employee, and where the offender is a student.” 34 U.S.C.A. § 20913(a). The evidence in Triebold’s case failed to establish that Triebold was residing, employed, or a student in the State of Wisconsin. In fact, Triebold’s change in residence was purely an intrastate affair within the State of Minnesota. (R.73:28, 54-56 and

R.36). The only jurisdiction to which Triebold was required under SORNA to provide notice and keep his registration current with was the State of Minnesota. Triebold failed to provide notice of his intrastate change in residence to the State of Minnesota, and was subsequently charged, convicted, and punished for that failure. (R.30). The record reflects that the “comprehensive national system for the registration of [sex] offenders” established by the Federal Sex Offender Registration and Notification Act worked exactly as Congress had intended. Triebold asserts that the State of Wisconsin lacks territorial jurisdiction to exact further punishment for Triebold’s acts and omissions which occurred solely within the State of Minnesota.

The Court of Appeals assertion that the federal SORNA merely “sets a ‘floor’” for state registration laws ignores the very clear purpose set out in the federal SORNA of creating a “comprehensive national system for the registration of those offenders.” 34 U.S.C.A. § 20901. That national system included rules to govern the initial and continuing registration requirements for sex offenders. Those rules specifically addressed possibility of interstate movement of sex offenders, and set out the notification requirements they would face upon moving to a different state. The interstate travel of persons is an issue the federal government is uniquely competent to address. Wisconsin’s registry laws conflict with the federal SORNA, by requiring out-of-state residents to provide continuing notifications for purely intrastate changes in residency, long after their contact with the State of Wisconsin may have ceased. That is not consistent with the creation of a “comprehensive national system for the registration of those offenders,” but rather is the product of the *ad hoc* piecemeal system of registration that had developed in its absence.

Triebold's arguments presume that the federal government had a legitimate interest in creating rules addressing the interstate movement of sex offenders, and the notification requirements those offenders would face upon moving to a different state, and intended that state registry laws would comply with those requirements.

2. The Wisconsin Legislature lacks territorial jurisdiction to command the citizen of another State to perform notifications in addition to those required by the federal Sex Offender Registration and Notification Act, 34 U.S.C. § 20901 *et. seq.*

Although it is not generally presented to a jury as an element of a crime, "the State is obligated in all prosecutions to establish its territorial jurisdiction over a defendant for charged crimes." ***State v. Brown***, 2003 WI App 34, ¶25, 260 Wis.2d 125, 659 N.W. 2d 110. Further, "[i]t is elementary that a court may act only upon crimes committed within the territorial jurisdiction of the sovereignty seeking to try the offense." ***Hotzel v. Simmons***, 258 Wis. 234, 240, 45 N.W.2d 683 (1951). This, then, is also an 'element' of every crime: that the State of Wisconsin should be found to have jurisdiction. In this appeal, Triebold challenged Wisconsin's territorial jurisdiction to convict him for failing to notify the Wisconsin Registry of a purely intrastate change in residences when he was a resident of the State of Minnesota. Again, this is a real and significant question implicating federal law which is novel and has statewide impact. It merits review by this Court. §§ 809.62(1r)(a) and (c)2, Wis. Stats.

Regarding territorial jurisdiction, the United States Constitution requires that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed...." U.S. Const.

Amend. VI. Questions of territorial jurisdiction also invoke the protections of the Due Process Clauses of the United States and Wisconsin Constitutions. U.S. Const. Amends. IV and XIV; Wis. Const. Art. 1 § 8; *See also, United States v. Cabrales*, 524 U.S. 1, 5, (1998) (“the Constitution requires that a person be tried for an offense where that offense is committed”); *and State v. Randle*, 2002 WI App 116, ¶14 fn.4. 252 Wis. 2d 743, 647 N.W.2d 324 (“[t]erritorial jurisdiction is part of the due process restrictions on the power of a court to exercise its jurisdiction over a given individual...”). “[T]he *locus delicti*⁹ must be determined from the nature of the crime alleged and the location of the act or acts constituting it.” *Cabrales*, *supra*, quoting *United States v. Anderson*, 328 U.S. 699, 703 (1946).

In Wisconsin, the limits of territorial jurisdiction over a crime are defined by Wisconsin Statutes, Section 939.03, which provides, among other things, that:

(1) A person is subject to prosecution and punishment under the law of this state if any of the following applies:

- (a) The person commits a crime, any of the constituent elements of which takes place in this state.
- (b) ...
- (c) While 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 other bases of jurisdiction listed in the statute are clearly inapplicable). In *Randle*, 2002 WI App 116 at ¶ 12, the Court of Appeals held that Section 939.03 applies to both personal and territorial jurisdiction. Thus, if the State of Wisconsin is to have territorial

⁹ *locus delicti*. [Latin “place of the wrong”] The place where an offense was committed.... Black’s Law Dictionary, 9th Ed. (2009).

jurisdiction over the crime alleged in the Information, it must seek that jurisdiction under Section 939.03, in compliance with the dictates of the United State and Wisconsin Constitutions.

Triebold's conduct took place entirely within the State of Minnesota. None of the constituent elements of his crime 'took place' within the State of Wisconsin. In fact, there was no evidence presented for Triebold committing any act or omission while located in the State of Wisconsin. (Other than committing the crime which required his initial registration in Wisconsin, which, of course, occurred long before the timeframe alleged in the Information). Consequently, the State cannot base territorial jurisdiction upon Wisconsin Statutes, section 939.03(1)(a).¹⁰

Any territorial jurisdiction would have to be based upon Section 939.03(1)(c), namely that Triebold “while out of this state ... [did] an act with intent that it cause in this state a consequence set forth in a section defining a crime.” However, Triebold performed no act which had a consequence in the State of Wisconsin, much less performed an act with the intent that it cause a consequence in the State of Wisconsin. Triebold moved from one address in the City of St. Paul, Minnesota, to another address in the same city, without providing “at least one jurisdiction” notice of his change in residence.¹¹ (R.73:28, 54-56 and R.36). This was

¹⁰ To be clear, the State *did* argue that territorial jurisdiction was appropriate under Section 939.03(1)(a). The Court of Appeals, however, did not address the State's argument, having found that territorial jurisdiction was appropriate under Section 939.03(1)(c). (COA Decision ¶ 15 fn. 8; Appx. 30).

¹¹ Trial counsel for Triebold argued that Section 939.03 requires an affirmative act, not simply an omission, in order for there to be jurisdiction under the statute. (R.71:37-39). Since Triebold's crime was one of omission, i.e. failure to provide notice, trial counsel argued that there could be no jurisdiction under the statute. Whatever the merits of this argument, the undersigned counsel would concede

an act which, without question, had a consequences in the State of Minnesota. Interest persons in the vicinity 259 English Street, St. Paul, Minnesota, were denied notice that a sex offender had relocated into their community. That was a real consequence for law enforcement, schools, and concerned citizens in the St. Paul, Minnesota, community. And Triebold was punished for that act, by the jurisdiction which suffered the consequences of that act, namely, the State of Minnesota. (R.30).

But Triebold's action had no consequences in the State of Wisconsin, and the State of Wisconsin presented no evidence to show that Triebold intended to cause any consequence in the State of Wisconsin. There were no schools in the State of 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.

The Court of Appeals regarded Triebold's argument's as "myopic," writing that "... all Wisconsin individuals and entities have a continuing interest in knowing where he resides, even if that is out of state." (COA Decision ¶¶ 14-15; Appx. 31). However, that could be said of individuals in all fifty states as well as the seven territories of the United States. Why would individuals in Iowa, South Dakota or North Dakota not also be interested in where Triebold resides? Will they all be able to require

that Triebold's physically moving his residences from one location to another location would satisfy the "act" requirement under the statute. The question is, did that "act" have a consequence in the State of Wisconsin?

notifications of purely intrastate changes in residence of out-of-state persons who are sex offenders? The purpose of the federal SORNA was “to establish a comprehensive national system for the registration of those offenders,” 34 U.S.C.A. § 20901. The point being to provide a set of basic rules so that the registries of the various states and territories of the United States would operate in coordination, not duplication, of one another.

The only sense in which Triebold’s acts might conceivably be said to have any consequence in the State of Wisconsin, was that the Wisconsin Sex Offender Registry was not “kept current” with regard to Triebold’s current residence in the State of Minnesota. However, as stated above, the Federal Sex Offender Registration and Notification Act, only requires that registration be kept “current” in jurisdictions “where the offender resides, where the offender is an employee, and where the offender is a student.” 34 U.S.C.A. § 20913(a). Triebold obligations with regard to the State of Wisconsin related to “initial registration purposes only.” *Id.* Under the Act, a non-resident sex offender is not required to make dual notifications for subsequent intrastate changes in residence. As such, even in this sense, Triebold’s move from one neighborhood to another in St. Paul, Minnesota, had no consequence in the State of Wisconsin, as Triebold was not obligated to keep his residence “current” with the Wisconsin Sex Offender Registry in the first place. 34 U.S.C.A. § 20913(a).

B. Triebold’s prosecution was barred by Wisconsin Statutes, section 939.71.

In 2019 the United State Supreme Court reaffirmed the longstanding dual-sovereignty doctrine, according to which two offenses

“are not the ‘same offence’ for double jeopardy purposes if ‘prosecuted by different sovereigns.’” ***Gamble v. United States***, __ U.S. ___, 139 S.Ct. 1960, 1964, 204 L.Ed.2d 322 (2019) quoting ***Heath v. Alabama***, 474 U.S. 82, 92 (1985). The decision was very much grounded on the text of the Double Jeopardy Clause which uses the word “offense,” as opposed to “conduct” or “act”. The dual-sovereignty doctrine, the Court explained, is not an exception to the Double Jeopardy Clause, but rather “follows from the text that defines that right in the first place. ‘[T]he language of the Clause ... protects individuals from being twice put in jeopardy ‘for the same *offence*,’ not for the same *conduct* or *actions*.” *Id.* at 1965, quoting ***Grady v. Corbin***, 495 U.S. 508, 529 (1990) (J. Scalia dissenting) (emphasis in the original). The term “[o]ffence’ was commonly understood in 1791 to mean ‘transgression,’ that is, ‘the Violation or Breaking of a Law.’” *Id.* “As originally understood, then, an ‘offence’ is defined by a law, and each law is defined by a sovereign. So where there are two sovereigns, there are two laws, and two ‘offences.’” *Id.*

The dual-sovereignty doctrine is not without its dissenters. *See, Gamble*, 139 S.Ct. at 1989 (J. Ginsberg dissenting); and ***Gamble***, 139 S.Ct. at 1196:

A free society does not allow its government to try the same individual for the same crime until it’s happy with the result. Unfortunately, the Court today endorses a colossal exception to this ancient rule against double jeopardy. My colleagues say that the federal government and each State are “separate sovereigns” entitled to try the same person for the same crime. So if all the might of one “sovereign” cannot succeed against the presumptively free individual, another may insist on the chance to try again. And if both manage to succeed, so much the better; they can add one punishment on top of the other.

(J. Gorsuch dissenting).

With similar concerns in mind, the Wisconsin State Legislature enacted Wisconsin Statutes, section 939.71, which alters the dual-

sovereignty doctrine in the State of Wisconsin. That statute provides that:

If an *act* forms the basis for a crime punishable under more than one statutory provision of this state or under a statutory provision of this state and the laws of another jurisdiction, a conviction or acquittal on the merits under one provision bars a subsequent prosecution under the other provision unless each provision requires proof of a fact for conviction which the other does not require

(emphasis added). Unlike the Double Jeopardy Clauses of the United States and Wisconsin Constitutions, section 939.71 is not premised upon “offenses,” but rather protects individuals from being twice put in jeopardy for the same “act.” The statute nonetheless continues to adhere to the principles of “multiplicity” to the extent that it allows “... a subsequent prosecution ... if each [statutory] provision requires proof of a fact for conviction which the other does not require, even if the same conduct was involved in the two prosecutions.” *State v. Swinson*, 2003 WI App 45, ¶ 49, 261 Wis.2d 633, 660 N.W.2d 12. In essence, this is the *Blockburger*¹² test for determining if two statutory provisions are legally identical, with the nuance that two statutory provisions will not automatically be deemed legally distinct simply because they were enacted by separate sovereigns.

Factually, Triebold’s “acts” alleged in the two prosecutions were identical. The criminal complaint in Triebold’s Minnesota prosecution alleged a timeframe for the crime of “on or about the 24th day of December 2013 to the 20th day of May 2014.” (R.30:1). The criminal complaint in Triebold’s Wisconsin prosecution alleged a timeframe for

¹² *Blockburger v. United States*, 284 U.S. 299 (1932). “The *Blockburger* test requires us to consider whether each of the offenses in this case requires proof of an element or fact that the other does not. If, under this test, the offenses are identical in law and fact, then charging both is multiplicitous and therefore unconstitutional.” *Swinson*, 2003 WI App 45 at ¶ 28.

the crime of “on Friday, January 3, 2014,” that is, ten days after December 24, 2014. (R.1:1). The statement of probable cause attached to the Minnesota complaint alleged that Triebold last reported his address was 750 Point Douglas Road, St. Paul, Minnesota, as did the Wisconsin complaint. (R.30:2 and R.1:2-3). In both cases Triebold was convicted and punished for failing to provide notice of a change in residence from 750 Point Douglas Road, St. Paul, Minnesota, to 259 English Street, St. Paul, Minnesota. *Id.* The two complaints only differ in the registry they alleged Triebold was required to notify of his change in residence.

Central to Triebold’s statutory double jeopardy argument is the assertion that Triebold was only required to notify changes in residence to “at least one jurisdiction” in which he was required to register. 34 U.S.C.A. § 20913(c). Moreover, his obligation to keep his registration current was limited to those “jurisdiction[s] where the offender resides, where the offender is an employee, and where the offender is a student.” 34 U.S.C.A. § 20913(a). Under the framework of the Act, had Triebold notified the state of his residence, i.e. Minnesota, he would have fulfilled his notification obligations, and Minnesota would then notify Wisconsin of the change in residence. 34 U.S.C.A. § 20913(c). Triebold was not required to provide dual notifications. *Id.* Thus, Triebold was tried and convicted for two *offenses*, each arising from a single *act*. Triebold failed to keep his registration current by failing to notify Minnesota of his change in residence. For this violation he was convicted and punished by the State of Minnesota. He should not be convicted and punished by the State of Wisconsin as well.

VII. Conclusion.

Wherefore, Triebold respectfully requests that this Court grant review and reverse the decisions of the circuit court and Court of Appeals, vacate his Judgment of Conviction on the charge of failure to comply with sex offender registry notification requirements, 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 January 27, 2021.

Electronically signed by
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VIII. Certifications.

I certify that this petition meets the form and length requirements of Rules 809.19(8)(b) and 809.62(4) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13-point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the petition is 6735 words.

I further certify that I personally served the State of Wisconsin, Plaintiff-Respondent, with three copies of this petition 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 petition, 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 January 27, 2021.

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