CHAPTER 968

COMMENCEMENT OF CRIMINAL PROCEEDINGS

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Cross–reference: See definitions in s. 967.02.

968.01 Complaint. (1) In this section:

(a) "Electronic" has the meaning given in s. 137.11 (5).

(b) "Electronic signature" has the meaning given in s. 801.18 (1) (f).

(c) "Facsimile machine" has the meaning given in s. 134.72 (1) (a).

(2) The complaint is a written statement of the essential facts constituting the offense charged. A person may make a complaint on information and belief. Except as provided in sub. (3) or (4), the complaint shall be made upon oath before a district attorney or judge as provided in this chapter.

(3) A person may comply with sub. (2) if he or she makes the oath by telephone contact with the district attorney or judge, signs the statement and immediately thereafter transmits a copy of the signed statement to the district attorney or judge using a facsimile machine. The person shall also transmit the original signed statement, without using a facsimile machine, to the district attorney or judge. If the complaint is filed, both the original and the copy shall be filed under s. 968.02 (2).

(4) A person may comply with sub. (2) if he or she makes the oath by telephone contact with the district attorney or judge and immediately thereafter electronically transmits the statement, accompanied by the person's electronic signature, to the district attorney or judge. If the complaint is filed, the electronically transmitted statement shall be incorporated into a criminal complaint filed in either an electronic or paper format under s. 968.02 (2).

History: 1989 a. 336; 1995 a. 351; 2009 a. 184; 2017 a. 365.

To be constitutionally sufficient to support the issuance of an arrest warrant and to show probable cause, a complaint must contain the essential facts constituting the offense charged. A complaint was fatally defective in merely repeating the language of the statute allegedly violated. State v. Williams, 47 Wis. 2d 242, 177 N.W.2d 611 (1970).

For a charge of resisting arrest, a complaint stated in statutory language was sufficient and no further facts were necessary. State v. Smith, 50 Wis. 2d 460, 184 N.W.2d 889 (1971).

A complaint is sufficient as to reliability of hearsay information if the officer making it states that it is based on a written statement of the minor victim of the offense charged. State v. Knudson, 51 Wis. 2d 270, 187 N.W.2d 321 (1971).

A disorderly conduct complaint, which alleged that the defendant at a stated time and place violated s. 947.01 (1) by interfering with the police officer–complainant while he was taking another person into custody and that the charge was based on the complainant's personal observations, met the test of legal sufficiency and did not lack specificity so as to invalidate a conviction. State v. Becker, 51 Wis. 2d 659, 188 N.W.2d 449 (1971).

A defendant waives objections to the sufficiency of a complaint by not objecting before or at the time of pleading to the information. Day v. State, 52 Wis. 2d 122, 187 N.W.2d 790 (1971).

A complaint is a self–contained charge, and it alone can be considered in determining probable cause. Facts that would lead a reasonable person to conclude that a crime was committed by the defendant must appear within the 4 corners of the document. State v. Haugen, 52 Wis. 2d 791, 191 N.W.2d 12 (1971).

A complaint is not defective because, based on statements to an officer that cannot be admitted at the trial, *Miranda* warnings were not given. Such an objection is waived if not raised prior to trial. Gelhaar v. State, 58 Wis. 2d 547, 207 N.W.2d 88 (1973).

To charge a defendant with the possession or sale of obscene materials, the complaint must allege that the defendant knew the nature of the materials; a charge of acting "feloniously" is insufficient to charge scienter. State v. Schneider, 60 Wis. 2d 563, 211 N.W.2d 630 (1973).

A complaint based on a police officer's sworn statement of what the alleged victim described as having actually happened met the test of reliability of the informer and constituted probable cause for a magistrate to issue a warrant for the arrest of the defendant. Allison v. State, 62 Wis. 2d 14, 214 N.W.2d 437 (1974).

An absolute privilege attached to alleged defamatory statements made by the defendant about the plaintiff to an assistant district attorney in seeking the issuance of a criminal complaint. Bergman v. Hupy, 64 Wis. 2d 747, 221 N.W.2d 898 (1974).

A criminal complaint sufficiently alleges probable cause that the defendant has committed the alleged offense when it recites that a participant in the crime has admitted his own participation and implicates the defendant, since an inference may be reasonably drawn that the participant is telling the truth. Ruff v. State, 65 Wis. 2d 713, 223 N.W.2d 446 (1974).

A complaint, alleging that the defendant burglarized a trailer at a construction site, based in part upon the hearsay statements of the construction foreman that tools found

in the defendant's automobile had been locked in the trailer, was sufficient to satisfy the two–pronged test of *Aguilar.* Anderson v. State, 66 Wis. 2d 233, 223 N.W.2d 879 (1974).

In determining the sufficiency of a complaint, the credibility of informants or witnesses is adequately tested by the 2–pronged *Aguilar* standard. State v. Marshall, 92 Wis. 2d 101, 284 N.W.2d 592 (1979).

A criminal complaint may be attacked when there has been an omission of critical material when inclusion is necessary for an impartial judge to determine probable cause. State v. Mann, 123 Wis. 2d 375, 367 N.W.2d 209 (1985).

Neither a presumption of prosecutor vindictiveness or actual vindictiveness was found when, following a mistrial resulting from a hung jury, the prosecutor filed increased charges and then offered to accept a plea bargain requiring a guilty plea to the original charges. Adding additional charges to obtain a guilty plea does no more than present the defendant with the alternative of forgoing trial or facing charges on which the defendant is subject to prosecution. State v. Johnson, 2000 WI 12, 232 Wis. 2d 679, 605 N.W.2d 846, 97–1360.

The test of a complaint is of minimal adequacy in setting forth the essential facts establishing probable cause through a common sense, and not hypertechnical, evaluation. Only affidavits specifically incorporated into the complaint may be used to show probable cause, but the legal term of art, "incorporated by reference," need not be used; the term "attached" was sufficient. State v. Smaxwell, 2000 WI App 112, 235 Wis. 2d 230, 612 N.W.2d 756, 99–2261.

A prosecutor has great discretion in charging decisions and generally answers to the public, not the courts, for those decisions. As such, courts review the prosecutor's charging decisions for an erroneous exercise of discretion. If there is a reasonable likelihood that a prosecutor's decision to bring additional charges was rooted in prosecutorial vindictiveness, a rebuttable presumption of vindictiveness applies. If there is no presumption of vindictiveness, the defendant must establish actual prosecutorial vindictiveness. The filing of additional charges during the give–and–take of pretrial plea negotiations does not warrant a presumption of vindictiveness. State v. Cameron, 2012 WI App 93, 344 Wis. 2d 101, 820 N.W.2d 433, 11–1368.

The state has discretion to charge a defendant with one continuing offense based on multiple criminal acts when the separately chargeable offenses are committed by the same person at substantially the same time and relating to one continued transaction. In that situation, the nature of the charge is a matter of election on the part of the state. Moreover, in s. 971.36 (3) (a) the legislature has explicitly provided prosecutors with discretion to charge multiple thefts as a single crime when the property belonged to the same owner and the thefts were committed pursuant to a single intent and design or in execution of a single deceptive scheme. State v. Jacobsen, 2014 WI App 13, 352 Wis. 2d 409, 842 N.W.2d 365, 13–0830.

Multiplicity arises when the defendant is charged in more than one count for a single offense. Challenges may arise when a single course of conduct is charged in multiple counts of the same statutory offense. Multiplicity claims are examined using a two–part test: 1) whether the charged offenses are identical in law and in fact, and 2) whether the legislature intended to authorize multiple punishments. If the first part of the test reveals that the charged offenses are not identical in law and in fact, a presumption arises that the legislature did not intend to preclude cumulative punishments. State v. Jacobsen, 2014 WI App 13, 352 Wis. 2d 409, 842 N.W.2d 365, 13–0830.

While citation to a specific statute may be the preferred practice, failure to specifically cite to a statute in the information and complaint is harmless error when there is no prejudice to the defendant. State v. Elverman, 2015 WI App 91, 366 Wis. 2d 169, 873 N.W.2d 528, 14–0354.

Forms similar to the uniform traffic citations that are used as complaints to initiate criminal prosecutions in certain misdemeanor cases are sufficient to confer subject matter jurisdiction on the court, but any conviction that results from their use in the manner described in the opinion is null and void; this section and ss. 968.02, 968.04, 971.01, 971.04, 971.05 and 971.08 are discussed. 63 Atty. Gen. 540.

968.02 Issuance and filing of complaints. (1) Except as otherwise provided in this section, a complaint charging a person with an offense shall be issued only by a district attorney of the county where the crime is alleged to have been committed. A complaint is issued when it is approved for filing by the district attorney. The approval shall be in the form of a written endorsement on the complaint or the electronic signature of the district attorney as provided in s. 801.18 (12).

(2) After a complaint has been issued, it shall be filed with a judge and either a warrant or summons shall be issued or the complaint shall be dismissed, pursuant to s. 968.03. Such filing commences the action.

(3) If a district attorney refuses or is unavailable to issue a complaint, a circuit judge may permit the filing of a complaint, if the judge finds there is probable cause to believe that the person to be charged has committed an offense after conducting a hearing. If the district attorney has refused to issue a complaint, he or she shall be informed of the hearing and may attend. The hearing shall be ex parte without the right of cross–examination.

(4) If the alleged violator under s. 948.55 (2) or 948.60 (2) (c) is or was the parent or guardian of a child who is injured or dies as a result of an accidental shooting, the district attorney may consider, among other factors, the impact of the injury or death on the alleged violator when deciding whether to issue a complaint regarding the alleged violation. This subsection does not restrict the factors that a district attorney may consider in deciding whether to issue a complaint regarding any alleged violation.

History: 1977 c. 449; 1991 a. 139; 1999 a. 185; Sup. Ct. Order No. 14–03, 2016 WI 29, filed 4–28–16, eff. 7–1–16.

A judge abused his discretion in barring the public from a hearing under sub. (3). State ex rel. Newspapers v. Circuit Court, 124 Wis. 2d 499, 370 N.W.2d 209 (1985).

A judge's order under sub. (3) is not appealable. Gavcus v. Maroney, 127 Wis. 2d 69, 377 N.W.2d 201 (Ct. App. 1985).

Sub. (3) does not give a trial court authority to order a district attorney to file different or additional charges than those already brought. Unnamed Petitioner v. Walworth Circuit Ct., 157 Wis. 2d 157, 458 N.W.2d 575 (Ct. App. 1990).

Sub. (3) does not confer upon the person who is the subject of a proposed prosecution the right to participate in any way or to obtain reconsideration of the ultimate decision reached. A defendant named in a complaint issued pursuant to sub. (3) has the same opportunity to challenge in circuit court the legal and factual sufficiency of that complaint as a defendant named in a complaint issued pursuant to sub. (1). Kalal v. Dane County, 2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 110, 02–2490.

A refusal to issue a complaint under sub. (3) may be proven directly or circumstantially, by inferences reasonably drawn from words and conduct. The refusal can be open and explicit or indirect and inferred. Inaction alone will ordinarily not support an inference of a refusal to prosecute. Kalal v. Dane County, 2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 110, 02–2490.

Forms similar to the uniform traffic citation that are used as complaints to initiate criminal prosecutions in certain misdemeanor cases are sufficient to confer subject matter jurisdiction on the court but any conviction that results from their use in the manner described in the opinion is null and void; this section and ss. 968.02, 968.04, 971.01, 971.04, 971.05, and 971.08 are discussed. 63 Atty. Gen. 540.

Judicial scrutiny of prosecutorial discretion in decision not to file complaint. Becker. 71 MLR 749 (1988).

968.03 Dismissal or withdrawal of complaints. (1) If the judge does not find probable cause to believe that an offense has been committed or that the accused has committed it, the judge shall endorse such finding on the complaint and file the complaint with the clerk.

(2) An unserved warrant or summons shall, at the request of the district attorney, be returned to the judge who may dismiss the action. Such request shall be in writing, it shall state the reasons therefor in writing and shall be filed with the clerk.

(3) The dismissals in subs. (1) and (2) are without prejudice.

History: 1993 a. 486.

968.04 Warrant or summons on complaint. (1) WARRANTS. If it appears from the complaint, or from an affidavit or affidavits filed with the complaint or after an examination under oath of the complainant or witnesses, when the judge determines that this is necessary, that there is probable cause to believe that an offense has been committed and that the accused has committed it, the judge shall issue a warrant for the arrest of the defendant or a summons in lieu thereof. The warrant or summons shall be delivered forthwith to a law enforcement officer for service.

(a) When an accused has been arrested without a warrant and is in custody or appears voluntarily before a judge, no warrant shall be issued and the complaint shall be filed forthwith with a judge.

(b) A warrant or summons may be issued by a judge in another county when there is no available judge of the county in which the complaint is issued. The warrant shall be returnable before a judge in the county in which the offense alleged in the complaint was committed, and the summons shall be returnable before the circuit court of the county in which the offense alleged in the complaint was committed.

(c) A judge may specify geographical limits for enforcement of a warrant.

(d) An examination of the complainant or witness under sub. (1) may take place by telephone on request of the person seeking the warrant or summons unless good cause to the contrary appears. The judge shall place each complainant or witness under oath and arrange for all sworn testimony to be recorded, either by a stenographic reporter or by means of a voice recording device. The judge shall have the record transcribed. The transcript, certified as accurate by the judge or reporter, as appropriate, shall be filed with the court. If the testimony was recorded by means of a voice recording device, the judge shall also file the original recording with the court.

(2) SUMMONS. (a) In any case the district attorney, after the issuance of a complaint, may issue a summons in lieu of requesting the issuance of a warrant. The complaint shall then be filed with the clerk.

(b) In misdemeanor actions where the maximum imprisonment does not exceed 6 months, the judge shall issue a summons instead of a warrant unless the judge believes that the defendant will not appear in response to a summons.

(c) If a person summoned fails to appear in response to a summons issued by a district attorney, the district attorney may proceed to file the complaint as provided in s. 968.02 and, in addition to endorsing his or her approval on the complaint, shall endorse upon the complaint the fact that the accused failed to respond to a summons.

(3) MANDATORY PROVISIONS. (a) *Warrant.* The warrant shall:

1. Be in writing and signed by the judge.

2. State the name of the crime and the section charged and number of the section alleged to have been violated.

3. Have attached to it a copy of the complaint.

4. State the name of the person to be arrested, if known, or if not known, designate the person to be arrested by any description by which the person to be arrested can be identified with reasonable certainty.

5. State the date when it was issued and the name of the judge who issued it together with the title of the judge's office.

6. Command that the person against whom the complaint was made be arrested and brought before the judge issuing the warrant, or, if the judge is absent or unable to act, before some other judge in the same county.

7. The warrant shall be in substantially the following form:

STATE OF WISCONSIN,

.... County

State of Wisconsin

vs.

.... (Defendant(s))

THE STATE OF WISCONSIN TO ANY LAW ENFORCEMENT OFFICER:

A complaint, copy of which is attached, having been filed with me accusing the defendant(s) of committing the crime of .... contrary to sec. ...., Stats., and I having found that probable cause exists that the crime was committed by the defendant(s).

You are, therefore, commanded to arrest the defendant(s) and bring .... before me, or, if I am not available, before some other judge of this county.

Dated ...., ... (year)

....(Signature)

....(Title)

8. The complaint and warrant may be on the same form. The warrant shall be beneath the complaint. If separate forms are used, a copy of the complaint shall be attached to the warrant.

(b) *Summons.* 1. The summons shall command the defendant to appear before a court at a certain time and place and shall be in substantially the form set forth in subd. 3.

2. A summons may be served anywhere in the state and it shall be served by delivering a copy to the defendant personally or by leaving a copy at the defendant's usual place of abode with a person of discretion residing therein or by mailing a copy to the defendant's last–known address. It shall be served by a law enforcement officer.

3. The summons shall be in substantially the following form:

a. When issued by a judge:

STATE OF WISCONSIN,

.... County

State of Wisconsin

vs.

.... (Defendant)

THE STATE OF WISCONSIN TO SAID DEFENDANT:

A complaint, copy of which is attached, having been filed with me accusing the defendant of committing the crime of .... contrary to sec. ...., Stats., and I having found that probable cause exists that the crime was committed by the defendant.

You, ..., are, therefore, summoned to appear before Branch .... of the .... court of .... County at the courthouse in the City of .... to answer said complaint, on ...., ..., (year) at .... o'clock in the .... noon, and in case of your failure to appear, a warrant for your arrest will be issued.

Dated ...., ... (year)

....(Signature)

....(Title)

b. When issued by a district attorney:

STATE OF WISCONSIN,

.... County

State of Wisconsin

vs.

.... (Defendant)

THE STATE OF WISCONSIN TO SAID DEFENDANT:

A complaint, copy of which is attached, having been made before me accusing the defendant of committing the crime of .... contrary to sec. ...., Stats.

You, ..., are, therefore, summoned to appear before Branch .... of the .... court of .... County at the courthouse in the City of .... to answer said complaint, on ...., ... (year), at .... o'clock in the .... noon, and in case of your failure to appear, a warrant for your arrest may be issued.

Dated ...., ... (year)

.... (Signature)

.... District Attorney

4. The complaint and summons may be on the same form. The summons shall be beneath the complaint. If separate forms are used, a copy of the complaint shall be attached to the summons.

(4) SERVICE. (a) The warrant shall be directed to all law enforcement officers of the state. A warrant may be served anywhere in the state.

(b) A warrant is served by arresting the defendant and informing the defendant as soon as practicable of the nature of the crime with which the defendant is charged.

(c) An arrest may be made by a law enforcement officer without a warrant in the law enforcement officer's possession when the law enforcement officer has knowledge that a warrant has been issued. In such case, the officer shall inform the defendant as soon as practicable of the nature of the crime with which the defendant is charged.

(d) The law enforcement officer arresting a defendant shall endorse upon the warrant the time and place of the arrest and the law enforcement officer's fees and mileage therefor.

History: 1973 c. 12; 1975 c. 39, 41, 199; 1977 c. 449 ss. 480, 497; 1983 a. 535; Sup. Ct. Order, 141 Wis. 2d xiii (1987); 1987 a. 151; 1993 a. 486; 1997 a. 250.

Judicial Council Note, 1988: Sub. (1) (d) permits an arrest warrant or summons to be issued upon the basis of sworn recorded testimony received by telephone on request of the person seeking the warrant or summons unless good cause to the contrary appears. The telephone procedure permits faster processing of the application, while preserving a record of the basis for subsequent review. [Re Order effective Jan. 1, 1988]

To be constitutionally sufficient to support the issuance of an arrest warrant and to show probable cause, a complaint must contain the essential facts constituting the offense charged. A complaint was fatally defective in merely repeating the language of the statute allegedly violated. State v. Williams, 47 Wis. 2d 242, 177 N.W.2d 611 (1970).

A warrant was properly issued upon sworn testimony of a sheriff that an accomplice had confessed and implicated the defendant, since reliable hearsay is permitted and a confession is not inherently untrustworthy. Okrasinski v. State, 51 Wis. 2d 210, 186 N.W.2d 314 (1971).

When a complaint alleged that a reliable informant procured a sample of drugs from the defendant's apartment, the inference that the informant observed the defen-

dant's possession of a controlled substance satisfied the *Aguilar* test. Scott v. State, 73 Wis. 2d 504, 243 N.W.2d 215 (1976).

A criminal prosecution is properly and timely commenced by a John Doe complaint and arrest warrant that identify the defendant solely by a DNA profile, which meets the requirement of sub. (3) (a) 4. that if the defendant's name is not known the person to be arrested must be identified by any description by which the person to be arrested can be identified with reasonable certainty. State v. Dabney, 2003 WI App 108, 264 Wis. 2d 843, 663 N.W.2d 366, 02–2445.

Applicable law allows electronic transmission of certain confidential case information among clerks of circuit court, county sheriff's offices, and the Department of Justice through electronic interfaces involving the Department of Administration's Office of Justice Assistance, specifically including electronic data messages about adult arrest warrants if either the warrant or the case in which it was issued has been ordered sealed by the court. OAG 2–10.

NOTE: See also the notes to Article I, section 11, of the Wisconsin Constitution.

968.05 Corporations or limited liability companies: summons in criminal cases.

(1) When a corporation or limited liability company is charged with the commission of a criminal offense, the judge or district attorney shall issue a summons setting forth the nature of the offense and commanding the corporation or limited liability company to appear before a court at a specific time and place.

(2) The summons for the appearance of a corporation or limited liability company may be served as provided for service of a summons upon a corporation or limited liability company in a civil action. The summons shall be returnable not less than 10 days after service.

History: 1993 a. 112.

Cross–reference: See s. 973.17 for provision for default judgment against a corporation.

968.06 Indictment by grand jury.

Upon indictment by a grand jury a complaint shall be issued, as provided by s. 968.02, upon the person named in the indictment and the person shall be entitled to a preliminary hearing under s. 970.03, and all proceedings thereafter shall be the same as if the person had been initially charged under s. 968.02 and had not been indicted by a grand jury.

History: 1979 c. 291.

968.07 Arrest by a law enforcement officer.

(1) A law enforcement officer may arrest a person when:

(a) The law enforcement officer has a warrant commanding that such person be arrested; or

(b) The law enforcement officer believes, on reasonable grounds, that a warrant for the person's arrest has been issued in this state; or

(c) The law enforcement officer believes, on reasonable grounds, that a felony warrant for the person's arrest has been issued in another state; or

(d) There are reasonable grounds to believe that the person is committing or has committed a crime.

(1m) Notwithstanding sub. (1), a law enforcement officer shall arrest a person when required to do so under s. 813.12 (7), 813.122 (10), 813.125 (6), 813.128 (3g) (b), or 968.075 (2) (a) or (5) (e).

(2) A law enforcement officer making a lawful arrest may command the aid of any person, and such person shall have the same power as that of the law enforcement officer.

(3) If the alleged violator under s. 948.55 (2) or 948.60 (2) (c) is or was the parent or guardian of a child who is injured or dies as a result of an accidental shooting, no law enforcement officer may arrest the alleged violator until at least 7 days after the date of the shooting.

History: 1991 a. 139; 1993 a. 486; 2005 a. 104; 2015 a. 352.

If the police have probable cause for arrest without a warrant, they may break down a door to effect the arrest after announcing their purpose in demanding admission. The remedy for excessive force is not dismissal of the criminal charge. Nadolinski v. State, 46 Wis. 2d 259, 174 N.W.2d 483 (1970).

An arrest based solely on evidence discovered after an illegal search is invalid. State ex rel. Furlong v. Waukesha County Court, 47 Wis. 2d 515, 177 N.W.2d 333 (1970).

While probable cause for an arrest without a warrant requires that an officer have more than a mere suspicion, the officer does not need the same quantum of evidence necessary for conviction, but information that would lead a reasonable officer to believe that guilt is more than a possibility, which information can be based in part on hearsay. State v. DiMaggio, 49 Wis. 2d 565, 182 N.W.2d 466 (1971).

An officer need not be in possession of a warrant to make a valid arrest. Schill v. State, 50 Wis. 2d 473, 184 N.W.2d 858 (1971).

An arrest was valid when a defendant, approached by an officer, voluntarily stated that he assumed they would be looking for him because he had been the last person to see the victim alive. Schenk v. State, 51 Wis. 2d 600, 187 N.W.2d 853 (1971).

Police have grounds to arrest without a warrant when they have information from a reliable informer that a crime is to be committed, when they check the information, and when the defendants attempt to escape when stopped. Molina v. State, 53 Wis. 2d 662, 193 N.W.2d 874 (1972).

A person is not under arrest and the officer is not attempting an arrest, so far as the right to use force is concerned, until the person knows or should know that the person restraining or attempting to restrain him or her is an officer. Celmer v. Quarberg, 56 Wis. 2d 581, 203 N.W.2d 45 (1972).

An illegal execution of a valid arrest warrant is not sufficient to result in a loss of personal jurisdiction over the accused. State v. Monsoor, 56 Wis. 2d 689, 203 N.W.2d 20 (1973).

The fact that a witness had identified the defendant by photograph was sufficient to support an arrest, even though the witness was not allowed to identify the defendant at the trial. State v. Wallace, 59 Wis. 2d 66, 207 N.W.2d 855 (1973).

When an officer, mistakenly believing in good faith that the occupants of a car had committed a crime, stopped a car and arrested the occupants, the arrest was illegal, but a shotgun in plain sight on the back seat could be seized and used in evidence. State v. Taylor, 60 Wis. 2d 506, 210 N.W.2d 873 (1973).

Enforcement officers may make constitutionally valid arrests without warrants under sub. (1) (d) if they have reasonable grounds to believe that the person has committed a crime. Rinehart v. State, 63 Wis. 2d 760, 218 N.W.2d 323 (1974).

The police force is considered as a unit. If there is a police–channeled communication to the arresting officer who acts in good faith, the arrest is based on probable cause when facts exist within the police department. State v. Shears, 68 Wis. 2d 217, 229 N.W.2d 103 (1975).

When bags were heavy and contained brick–like objects obtained in an overnight trip and the defendant's house was under surveillance, there was probable cause for arrest for possession of marijuana. State v. Phelps, 73 Wis. 2d 313, 243 N.W.2d 213 (1976).

The test under sub. (1) (d) is whether the arresting officer could have obtained a warrant on the basis of information known prior to the arrest. Police may rely on eyewitness reports of citizen informers. Loveday v. State, 74 Wis. 2d 503, 247 N.W.2d 116 (1976).

An officer may make a warrantless arrest for an ordinance violation if a statutory counterpart of the ordinance exists. City of Madison v. Ricky Two Crow, 88 Wis. 2d 156, 276 N.W.2d 359 (Ct. App. 1979).

Evidence obtained during a mistaken arrest is admissible as long as the arresting officer acted in good faith and had reasonable, articulable grounds to believe that the suspect was the intended arrestee. State v. Lee, 97 Wis. 2d 679, 294 N.W.2d 547 (Ct. App. 1980).

An arrest by an out–of–state police officer was a valid citizen's arrest. State v. Slawek, 114 Wis. 2d 332, 338 N.W.2d 120 (Ct. App. 1983).

When a defendant's mother admitted police into her home to talk to her son, the subsequent arrest of her son was valid. State v. Rodgers, 119 Wis. 2d 102, 349 N.W.2d 453 (1984).

Municipal police may arrest and detain a person for whom another municipality in another county has issued a civil arrest warrant. 61 Atty. Gen. 275.

A city police officer is a law enforcement officer and traffic officer within s. 345.22. 61 Atty. Gen. 419.

NOTE: See also the notes to Article I, section 11, of the Wisconsin Constitution.

968.073 Recording custodial interrogations.

(1) In this section:

(a) "Custodial interrogation" means an interrogation by a law enforcement officer or an agent of a law enforcement agency of a person suspected of committing a crime from the time the suspect is or should be informed of his or her rights to counsel and to remain silent until the questioning ends, during which the officer or agent asks a question that is reasonably likely to elicit an incriminating response and during which a reasonable person in the suspect's position would believe that he or she is in custody or otherwise deprived of his or her freedom of action in any significant way.

(b) "Law enforcement agency" has the meaning given in s. 165.83 (1) (b).

(c) "Law enforcement officer" has the meaning given in s. 165.85 (2) (c).

(2) It is the policy of this state to make an audio or audio and visual recording of a custodial interrogation of a person suspected of committing a felony unless a condition under s. 972.115 (2) (a) 1. to 6. applies or good cause is shown for not making an audio or audio and visual recording of the interrogation.

(3) A law enforcement officer or agent of a law enforcement agency conducting a custodial interrogation is not required to inform the subject of the interrogation that the officer or agent is

making an audio or audio and visual recording of the interrogation.

History: 2005 a. 60.

Instituting Innocence Reform: Wisconsin's New Government Experiment. Kruse. 2006 WLR 645.

968.075 Domestic abuse incidents; arrest and prosecution. (1) DEFINITIONS. In this section:

(a) "Domestic abuse" means any of the following engaged in by an adult person against his or her spouse or former spouse, against an adult with whom the person resides or formerly resided or against an adult with whom the person has a child in common:

1. Intentional infliction of physical pain, physical injury or illness.

2. Intentional impairment of physical condition.

3. A violation of s. 940.225 (1), (2) or (3).

4. A physical act that may cause the other person reasonably to fear imminent engagement in the conduct described under subd. 1., 2. or 3.

(b) "Law enforcement agency" has the meaning specified in s. 165.83 (1) (b).

(d) "Party" means a person involved in a domestic abuse incident.

(e) "Predominant aggressor" means the most significant, but not necessarily the first, aggressor in a domestic abuse incident.

(2) CIRCUMSTANCES REQUIRING ARREST; PRESUMPTION AGAINST CERTAIN ARRESTS. (a) Notwithstanding s. 968.07 (1) and except as provided in pars. (am) and (b), a law enforcement officer shall arrest and take a person into custody if:

1. The officer has reasonable grounds to believe that the person is committing or has committed domestic abuse and that the person's actions constitute the commission of a crime; and

2. Any of the following apply:

a. The officer has a reasonable basis for believing that continued domestic abuse against the alleged victim is likely.

b. There is evidence of physical injury to the alleged victim.

c. The person is the predominant aggressor.

(am) Notwithstanding s. 968.07 (1), unless the person's arrest is required under s. 813.12 (7), 813.122 (10), 813.125 (6), or 813.128 (3g) (b) or sub. (5) (e), if a law enforcement officer identifies the predominant aggressor, it is generally not appropriate for a law enforcement officer to arrest anyone under par. (a) other than the predominant aggressor.

(ar) In order to protect victims from continuing domestic abuse, a law enforcement officer shall consider all of the following in identifying the predominant aggressor:

1. The history of domestic abuse between the parties, if it can be reasonably ascertained by the officer, and any information provided by witnesses regarding that history.

2. Statements made by witnesses.

3. The relative degree of injury inflicted on the parties.

4. The extent to which each person present appears to fear any party.

5. Whether any party is threatening or has threatened future harm against another party or another family or household member.

6. Whether either party acted in self–defense or in defense of any other person under the circumstances described in s. 939.48.

(b) If the officer's reasonable grounds for belief under par. (a) 1. are based on a report of an alleged domestic abuse incident, the officer is required to make an arrest under par. (a) only if the report is received, within 28 days after the day the incident is alleged to have occurred, by the officer or the law enforcement agency that employs the officer.

(2m) IMMEDIATE RELEASE PROHIBITED. Unless s. 968.08 applies, a law enforcement officer may not release a person whose arrest was required under sub. (2) until the person posts bail under s. 969.07 or appears before a judge under s. 970.01 (1).

(3) LAW ENFORCEMENT POLICIES. (a) Each law enforcement agency shall develop, adopt, and implement written policies regarding procedures for domestic abuse incidents. The policies shall include, but not be limited to, the following:

1. a. A statement emphasizing that in most circumstances, other than those under sub. (2), a law enforcement officer should arrest and take a person into custody if the officer has reasonable grounds to believe that the person is committing or has committed domestic abuse and that the person's actions constitute the commission of a crime.

b. A policy reflecting the requirements of subs. (2) and (2m).

c. A statement emphasizing that a law enforcement officer's decision as to whether or not to arrest under this section may not be based on the consent of the victim to any subsequent prosecution or on the relationship of the parties.

d. A statement emphasizing that a law enforcement officer's decision not to arrest under this section may not be based solely upon the absence of visible indications of injury or impairment.

e. A statement discouraging, but not prohibiting, the arrest of more than one party.

f. A statement emphasizing that a law enforcement officer, in determining whether to arrest a party, should consider whether he or she acted in self–defense or in defense of another person.

2. A procedure for the written report and referral required under sub. (4).

3. A procedure for notifying the alleged victim of the incident of the provisions in sub. (5), the procedure for releasing the arrested person and the likelihood and probable time of the arrested person's release.

4. A procedure that requires a law enforcement officer, if the law enforcement officer has reasonable grounds to believe that a person is committing or has committed domestic abuse, to inform the victim of the availability of shelters and services in his or her community, including using lists available under ss. 49.165 (4) (b) and 165.93 (4) (b); to give notice of legal rights and remedies available to him or her; and to provide him or her with a statement that reads substantially as follows: "If you are the victim of domestic abuse, you may contact a domestic violence victim service provider to plan for your safety and take steps to protect yourself, including filing a petition under s. 813.12 of the Wisconsin statutes for a domestic abuse injunction or under s. 813.125 of the Wisconsin statutes for a harassment injunction."

(am) The policies under par. (a) may provide that the law enforcement agency will share information with organizations that are eligible to receive grants under s. 49.165 (2) or 165.93 (2).

(b) In the development of these policies, each law enforcement agency is encouraged to consult with community organizations and other law enforcement agencies with expertise in the recognition and handling of domestic abuse incidents.

(c) This subsection does not limit the authority of a law enforcement agency to establish policies that require arrests under more circumstances than those set forth in sub. (2), but the policies may not conflict with the presumption under sub. (2) (am).

(4) REPORT REQUIRED WHERE NO ARREST. If a law enforcement officer does not make an arrest under this section when the officer has reasonable grounds to believe that a person is committing or has committed domestic abuse and that person's acts constitute the commission of a crime, the officer shall prepare a written report stating why the person was not arrested. The report shall be sent to the district attorney's office, in the county where the acts took place, immediately after investigation of the incident has been completed. The district attorney shall review the report to determine whether the person involved in the incident should be charged with the commission of a crime.

(5) CONTACT PROHIBITION. (a) 1. Unless there is a waiver under par. (c), during the 72 hours immediately following an arrest for a domestic abuse incident, the arrested person shall avoid the residence of the alleged victim of the domestic abuse incident and, if applicable, any premises temporarily occupied by the alleged

victim, and avoid contacting or causing any person, other than law enforcement officers and attorneys for the arrested person and alleged victim, to contact the alleged victim.

2. An arrested person who intentionally violates this paragraph may be fined not more than $10,000 or imprisoned for not more than 9 months or both.

(b) 1. Unless there is a waiver under par. (c), a law enforcement officer or other person who releases a person arrested for a domestic abuse incident from custody less than 72 hours after the arrest shall inform the arrested person orally and in writing of the requirements under par. (a), the consequences of violating the requirements and the provisions of s. 939.621. The arrested person shall sign an acknowledgment on the written notice that he or she has received notice of, and understands the requirements, the consequences of violating the requirements and the provisions of s. 939.621. If the arrested person refuses to sign the notice, he or she may not be released from custody.

2. If there is a waiver under par. (c) and the person is released under subd. 1., the law enforcement officer or other person who releases the arrested person shall inform the arrested person orally and in writing of the waiver and the provisions of s. 939.621.

3. Failure to comply with the notice requirement under subd. 1. regarding a person who is lawfully released from custody bars a prosecution under par. (a), but does not affect the application of s. 939.621 in any criminal prosecution.

(c) At any time during the 72–hour period specified in par. (a), the alleged victim may sign a written waiver of the requirements in par. (a). The law enforcement agency shall have a waiver form available.

(d) The law enforcement agency responsible for the arrest of a person for a domestic abuse incident shall notify the alleged victim of the requirements under par. (a) and the possibility of, procedure for and effect of a waiver under par. (c).

(e) Notwithstanding s. 968.07 (1), a law enforcement officer shall arrest and take a person into custody if the officer has reasonable grounds to believe that the person has violated par. (a).

(6) CONDITIONAL RELEASE. A person arrested and taken into custody for a domestic abuse incident is eligible for conditional release. Unless there is a waiver under sub. (5) (c), as part of the conditions of any such release that occurs during the 72 hours immediately following such an arrest, the person shall be required to comply with the requirements under sub. (5) (a) and to sign the acknowledgment under sub. (5) (b). The arrested person's release shall be conditioned upon his or her signed agreement to refrain from any threats or acts of domestic abuse against the alleged victim or other person.

(6m) OFFICER IMMUNITY. A law enforcement officer is immune from civil and criminal liability arising out of a decision by the officer to arrest or not arrest an alleged offender, if the decision is made in a good faith effort to comply with this section.

(7) PROSECUTION POLICIES. Each district attorney's office shall develop, adopt and implement written policies encouraging the prosecution of domestic abuse offenses. The policies shall include, but not be limited to, the following:

(a) A policy indicating that a prosecutor's decision not to prosecute a domestic abuse incident should not be based:

1. Solely upon the absence of visible indications of injury or impairment;

2. Upon the victim's consent to any subsequent prosecution of the other person involved in the incident; or

3. Upon the relationship of the persons involved in the incident.

(b) A policy indicating that when any domestic abuse incident is reported to the district attorney's office, including a report made under sub. (4), a charging decision by the district attorney should, absent extraordinary circumstances, be made not later than 2 weeks after the district attorney has received notice of the incident.

(8) EDUCATION AND TRAINING. Any education and training by the law enforcement agency relating to the handling of domestic abuse complaints shall stress enforcement of criminal laws in domestic abuse incidents and protection of the alleged victim. Law enforcement agencies and community organizations with expertise in the recognition and handling of domestic abuse incidents shall cooperate in all aspects of the training.

(9) ANNUAL REPORT. (a) Each district attorney shall submit an annual report to the department of justice listing all of the following:

1. The number of arrests for domestic abuse incidents in his or her county as compiled and furnished by the law enforcement agencies within the county.

1m. The number of responses law enforcement made that involved a domestic abuse incident that did not result in an arrest.

2. The number of subsequent prosecutions and convictions of the persons arrested for domestic abuse incidents.

(b) The listing of the number of arrests, prosecutions and convictions under par. (a) shall include categories by statutory reference to the offense involved and include totals for all categories.

History: 1987 a. 346; 1989 a. 293; 1993 a. 319; 1995 a. 304; 2005 a. 104; 2011 a. 267; 2013 a. 168 s. 20; 2013 a. 323; 2015 a. 352.

NOTE: 1987 Wis. Act 346, which created this section, states the legislative intent and purpose in section 1 of the Act.

Questions by an officer prior to an arrest to determine which spouse was the primary physical aggressor under sub. (3) (a) 1. b. were investigatory and *Miranda* warnings were not required when the defendant was not deprived of freedom or questioned in a coercive environment. State v. Leprich, 160 Wis. 2d 472, 465 N.W.2d 844 (Ct. App. 1991).

Warrantless arrest and detention for bail jumping, s. 946.49, is authorized if probable cause exists that the arrestee violated the contact prohibition in sub. (5) (a) 1. after being released under ch. 969. 78 Atty. Gen. 177.

This section applies to roommates living in university residence halls, whether privately or state owned. If criteria requiring arrest under sub. (2) exist, a law enforcement officer must make a custodial arrest. 79 Atty. Gen. 109.

A Prosecutor's View of Elder Abuse. Hanrahan. Wis. Law. Sept. 2000.

968.08 Release by law enforcement officer of arrested person. A law enforcement officer having custody of a person arrested without a warrant may release the person arrested without requiring the person to appear before a judge if the law enforcement officer is satisfied that there are insufficient grounds for the issuance of a criminal complaint against the person arrested.

History: 1993 a. 486.

968.085 Citation; nature; issuance; release of accused. (1) NATURE. A citation under this section is a directive, issued by a law enforcement officer, that a person appear in court and answer criminal charges. A citation is not a criminal complaint and may not be used as a substitute for a criminal complaint.

(2) AUTHORITY TO ISSUE; EFFECT. Except as provided in sub. (8), a law enforcement officer may issue a citation to any person whom he or she has reasonable grounds to believe has committed a misdemeanor. A citation may be issued in the field or at the headquarters or precinct station of the officer instead of or subsequent to a lawful arrest. If a citation is issued, the person cited shall be released on his or her own recognizance. In determining whether to issue a citation, the law enforcement officer may consider whether:

(a) The accused has given proper identification.

(b) The accused is willing to sign the citation.

(c) The accused appears to represent a danger of harm to himself or herself, another person or property.

(d) The accused can show sufficient evidence of ties to the community.

(e) The accused has previously failed to appear or failed to respond to a citation.

(f) Arrest or further detention appears necessary to carry out legitimate investigative action in accordance with law enforcement agency policies.

(3) CONTENTS. The citation shall do all of the following:

(a) Identify the offense and section which the person is alleged to have violated, including the date, and if material, identify the property and other persons involved.

(b) Contain the name and address of the person cited, or other identification if that cannot be ascertained.

(c) Identify the officer issuing the citation.

(d) Direct the person cited to appear for his or her initial appearance in a designated court, at a designated time and date.

(4) SERVICE. A copy of the citation shall be delivered to the person cited, and the original must be filed with the district attorney.

(5) REVIEW BY DISTRICT ATTORNEY. If the district attorney declines to prosecute, he or she shall notify the law enforcement agency which issued the citation. The law enforcement agency shall attempt to notify the person cited that he or she will not be charged and is not required to appear as directed in the citation.

(6) CITATION NO BAR TO CRIMINAL SUMMONS OR WARRANT. The prior issuance of a citation does not bar the issuance of a summons or a warrant for the same offense.

(7) PREPARATION OF FORM. The judicial conference shall prescribe the form and content of the citation under s. 758.171.

(8) INAPPLICABILITY TO CERTAIN DOMESTIC ABUSE CASES. A law enforcement officer may not issue a citation to a person for an offense if the officer is required to arrest the person for that offense under s. 968.075 (2).

History: 1983 a. 433; 2005 a. 104.

968.09 Warrant on failure to appear. (1) When a defendant or a witness fails to appear before the court as required, or violates a term of the defendant's or witness's bond or the defendant's or witness's probation, if any, the court may issue a bench warrant for the defendant's or witness's arrest which shall direct that the defendant or witness be brought before the court without unreasonable delay. The court shall state on the record at the time of issuance of the bench warrant the reason therefor.

(2) Prior to the defendant's appearance in court after the defendant's arrest under sub. (1), ch. 969 shall not apply.

History: 1971 c. 298; 1993 a. 486.

A bench warrant may be directed to all law enforcement officers in the state without regard to whether the defendant is charged with a violation of a state statute or county ordinance. The form of the warrant should be as suggested by s. 968.04 (3) (a) 7. 62 Atty. Gen. 208.

968.10 Searches and seizures; when authorized. A search of a person, object or place may be made and things may be seized when the search is made:

(1) Incident to a lawful arrest;

(2) With consent;

(3) Pursuant to a valid search warrant;

(4) With the authority and within the scope of a right of lawful inspection;

(5) Pursuant to a search during an authorized temporary questioning as provided in s. 968.25; or

(6) As otherwise authorized by law.

NOTE: See the notes to Article I, section 11, of the Wisconsin Constitution.

968.11 Scope of search incident to lawful arrest. When a lawful arrest is made, a law enforcement officer may reasonably search the person arrested and an area within such person's immediate presence for the purpose of:

(1) Protecting the officer from attack;

(2) Preventing the person from escaping;

(3) Discovering and seizing the fruits of the crime; or

(4) Discovering and seizing any instruments, articles or things which may have been used in the commission of, or which may constitute evidence of, the offense.

The holding of *Arizona v. Gant*, 556 U.S. 332, that *Belton* does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle is adopted as the proper interpretation of the Wisconsin Constitution's protection against unreasonable searches and seizures. State v. Dearborn, 2010 WI 84, 327 Wis. 2d 252, 786 N.W.2d 97, 07–1894.

NOTE: See also the notes to Article I, section 11, of the Wisconsin Constitution.

968.12 Search warrant. (1) DESCRIPTION AND ISSUANCE. A search warrant is an order signed by a judge directing a law enforcement officer to conduct a search of a designated person, a designated object or a designated place for the purpose of seizing designated property or kinds of property. A judge shall issue a search warrant if probable cause is shown.

(2) WARRANT UPON AFFIDAVIT. A search warrant may be based upon sworn complaint or affidavit, or testimony recorded by a phonographic reporter or under sub. (3) (d), showing probable cause therefor. The complaint, affidavit or testimony may be upon information and belief. The person requesting the warrant may swear to the complaint or affidavit before a notarial officer authorized under s. 706.07 to take acknowledgments or before a judge, or a judge may place a person under oath via telephone, radio, or other means of electronic communication, without the requirement of face–to–face contact, to swear to the complaint or affidavit. The judge shall indicate on the search warrant that the person so swore to the complaint or affidavit.

(3) WARRANT UPON ORAL TESTIMONY. (a) *General rule.* A search warrant may be based upon sworn oral testimony communicated to the judge by telephone, radio or other means of electronic communication, under the procedure prescribed in this subsection.

(b) *Application and issuance.* 1. 'Duplicate originals.' The person who is requesting the warrant may prepare a duplicate original warrant and read the duplicate original warrant, verbatim, to the judge. The judge shall enter, verbatim, what is read on the original warrant. The judge may direct that the warrant be modified. If the judge determines that there is probable cause for the warrant, the judge shall order the issuance of a warrant by directing the person requesting the warrant to sign the judge's name on the duplicate original warrant. In addition, the person shall sign his or her own name on the duplicate original warrant. The judge shall immediately sign the original warrant and enter on the face of the original warrant the exact time when the warrant was ordered to be issued.

2. 'Electronic transmission.' The person who is requesting the warrant may sign his or her own name on the warrant and transmit it to the judge. The judge may modify the warrant. If the judge determines that there is probable cause for the warrant, the judge shall order the issuance of a warrant by signing the warrant and entering on the face of the warrant the exact time when the warrant was ordered to be issued. The judge shall immediately transmit the signed warrant to the person who requested it.

(c) *Probable cause.* The finding of probable cause for a warrant upon oral testimony shall be based on the same kind of evidence as is sufficient for a warrant upon affidavit.

(d) *Recording and certification of testimony.* When a caller informs the judge that the purpose of the call is to request a warrant, the judge shall place under oath each person whose testimony forms a basis of the application and each person applying for the warrant. The judge or requesting person shall arrange for all sworn testimony to be recorded either by a stenographic reporter or by means of a voice recording device. The judge shall have the record transcribed. The transcript, certified as accurate by the judge or reporter, as appropriate, shall be filed with the court. If the testimony was recorded by means of a voice recording device, the judge shall also file the original recording with the court.

(e) *Contents.* The contents of a warrant upon oral testimony shall be the same as the contents of a warrant upon affidavit.

(f) *Entry of time of execution.* The person who executes the warrant shall enter the exact time of execution on the face of the duplicate original warrant.

(4) LOCATION OF SEARCH. A search warrant may authorize a search to be conducted anywhere in the state and may be executed pursuant to its terms anywhere in the state.

(5) SIGNATURES. In this section, a person requesting a warrant and a judge issuing a warrant may sign by using an electronic signature, a handwritten signature, or a handwritten signature that is electronically imaged.

History: 1971 c. 298; 1983 a. 443; Sup. Ct. Order, 141 Wis. 2d xiii (1987); Sup. Ct. Order No. 14–03, 2016 WI 29, filed 4–28–16, eff. 7–1–16; 2017 a. 261.

Judicial Council Note, 1988: Sub. (2) is amended to eliminate the preference for written affidavits as the basis for search warrants. Telephoned testimony allows faster response and the transcribed record is no less adequate for review.

Sub. (3) (a) is amended to eliminate the preference for written affidavits as the basis for search warrants. Telephoned testimony allows faster response and the transcribed record is no less adequate for review.

Sub. (3) (c) is amended to eliminate the preference for written affidavits as the basis for search warrants. Telephoned testimony allows faster response and the transcribed record is no less adequate for review.

Sub. (3) (d) is amended to authorize that the testimony be recorded either by a stenographic reporter or a voice recording device. [Re Order effective Jan. 1, 1988]

NOTE: See the notes to Article I, section 11, of the Wisconsin Constitution.

Specific statutory authorization was not necessary for a judge to issue an order that authorized the procedures used to track the defendant's cell phone because the order was supported by probable cause. Nonetheless, the order did comply with the spirit of this section and s. 968.135. State v. Tate, 2014 WI 89, 357 Wis. 2d 172, 849 N.W.2d 798, 12–0336.

968.13 Search warrant; property subject to seizure.

(1) A search warrant may authorize the seizure of the following:

(a) Contraband, which includes without limitation because of enumeration lottery tickets, gambling machines or other gambling devices, lewd, obscene or indecent written matter, pictures, sound recordings or motion picture films, forged money or written instruments and the tools, dies, machines or materials for making them, and controlled substances, as defined in s. 961.01 (4), and controlled substance analogs, as defined in s. 961.01 (4m), and the implements for smoking or injecting them. Gambling machines or other gambling devices possessed by a shipbuilding business that complies with s. 945.095 are not subject to this section.

(b) Anything which is the fruit of or has been used in the commission of any crime or of a violation of s. 346.63 or a local ordinance in conformity therewith.

(c) Anything other than documents which may constitute evidence of any crime or of a violation of s. 346.63 or a local ordinance in conformity therewith.

(d) Documents which may constitute evidence of any crime, if probable cause is shown that the documents are under the control of a person who is reasonably suspected to be concerned in the commission of that crime under s. 939.05 (2).

(2) In this section, "documents" includes, but is not limited to, books, papers, records, recordings, tapes, photographs, films or computer or electronic data.

History: 1971 c. 219; 1979 c. 81; 1995 a. 11, 448; 2015 a. 183.

An adversary hearing is not necessary for the seizure of a limited quantity of obscene material as evidence but is necessary before more than evidentiary copies are seized. State ex rel. Howard v. O'Connell, 53 Wis. 2d 248, 192 N.W.2d 201 (1971).

"Contraband" under sub. (1) (a) is not limited to items that are per se illegal; it also encompasses items used, acquired, or transferred illegally, including money. Jones v. State, 226 Wis. 2d 565, 594 N.W.2d 738 (1999), 97–3306.

NOTE: See also the notes to Article I, section 11, of the Wisconsin Constitution.

968.135 Subpoena for documents.

Upon the request of the attorney general or a district attorney and upon a showing of probable cause under s. 968.12, a court shall issue a subpoena requiring the production of documents, as specified in s. 968.13 (2). The documents shall be returnable to the court which issued the subpoena. Motions to the court, including, but not limited to, motions to quash or limit the subpoena, shall be addressed to the court which issued the subpoena. Any person who unlawfully refuses to produce the documents may be compelled to do so as provided in ch. 785. This section does not limit or affect any other subpoena authority provided by law.

History: 1979 c. 81, 177; 1983 a. 443 s. 4.

A bank's voluntary surrender of records other than those demanded on the subpoena provided no basis for suppression. State v. Swift, 173 Wis. 2d 870, 496 N.W.2d 713 (Ct. App. 1993).

This section protects the interests of persons whose documents are sought in addition to protecting the interests of the person on whom a subpoena is served. The defendant had standing to challenge subpoenas issued to produce her bank records. A person has standing to seek judicial intervention when that person has a personal stake in the outcome and is directly affected by the issues in controversy. State v. Popenhagen, 2008 WI 55, 309 Wis. 2d 601, 749 N.W.2d 611, 06–1114.

This section encompasses a motion to suppress documents in violation of this section and to suppress statements directly derived from those documents. The circuit court has discretion to suppress or allow evidence obtained in violation of a statute that does not specifically require suppression of evidence obtained contrary to the statute, depending on the facts and circumstances of the case and the objectives of the statute. State v. Popenhagen, 2008 WI 55, 309 Wis. 2d 601, 749 N.W.2d 611, 06–1114.

If a person were permitted to bring a motion to quash the subpoena for bank documents unlawfully obtained but not permitted to bring a motion to suppress incriminating statements derived directly from the unlawfully obtained bank documents, the person would not get the full benefit of the protections of the statute, and the underlying objectives of the statute would be defeated. State v. Popenhagen, 2008 WI 55, 309 Wis. 2d 601, 749 N.W.2d 611, 06–1114.

Specific statutory authorization was not necessary for a judge to issue an order that authorized the procedures used to track the defendant's cell phone because the order was supported by probable cause. Nonetheless, the order did comply with the spirit of this section and s. 968.12. State v. Tate, 2014 WI 89, 357 Wis. 2d 172, 849 N.W.2d 798, 12–0336.

968.14 Use of force.

All necessary force may be used to execute a search warrant or to effect any entry into any building or property or part thereof to execute a search warrant.

Officers acted legally when, armed with a search warrant, they knocked on a door, pushed it open when the defendant opened it 2 inches, and put him under restraint before showing the warrant. State v. Meier, 60 Wis. 2d 452, 210 N.W.2d 685 (1973).

To dispense with the rule of announcement in executing a warrant, particular facts must be shown in each case that support an officer's reasonable suspicion that exigent circumstances exist. An officer's experience and training are valid relevant considerations. State v. Meyer, 216 Wis. 2d 729, 576 N.W.2d 260 (1998), 96–2243.

Irrespective of whether the search warrant authorizes a "no–knock" entry, reasonableness is determined when the warrant is executed. State v. Davis, 2000 WI 270, 240 Wis. 2d 15, 622 N.W.2d 1.

There is no blanket exception to the knock and announce requirement for executing warrants. To justify no–knock entry, a reasonable suspicion that knocking and announcing will be dangerous, or futile, or will inhibit the effective investigation of a crime must exist. Richards v. Wisconsin, 520 U.S. 385, 137 L. Ed. 2d 615 (1997).

NOTE: See also the notes to Article I, section 11, of the Wisconsin Constitution.

968.15 Search warrants; when executable.

(1) A search warrant must be executed and returned not more than 5 days after the date of issuance.

(2) Any search warrant not executed within the time provided in sub. (1) shall be void and shall be returned to the judge issuing it.

Execution of search warrant is timely if in compliance with sub. (1) and if probable cause which led to issuance still exists at time of execution. Defense has burden of proof in timeliness challenge. State v. Edwards, 98 Wis. 2d 367, 297 N.W.2d 12 (1980).

Law enforcement's failure to return an order and inventory within the confines of this section and s. 968.17 did not render the execution of the order unreasonable. The timely return of a warrant is a ministerial duty that does not affect the validity of the search absent prejudice to the defendant. State v. Sveum, 2010 WI 92, 328 Wis. 2d 369, 787 N.W.2d 317, 08–0658.

968.16 Detention and search of persons on premises.

The person executing the search warrant may reasonably detain and search any person on the premises at the time to protect himself or herself from attack or to prevent the disposal or concealment of any item particularly described in the search warrant.

History: 1993 a. 486.

The defendant had sufficient control and dominion over a car for it to be considered "premises," justifying a search of the defendant. State v. Reed, 156 Wis. 2d 546, 457 N.W.2d 494 (Ct. App 1990).

The frisk of a person not named in a search warrant during the execution of the warrant was reasonable when occupants of the residence were very likely to be involved in drug trafficking; drugs felt in a pocket during the frisk were lawfully seized when the officer had probable cause to believe that there was a connection between what was felt and criminal activity. State v. Guy, 172 Wis. 2d 86, 492 N.W.2d 311 (1992).

NOTE: See also the notes to Article I, section 11, of the Wisconsin Constitution.

968.17 Return of search warrant.

(1) The return of the search warrant shall be made within 48 hours after execution to the clerk designated in the warrant. The return shall be accompanied

by a written inventory of any property taken. Upon request, the clerk shall deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the search warrant.

(2) An affidavit or complaint made in support of the issuance of the warrant and the transcript of any testimony taken shall be filed with the clerk within 5 days after the date of the execution of any search warrant.

History: 1971 c. 298.

In computing the time within which a search warrant must be returned, the court may exclude the hours between 4:30 p.m. Friday and 8 a.m. Monday. Such a delay would not affect the validity of the search. State v. Meier, 60 Wis. 2d 452, 210 N.W.2d 685 (1973).

The trial court erred in suppressing controlled substances and associated paraphernalia seized pursuant to a search warrant on the ground that a transcript of testimony upon which the warrant was based was not filed within 5 days of its execution, as required by sub. (2), because: 1) s. 968.22 provides that no evidence seized under a search warrant may be suppressed due to technical irregularities not affecting the defendant's substantial rights; 2) the 5–day filing requirement is a ministerial duty, a violation of which does not invalidate a search absent prejudice; and 3) there was no prejudice when the transcript was filed approximately 6 weeks prior to the filing of the information, before which the defendant was statutorily precluded from making any motion to suppress. State v. Elam, 68 Wis. 2d 614, 229 N.W.2d 664 (1975).

Law enforcement's failure to return an order and inventory within the confines of s. 968.15 and this section did not render the execution of the order unreasonable. The timely return of a warrant is a ministerial duty that does not affect the validity of the search absent prejudice to the defendant. State v. Sveum, 2010 WI 92, 328 Wis. 2d 369; 787 N.W.2d 317, 08–0658.

968.18 Receipt for seized property. Any law enforcement officer seizing any items without a search warrant shall give a receipt as soon as practicable to the person from whose possession they are taken. Failure to give such receipt shall not render the evidence seized inadmissible upon a trial.

968.19 Custody of property seized. Property seized under a search warrant or validly seized without a warrant shall be safely kept by the officer, who may leave it in the custody of the sheriff and take a receipt therefor, so long as necessary for the purpose of being produced as evidence on any trial.

968.20 Return of property seized. (1) Any person claiming the right to possession of property seized pursuant to a search warrant or seized without a search warrant, except for an animal taken into custody under s. 173.13 (1) or withheld from its owner under s. 173.21 (1) (a), may apply for its return to the circuit court for the county in which the property was seized or where the search warrant was returned, except that a court may commence a hearing, on its own initiative, to return property seized under s. 968.26. If an initial appearance under s. 970.01 is scheduled, the application for the return of the property shall be filed within 120 days of the initial appearance.

(1g) The court shall order such notice as it deems adequate to be given the district attorney and, unless notice was provided under s. 968.26 (7), to all persons who have or may have an interest in the property. The court shall hold a hearing to hear all claims to its true ownership. Except for a hearing commenced by the court, the hearing shall occur no more than 30 days after a motion is filed except that either party may, by agreement or for good cause, move the court for one extension of no more than 10 days. Any motion may be supported by affidavits or other submissions. If the right to possession is proved to the court's satisfaction, it shall order the property, other than contraband or property covered under sub. (1m) or (1r) or s. 173.21 (4) or 968.205, returned if the court finds any of the following:

(a) It is likely that the final judgment will be that the state must return the property to the claimant and the property is not reasonably needed as evidence or for other investigatory reasons or, if needed, satisfactory arrangements can be made for its return for subsequent use.

(am) The property is the only reasonable means for a defendant to pay for legal representation in the forfeiture or criminal proceeding, the property is not likely to be needed for payment of victim compensation, restitution, or fines, and the property is not reasonably needed as evidence or for other investigatory reasons. If the court makes this finding, it may order the return of funds or property sufficient to obtain legal counsel but less than the total amount seized and require an accounting.

(b) All proceedings and investigations in which it might be required have been completed.

(1h) If a court orders property returned under sub. (1g), the court shall order the person not to sell, transfer, assign, or otherwise encumber the property until the court orders the property either returned under s. 961.55 (3) or 973.075 (5) or forfeited under s. 961.555 or 973.076. If the person is subsequently convicted of or found to have committed the offense, the court shall order the person to surrender the returned property for proceedings under s. 961.555 or 973.076, whichever is appropriate.

(1m) (a) In this subsection:

1. "Crime" includes an act committed by a juvenile or by an adult who is adjudicated incompetent that would have been a crime if the act had been committed by a competent adult.

2. "Dangerous weapon" has the meaning given in s. 939.22 (10).

(b) If the seized property is a dangerous weapon or ammunition, the property shall not be returned to any person who committed a crime involving the use of the dangerous weapon or the ammunition.

(c) Subject to par. (d), seized property that is a dangerous weapon or ammunition may be returned to the rightful owner under this section if the owner had no prior knowledge of and gave no consent to the commission of the crime.

(d) 1. If the seized property is a firearm, the property has not been returned under this section, and a person claiming the right to possession of the firearm has applied for its return under sub. (1), the court shall order a hearing under sub. (1) to occur within 20 business days after the person applies for the return. If, at the hearing, all conditions under sub. (1) have been met and the person is not prohibited from possessing a firearm under state or federal law as determined by using information provided under s. 165.63, the court shall, within 5 days of the completion of the hearing and using a return of firearms form developed by the director of state courts, order the property returned if one of the following has occurred:

a. The district attorney has affirmatively declined to file charges in connection with the seizure against the person.

b. All charges filed in connection with the seizure against the person have been dismissed.

c. Ten months have passed since the seizure and no charges in connection with the seizure have been filed against the person.

d. The trial court has reached final disposition for all charges in connection with the seizure and the person has not been adjudged guilty, or not guilty by reason of mental disease or defect, of a crime in connection with the seizure.

e. The person has established that he or she had no prior knowledge of and gave no consent to the commission of the activity that led to the seizure.

2. If an entity holding a seized firearm receives a return of firearms form, the entity shall return the firearm within 10 business days of receiving the form unless the entity determines that the person who would receive the firearm is prohibited from possessing a firearm under state or federal law. The entity shall use the information provided under s. 165.63 to aid in making the determination under this subdivision.

(e) Property which may not be returned to an owner under this subsection shall be disposed of under subs. (3) and (4).

(1r) (a) If the seized property is a firearm ordered seized under s. 51.20 (13) (cv) 1., 2007 stats., the court that issued that order shall order the firearm returned if the order under s. 51.20 (13) (cv) 1., 2007 stats., has been canceled under s. 51.20 (13) (cv) 2. or (16) (gm), 2007 stats., or is canceled under s. 51.20 (13) (cv) 1m. c.

(b) If the seized property is a firearm ordered seized under s. 51.20 (13) (cv) 1., the court that issued that order shall order the

firearm returned if the order under s. 51.20 (13) (cv) 1. is canceled under s. 51.20 (13) (cv) 1m. c.

(c) If the seized property is a firearm ordered seized under s. 51.45 (13) (i) 1., the court that issued that order shall order the firearm returned if the order under s. 51.45 (13) (i) 1. is canceled under s. 51.45 (13) (i) 2. c.

(d) If the seized property is a firearm ordered seized under s. 54.10 (3) (f) 1., the court that issued that order shall order the firearm returned if the order under s. 54.10 (3) (f) 1. is canceled under s. 54.10 (3) (f) 2. c.

(e) If the seized property is a firearm ordered seized under s. 55.12 (10) (a), the court that issued that order shall order the firearm returned if the order under s. 55.12 (10) (a) is canceled under s. 55.12 (10) (b) 3.

(2) Property not required for evidence or use in further investigation, unless contraband or property covered under sub. (1m) or (1r) or s. 173.12 or 968.205, may be returned by the officer to the person from whom it was seized without the requirement of a hearing.

(3) (a) First class cities shall dispose of dangerous weapons or ammunition seized 12 months after taking possession of them if the owner, authorized under sub. (1m), has not requested their return and if the dangerous weapon or ammunition is not required for evidence or use in further investigation and has not been disposed of pursuant to a court order at the completion of a criminal action or proceeding. Disposition procedures shall be established by ordinance or resolution and may include provisions authorizing an attempt to return to the rightful owner any dangerous weapons or ammunition which appear to be stolen or are reported stolen. If enacted, any such provision shall include a presumption that if the dangerous weapons or ammunition appear to be or are reported stolen an attempt will be made to return the dangerous weapons or ammunition to the authorized rightful owner. If the return of a seized dangerous weapon other than a firearm is not requested by its rightful owner under sub. (1) and is not returned by the officer under sub. (2), the city shall safely dispose of the dangerous weapon or, if the dangerous weapon is a motor vehicle, as defined in s. 340.01 (35), sell the motor vehicle following the procedure under s. 973.075 (4) or authorize a law enforcement agency to retain and use the motor vehicle. If the return of a seized firearm or ammunition is not requested by its authorized rightful owner under sub. (1) and is not returned by the officer under sub. (2), the seized firearm or ammunition shall be shipped to and become property of the state crime laboratories. A person designated by the department of justice may destroy any material for which the laboratory has no use or arrange for the exchange of material with other public agencies. In lieu of destruction, shoulder weapons for which the laboratories have no use shall be turned over to the department of natural resources for sale and distribution of proceeds under s. 29.934 or for use under s. 29.938.

(b) Except as provided in par. (a) or sub. (1m) or (4), a city, village, town or county or other custodian of a seized dangerous weapon or ammunition, if the dangerous weapon or ammunition is not required for evidence or use in further investigation and has not been disposed of pursuant to a court order at the completion of a criminal action or proceeding, shall make reasonable efforts to notify all persons who have or may have an authorized rightful interest in the dangerous weapon or ammunition of the application requirements under sub. (1). If, within 30 days after the notice, an application under sub. (1) is not made and the seized dangerous weapon or ammunition is not returned by the officer under sub. (2), the city, village, town or county or other custodian may retain the dangerous weapon or ammunition and authorize its use by a law enforcement agency, except that a dangerous weapon used in the commission of a homicide or a handgun, as defined in s. 175.35 (1) (b), may not be retained. If a dangerous weapon other than a firearm is not so retained, the city, village, town or county or other custodian shall safely dispose of the dangerous weapon or, if the dangerous weapon is a motor vehicle, as defined in s. 340.01 (35), sell the motor vehicle following the procedure under s. 973.075 (4). If a firearm or ammunition is not so retained, the city, village, town or county or other custodian shall ship it to the state crime laboratories and it is then the property of the laboratories. A person designated by the department of justice may destroy any material for which the laboratories have no use or arrange for the exchange of material with other public agencies. In lieu of destruction, shoulder weapons for which the laboratory has no use shall be turned over to the department of natural resources for sale and distribution of proceeds under s. 29.934 or for use under s. 29.938.

(4) Any property seized, other than property covered under s. 968.205, that poses a danger to life or other property in storage, transportation or use and that is not required for evidence or further investigation shall be safely disposed of upon command of the person in whose custody they are committed. The city, village, town or county shall by ordinance or resolution establish disposal procedures. Procedures may include provisions authorizing an attempt to return to the rightful owner substances which have a commercial value in normal business usage and do not pose an immediate threat to life or property. If enacted, any such provision shall include a presumption that if the substance appears to be or is reported stolen an attempt will be made to return the substance to the rightful owner.

History: 1977 c. 260; 1977 c. 449 s. 497; 1979 c. 221; 1981 c. 160; 1983 a. 189 s. 329 (3); 1983 a. 278; 1985 a. 29 ss. 2447 to 2449, 3200 (35); 1987 a. 203; 1987 a. 332 s. 64; 1993 a. 90, 196; 1996 a. 157; 1997 a. 192, 248; 1999 a. 185; 2001 a. 16; 2005 a. 387, 394; 2009 a. 258; 2011 a. 257 s. 56; 2015 a. 64, 141, 233; 2017 a. 211, 365.

A claimant of seized property has the burden of showing that it is not contraband and is not needed as evidence in a possible retrial. Money may be applied to the payment of counsel fees. Welter v. Sauk County Clerk of Court, 53 Wis. 2d 178, 191 N.W.2d 852 (1971).

Under sub. (1m) (b), "rightful owner" refers to an innocent person who owned a firearm or ammunition at the time an offense was committed. State v. Williams, 148 Wis. 2d 852, 436 N.W.2d 924 (Ct. App. 1989).

Whether explicit photographs seized during the execution of a search warrant were contraband is discussed. In re Return of Property in State v. Benhoff, 185 Wis. 2d 600, 518 N.W.2d 307 (Ct. App. 1994).

In the event that the district attorney elects not to bring a forfeiture action against seized property, a person seeking the return of the property may do so under this section, not s. 961.55 (3). Jones v. State, 226 Wis. 2d 565, 594 N.W.2d 738 (1999), 97–3306.

The definition of contraband in s. 968.13 applies to this section. The burden is on the state to prove by the greater weight of the credible evidence that property is contraband not subject to return under this section. Jones v. State, 226 Wis. 2d 565, 594 N.W.2d 738 (1999), 97–3306.

The term "use" in sub. (1m) (b) requires more than the mere fact that a firearm is with a person. It must be part of the crime in some way. State v. Perez, 2000 WI App 115, 235 Wis. 2d 238, 612 N.W.2d 374, 99–3108.

This section establishes an in rem proceeding to establish true ownership of property. It does not authorize granting a money judgment to the rightful owner when seized property is missing or mistakenly returned to another as a judgment in an in rem proceeding is valid only against the property and not against a defendant or a defendant's assets. City of Milwaukee v. Glass, 2001 WI 61, 243 Wis. 2d 636, 628 N.W.2d 343, 99–2389.

Sub. (1m) (b) prohibits the return of a dangerous weapon to a person convicted of carrying a concealed and dangerous weapon. State v. Perez, 2001 WI 79, 244 Wis. 2d 582, 628 N.W.2d 820, 99–3108.

Sub. (1m) (b) is subject to the excessive fines clause of the 8th amendment. State v. Bergquist, 2002 WI App 39, 250 Wis. 2d 792, 641 N.W.2d 179, 01–0814.

Sub. (1m) (b) forbids returning weapons to one who committed a crime involving their use; it does not require that the defendant be convicted of that crime. Agreeing to a crime being read in at the time of sentencing constitutes an admission of having committed the crime. When charged with possession of a firearm by a person ordered not to possess a firearm under an injunction, a defendant need not have them literally in his hands or on premises that he occupies but must have the right to possess them. Not having contact with the weapons for several years did not establish lack of possession, especially when the defendant was allowing the firearms to appreciate for later sale. State v. Kueny, 2006 WI App 197, 296 Wis. 2d 658, 724 N.W. 2d 399, 04–1291.

When the defendant's conduct resulting in his conviction for disorderly conduct involved the use of a single firearm, the circuit court properly denied the defendant's motion for the return of that gun under sub. (1m) (b). However, with respect to other guns and ammunition that were seized following the incident, those items were not used in the commission of the disorderly conduct offense and sub. (1m) (b) did not bar their return. State v. Leonard, 2015 WI App 57, 364 Wis. 2d 491, 868 N.W.2d 186, 14–2892.

Nothing in this section provides a creditor with the right to obtain a debtor's property in a proceeding under this section. A circuit court does not have the inherent authority to take property unassociated with the crime at issue and allocate that property to itself or others solely because the police happened to have seized the unassociated property at the time of arrest. This section does not provide for equitable relief. State v. Branch, 2015 WI App 65, 364 Wis. 2d 582, 869 N.W.2d 542, 14–2515.

A law enforcement agency may not retain unclaimed contraband money for its own use. In the absence of an asset forfeiture proceeding initiated by the state or a judicial determination that the money constitutes contraband, a local law enforcement agency should dispose of the money as unclaimed property under s. 59.66 (2). OAG 10–09.

Due process does not require states to give detailed instructions to owners who seek the return of lawfully seized property no longer needed in a police interrogation or criminal proceeding. West Covina v. Perkins, 525 U.S. 234, 119 S. Ct. 678, 142 L .Ed. 2d 636 (1999).

This section applies although a criminal action has not been commenced; the property owner has the burden of moving for the return of the property. Supreme Video, Inc. v. Schulz, 808 F. Supp. 1380 (1992).

968.205 Preservation of certain evidence. (1) In this section:

(a) "Custody" means actual custody of a person under a sentence of imprisonment, custody of a probationer, parolee, or person on extended supervision by the department of corrections, actual or constructive custody of a person pursuant to a dispositional order under ch. 938, supervision of a person, whether in institutional care or on conditional release, pursuant to a commitment order under s. 971.17 and supervision of a person under ch. 980, whether in detention before trial or while in institutional care or on supervised release pursuant to a commitment order.

(b) "Discharge date" means the date on which a person is released or discharged from custody that resulted from a criminal action, a delinquency proceeding under ch. 938, or a commitment proceeding under s. 971.17 or ch. 980 or, if the person is serving consecutive sentences of imprisonment, the date on which the person is released or discharged from custody under all of the sentences.

(2) Except as provided in sub. (3), if physical evidence that is in the possession of a law enforcement agency includes any biological material that was collected in connection with a criminal investigation that resulted in a criminal conviction, delinquency adjudication, or commitment under s. 971.17 or 980.06 and the biological material is from a victim of the offense that was the subject of the criminal investigation or may reasonably be used to incriminate or exculpate any person for the offense, the law enforcement agency shall preserve the physical evidence until every person in custody as a result of the conviction, adjudication, or commitment has reached his or her discharge date.

(2m) A law enforcement agency shall retain evidence to which sub. (2) applies in an amount and manner sufficient to develop a deoxyribonucleic acid profile, as defined in s. 939.74 (2d) (a), from the biological material contained in or included on the evidence.

(3) Subject to sub. (5), a law enforcement agency may destroy evidence that includes biological material before the expiration of the time period specified in sub. (2) if all of the following apply:

(a) The law enforcement agency sends a notice of its intent to destroy the evidence to all persons who remain in custody as a result of the criminal conviction, delinquency adjudication, or commitment, and to either the attorney of record for each person in custody or the state public defender.

(b) No person who is notified under par. (a) does either of the following within 90 days after the date on which the person received the notice:

1. Files a motion for testing of the evidence under s. 974.07 (2).

2. Submits a written request for retention of the evidence to the law enforcement agency.

(c) No other provision of federal or state law requires the law enforcement agency to retain the evidence.

(4) A notice provided under sub. (3) (a) shall clearly inform the recipient that the evidence will be destroyed unless, within 90 days after the date on which the person receives the notice, either a motion for testing of the evidence is filed under s. 974.07 (2) or a written request for retention of the evidence is submitted to the law enforcement agency.

(5) If, after providing notice under sub. (3) (a) of its intent to destroy evidence, a law enforcement agency receives a written request for retention of the evidence, the law enforcement agency shall retain the evidence until the discharge date of the person who made the request or on whose behalf the request was made, subject to a court order issued under s. 974.07 (7), (9) (a), or (10) (a) 5., unless the court orders destruction or transfer of the evidence under s. 974.07 (9) (b) or (10) (a) 5.

History: 2001 a. 16; 2005 a. 60.

968.21 Search warrant; secrecy. A search warrant shall be issued with all practicable secrecy, and the complaint, affidavit or testimony upon which it is based shall not be filed with the clerk or made public in any way until the search warrant is executed.

968.22 Effect of technical irregularities. No evidence seized under a search warrant shall be suppressed because of technical irregularities not affecting the substantial rights of the defendant.

The incorrect identification of a building's address in a warrant was a technical error and did not render the resulting search unreasonable when the search made was of the building identified by the informant, which was otherwise correctly identified in the warrant. State v. Nicholson, 174 Wis. 2d 542, 497 N.W.2d 791 (Ct. App. 1993).

Mistakes on the face of a warrant were a technical irregularity under this section and the warrant met the 4th amendment standard of reasonableness when although the warrant identified the car to be searched incorrectly two times, the executing officer attached and incorporated an affidavit that correctly identified the car 3 times, describing the correct color, make, model, and style of the car along with the correct license plate, and the information was based on the executing officer's personal knowledge from prior encounters. State v. Rogers, 2008 WI App 176, 315 Wis. 2d 60, 762 N.W.2d 795, 07–1850.

NOTE: See also the notes to Article I, section 11, of the Wisconsin Constitution.

968.23 Forms. The following forms for use under this chapter are illustrative and not mandatory:

STATE OF WISCONSIN,

.... County.

AFFIDAVIT OR COMPLAINT.

In the .... court of the .... of ....

A. B., being duly sworn, says that on the .... day of ...., A. D., ... (year), in said county, in and upon certain premises in the (city, town or village) of .... in said county, occupied by .... and more particularly described as follows: (describe the premises) there are now located and concealed certain things, to wit: (describe the things to be searched for) (possessed for the purpose of evading or violating the laws of the state of Wisconsin and contrary to section .... of the Wisconsin statutes) (or, which things were stolen from their true owner, in violation of section .... of the Wisconsin statutes) (or, which things were used in the commission of (or may constitute evidence of) an offense to wit: (describe offense) committed in violation of section .... of the Wisconsin statutes).

The facts tending to establish the grounds for issuing a search warrant are as follows: (set forth evidentiary facts showing probable cause for issuance of warrant).

Wherefore, the said A. B. prays that a search warrant be issued to search such premises for the said property, and to bring the same, if found, and the person in whose possession the same is found, before the said court (or, before the .... court for .... County), to be dealt with according to law.

(Signed) A. B.

Subscribed and sworn to before me this .... day of ...., ... (year)

...., Judge of the .... Court.

STATE OF WISCONSIN,

.... County.

SEARCH WARRANT.

In the .... court of the .... of ....

THE STATE OF WISCONSIN, To the sheriff or any constable or any peace officer of said county:

Whereas, A. B. has this day complained (in writing) to the said court upon oath that on the .... day of ...., A. D., ... (year), in said county, in and upon certain premises in the (city, town or village) of .... in said county, occupied by .... and more particularly described as follows: (describe the premises) there are now located and concealed certain things, to wit: (describe the things to be searched for) (possessed for the purpose of evading or violat-

ing the laws of the state of Wisconsin and contrary to section .... of the Wisconsin statutes) (or, which things were stolen from their true owner, in violation of section .... of the Wisconsin statutes) (or which things were used in the commission of (or, may constitute evidence of) an offense, to wit: (describe offense) committed in violation of section .... of the Wisconsin statutes) and prayed that a search warrant be issued to search said premises for said property.

Now, therefore, in the name of the state of Wisconsin you are commanded forthwith to search the said premises for said things, and if the same or any portion thereof are found, to bring the same and the person in whose possession the same are found, and return this warrant within 48 hours before the said court (or, before the .... court for .... County), to be dealt with according to law.

Dated this .... day of ...., ... (year)

...., Judge of the .... Court.

ENDORSEMENT ON WARRANT

Received by me ...., ... (year), at .... o'clock ....M.

...., Sheriff (or peace officer)

RETURN OF OFFICER

State of Wisconsin

.... Court,

.... County.

I hereby certify that by virtue of the within warrant I searched the within named premises and found the following things: (describe things seized) and have the same now in my possession subject to the direction of the court.

Dated this .... day of ...., ... (year)

...., Sheriff (or peace officer)

History: 1997 a. 250; 2015 a. 183.

968.24 Temporary questioning without arrest. After having identified himself or herself as a law enforcement officer, a law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime, and may demand the name and address of the person and an explanation of the person's conduct. Such detention and temporary questioning shall be conducted in the vicinity where the person was stopped.

History: 1993 a. 486.

Suspicious behavior of a driver and passenger justified detention. State v. Goebel, 103 Wis. 2d 203, 307 N.W.2d 915 (1981).

A defendant's flight from a police officer may, using the totality of circumstances test, justify a warrantless investigatory stop. State v. Jackson, 147 Wis. 2d 824, 434 N.W.2d 386 (1989).

Actions suggesting to a reasonable police officer that an individual is attempting to flee is adequately suspicious to support an investigatory stop. State v. Anderson, 155 Wis. 2d 77, 454 N.W.2d 763 (1990).

The *Terry* rule applies once a person becomes a valid suspect even though the encounter was initially consensual; if circumstances show investigation is not complete, the suspect does not have the right to terminate it. State v. Goyer, 157 Wis. 2d 532, 460 N.W.2d 424 (Ct. App. 1990).

When a person's activity may constitute either a civil forfeiture or crime, an investigative stop may be performed. State v. Krier, 165 Wis. 2d 673, 478 N.W.2d 63 (Ct. App. 1991).

A "showup" where police present a single suspect to a witness for identification, often at or near a crime scene shortly after the crime occurs, is suggestive but not impermissibly suggestive *per se.* State v. Garner, 207 Wis. 2d 520, 558 N.W.2d 916 (Ct. App. 1996), 96–0168.

Detaining a person at his home, then transporting him about one mile to the scene of an accident in which he was involved, was an investigative stop and a reasonable part of an ongoing accident investigation. State v. Quartana, 213 Wis. 2d 440, 570 N.W.2d 618 (Ct. App. 1997), 97–0695.

That the defendant is detained in a temporary *Terry* stop does not automatically mean *Miranda* warnings are not required. Whether the warnings are required depends on whether a reasonable person in the defendant's position would have considered himself or herself to be in custody. State v. Gruen, 218 Wis. 2d 581, 582 N.W.2d 728 (Ct. App. 1998), 96–2588.

This section authorizes officers to demand identification only when a person is suspected of committing a crime, but does not govern the lawfulness of requests for identification in other circumstances. State v. Griffith, 2000 WI 72, 236 Wis. 2d 48, 613 N.W.2d 72, 98–0931.

A police officer performing a *Terry* stop and requesting identification could perform a limited search for identifying papers when: 1) the information received by the officer was not confirmed by police records; 2) the intrusion on the suspect was minimal; 3) the officer observed that the suspect's pockets were bulging; and 4) the officer had experience with persons who claimed to have no identification when in fact they did. State v. Black, 2000 WI App 175, 238 Wis. 2d 203, 617 N.W.2d 210, 99–1686.

Under *Florida v. J.L.,* an anonymous tip giving rise to reasonable suspicion must bear indicia of reliability. That the tipster's anonymity is placed at risk indicates that the informant is genuinely concerned and not a fallacious prankster. Corroborated aspects of the tip also lend credibility; the corroborated actions of the suspect need be inherently criminal in and of themselves. State v. Williams, 2001 WI 21, 241 Wis. 2d 631, 623 N.W.2d 106, 96–1821.

An anonymous tip regarding erratic driving from another driver calling from a cell phone contained sufficient indicia of reliability to justify an investigative stop when: 1) the informant was exposed to possible identification, and therefore possible arrest if the tip proved false; 2) the tip reported contemporaneous and verifiable observations regarding the driving, location, and vehicle; and 3) the officer verified many of the details in the tip. That the tip reasonably suggested intoxicated driving created an exigency strongly in favor of immediate police investigation without the necessity that the officer personally observe erratic driving. State v. Rutzinski, 2001 WI 22, 241 Wis. 2d 729, 623 N.W.2d 516, 98–3541.

When a caller identifies himself or herself by name, placing his or her anonymity at risk, and the totality of the circumstances establishes a reasonable suspicion that criminal activity may be afoot, the police may execute a lawful investigative stop. Whether the caller gave correct identifying information, or whether the police ultimately could have verified the information, the caller, by providing the information, risked that his or her identity would be discovered and cannot be considered anonymous. State v. Sisk, 2001 WI App 182, 247 Wis. 2d 443, 634 N.W.2d 877, 00–2614.

It was reasonable to conduct a *Terry* search of a person who knocked on the door of a house while it was being searched for drugs pursuant to a warrant. State v. Kolp, 2002 WI App 17, 250 Wis. 2d 296, 640 N.W.2d 551, 01–0549.

Terry and this section apply to confrontations between the police and citizens in public places only. For private residences and hotels, in the absence of a warrant, the police must have probable cause and exigent circumstances or consent to justify an entry. Reasonable suspicion is not a prerequisite to an officer's seeking consent to enter a private dwelling. State v. Stout, 2002 WI App 41, 250 Wis. 2d 768, 641 N.W.2d 474, 01–0904.

To perform a protective search for weapons, an officer must have reasonable suspicion that a person may be armed and dangerous. A court may consider an officer's belief that his, her, or another's safety is threatened in finding reasonable suspicion, but such a belief is not a prerequisite to a valid search. There is no per se rule justifying a search any time an individual places his or her hands in his or her pockets contrary to police orders. The defendant's hand movements must be considered under the totality of the circumstances of the case. State v. Kyles, 2004 WI 15, 269 Wis. 2d 1, 675 N.W.2d 449, 02–1540.

Weaving within a single traffic lane does not alone give rise to the reasonable suspicion necessary to conduct an investigative stop of a vehicle. The reasonableness of a stop must be determined based on the totality of the facts and circumstances. State v. Post, 2007 WI 60, 301 Wis. 2d 1, 733 N.W.2d 634, 05–2778.

The potential availability of an innocent explanation does not prohibit an investigative stop. If any reasonable inference of wrongful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, the officers have the right to temporarily detain the individual for the purpose of inquiry. State v. Limon, 2008 WI App 77, 312 Wis. 2d 174, 751 N.W.2d 877, 07–1578.

When a person who is temporarily detained for investigation pursuant to a Terry stop is then moved to another location, courts conduct a two–part inquiry: First, was the person moved within the vicinity of the stop? Second, was the purpose in moving the person within the vicinity reasonable? Ten miles is too distant a transportation to be within the vicinity so long as the temporary detention is supported by no more than a reasonable suspicion. In order for the transporting of a defendant to a hospital that was not in the vicinity of the stop to have been lawful, it must have been supported by probable cause to arrest or by a reasonable exercise of the community caretaker function. State v. Blatterman, 2015 WI 46, 362 Wis. 2d 138, 864 N.W.2d 26, 13–2107.

Although this section and s. 345.22 pertain only to crimes and violations of traffic regulations, neither statute forecloses traffic stops to enforce non–traffic civil forfeiture offenses. State v. Iverson, 2015 WI 101, 365 Wis. 2d 302, 871 N.W.2d 661, 14–0515.

The statement in *Popke,* 2009 WI 37, that "a police officer may . . . conduct a traffic stop when, under the totality of the circumstances, he or she has grounds to reasonably suspect that a crime or traffic violation has been or will be committed," did not purport to circumscribe the universe of possible scenarios within which traffic stops permissibly may occur, or to make such limits contingent on whether the legislature has titled a particular law a "traffic regulation." A reasonable suspicion that a violation of the littering statute, s. 287.81, a non–traffic civil forfeiture offense, had occurred justified a brief and limited traffic stop. The more onerous standard of probable cause would also therefore justify a traffic stop. State v. Iverson, 2015 WI 101, 365 Wis. 2d 302, 871 N.W.2d 661, 14–0515.

The principles of *Terry* permit a state to require a suspect to disclose his or her name in the course of a *Terry* stop and allow imposing criminal penalties for failing to do so. Hiibel v. Sixth Judicial District Court of Nevada, Humboldt County, 542 U.S. 177, 124 S. Ct. 2451, 159 L. Ed. 2d 292 (2004).

When the defendant's refusal to disclose his name was not based on any articulated real and appreciable fear that his name would be used to incriminate him, or that it would furnish a link in the chain of evidence needed to prosecute him, application of a criminal statute requiring disclosure of the person's name when the police officer reasonably suspected the person had committed a crime did not violate the protection against self–incrimination. Hiibel v. Sixth Judicial District Court of Nevada, Humboldt County, 542 U.S. 177, 124 S. Ct. 2451, 159 L. Ed. 2d 292 (2004).

Cell Phone Tips of Crime and 'Reasonable Suspicion.' Andregg. Wis. Law. June 2005.

NOTE: See also the notes to Article I, section 11, of the Wisconsin Constitution.

968.25 Search during temporary questioning. When a law enforcement officer has stopped a person for temporary questioning pursuant to s. 968.24 and reasonably suspects that he or she or another is in danger of physical injury, the law enforcement officer may search such person for weapons or any instrument or article or substance readily capable of causing physical injury and of a sort not ordinarily carried in public places by law abiding persons. If the law enforcement officer finds such a weapon or instrument, or any other property possession of which the law enforcement officer reasonably believes may constitute the commission of a crime, or which may constitute a threat to his or her safety, the law enforcement officer may take it and keep it until the completion of the questioning, at which time the law enforcement officer shall either return it, if lawfully possessed, or arrest the person so questioned.

History: 1993 a. 486.

An investigatory stop–and–frisk for the sole purpose of discovering a suspect's identity was lawful under the facts of the case. State v. Flynn, 92 Wis. 2d 427, 285 N.W.2d 710 (1979).

A stop–and–frisk was not an unreasonable search and seizure. State v. Williamson, 113 Wis. 2d 389, 335 N.W.2d 814 (1983).

This section permits an officer to search the passenger compartment of a vehicle for weapons if an individual who recently occupied the vehicle is stopped under s. 968.24 and the officer "reasonably suspects that he or another is in danger of physical injury." State v. Moretto, 144 Wis. 2d 171, 423 N.W.2d 841 (1988).

Although *Terry* provides only for an officer to conduct a carefully limited search of the outer clothing in an attempt to discover weapons that might be used to assault him or her, under the circumstances of this case, the search was properly broadened to encompass the opening of the defendant's purse, which was essentially an extension of her person where the purse was accessible by her. State v. Limon, 2008 WI App 77, 312 Wis. 2d 174, 751 N.W.2d 877, 07–1578.

Terry tempered or torpedoed? The new law of stop and frisk. Lewis. WBB Aug. 1988.

NOTE: See also the notes to Article I, section 11, of the Wisconsin Constitution.

968.255 Strip searches. (1) In this section:

(a) "Detainee" means any of the following:

1. A person arrested for any felony.

2. A person arrested for any misdemeanor under s. 167.30 (1), 940.19, 941.20 (1), 941.23, 941.231, 941.237, 948.60, or 948.61.

3. A person taken into custody under s. 938.19 and there are reasonable grounds to believe the juvenile has committed an act which if committed by an adult would be covered under subd. 1. or 2.

4. A person arrested for any misdemeanor not specified in subd. 2., any other violation of state law punishable by forfeiture or any local ordinance if there is probable cause to believe the person is concealing a weapon or a thing which may constitute evidence of the offense for which he or she is detained.

5. A person arrested or otherwise lawfully detained or taken into custody, if the person will be incarcerated, imprisoned, or otherwise detained in a jail or prison with one or more other persons. Subject to subd. 3., for the purpose of this subdivision, "detainee" does not include a juvenile who is taken into custody under s. 938.19 and held in custody under s. 938.209.

(ag) "Jail" includes municipal prisons and rehabilitation facilities established under s. 59.53 (8) by whatever name they are known, but does not include lockup facilities.

(ar) "Lockup facilities" means those facilities of a temporary place of detention at a police station that are used exclusively to hold persons under arrest until they can be brought before a court and that are not used to hold persons pending trial who have appeared in court or have been committed to imprisonment for nonpayment of fines or forfeitures.

(b) "Strip search" means a search in which a detainee's genitals, pubic area, buttock or anus, or a female detainee's breast, is uncovered and either is exposed to view or is touched by a person conducting the search, except that if the detainee is a person defined in par. (a) 5., "strip search" means a search in which a detainee's genitals, pubic area, buttock or anus, or a female detainee's breast, is uncovered and exposed to view but is not touched by a person conducting the search unless the touching is necessary to gain the detainee's cooperation with the search or unless the touching is necessary to assist a disabled detainee's cooperation with the search.

(2) No person may conduct a strip search unless all of the following apply:

(ag) The person subject to the search is a detainee.

(am) The person conducting the search is of the same sex as the detainee, unless the search is a body cavity search conducted under sub. (3).

(b) The detainee is not exposed to the view of any person not conducting the search.

(c) The search is not reproduced through a visual or sound recording.

(d) A person conducting the search has obtained the prior written permission of the chief, sheriff or law enforcement administrator of the jurisdiction where the person is detained, or his or her designee, unless there is probable cause to believe that the detainee is concealing a weapon.

(e) A person conducting the search prepares a report identifying the person detained, all persons conducting the search, the time, date and place of the search and the written authorization required by par. (d), and provides a copy of the report to the detainee.

(3) No person other than a physician, physician assistant or registered nurse licensed to practice in this state may conduct a body cavity search. A physician, physician assistant, or registered nurse acting under this section, the employer of any such person, and any health care facility where the search is conducted have immunity from civil or criminal liability under s. 895.535.

(4) A person who intentionally violates this section may be fined not more than $1,000 or imprisoned not more than 90 days or both.

(5) This section does not limit the rights of any person to civil damages or injunctive relief.

(6) Each law enforcement agency, as defined in s. 165.83 (1) (b), and each facility where a strip search may be conducted pursuant to this section, shall establish written policies and procedures concerning strip searches which at least meet the minimum requirements of this section and shall provide annual training regarding the policies and procedures to any employee or agent of the agency or facility who may conduct a strip search.

(7) This section does not apply to a search of any person who:

(a) Is serving a sentence, pursuant to a conviction, in a jail, state prison or house of correction.

(b) Is placed in or transferred to a juvenile correctional facility, as defined in s. 938.02 (10p), or a secured residential care center for children and youth, as defined in s. 938.02 (15g).

(c) Is committed, transferred or admitted under ch. 51, 971 or 975.

(d) Is confined as a condition of probation under s. 973.09 (4).

History: 1979 c. 240; 1981 c. 297; 1987 a. 332; 1991 a. 17; 1993 a. 95, 105; 1995 a. 77, 154; 1997 a. 35; 1999 a. 9; 2001 a. 109; 2005 a. 344; 2011 a. 35; 2013 a. 317; 2015 a. 149; 2015 a. 195 s. 83; 2015 a. 206, 238.

A visual body cavity search is more intrusive than a strip search. It is not objectively reasonable for police to conclude that consent to a strip search includes consent to scrutiny of body cavities. State v. Wallace, 2002 WI App 61, 251 Wis. 2d 625, 642 N.W.2d 549, 00–3524.

This section is a regulatory statute aimed at controlling law enforcement officers' conduct via criminal penalties. It does not mention probable cause and authorizes no motions to quash or limit the search. When there was no violation of any constitutional right but merely of the statute itself, the violation of the statute provided no basis for a suppression motion. State v. Minett, 2014 WI App 40, 353 Wis. 2d 484, 846 N.W.2d 831, 13–0634.

Intrusive searches of the mouth, nose, or ears are not covered by sub. (3). However, searches of those body orifices should be conducted by medical personnel to comply with the 4th and 5th amendments. 71 Atty. Gen. 12.

968.256 Search of physically disabled person. (1) In this section, "physically disabled person" means a person who

requires an assistive device for mobility, including, but not limited to, a wheelchair, brace, crutch or artificial limb.

(2) A search of a physically disabled person shall be conducted in a careful manner. If a search of a physically disabled person requires the removal of an assistive device or involves a person lacking sensation in some portion of his or her body, the search shall be conducted with extreme care by a person who has had training in handling physically disabled persons.

History: 1979 c. 240.

968.26 John Doe proceeding. (1b) In this section:

(a) "Crime" means any of the following:

1. Any Class A, B, C, or D felony under chs. 940 to 948 or 961.

2. A violation of any of the following if it is a Class E, F, G, H, or I felony:

a. Section 940.04, 940.11, 940.19 (2), (4), (5), or (6), 940.195 (2), (4), (5), or (6), 940.20, 940.201, 940.203, 940.205, 940.207, 940.208, 940.22 (2), 940.225 (3), 940.29, 940.302 (2) (c), 940.32, 941.32, 941.38 (2), 942.09 (2), 943.10, 943.205, 943.32 (1), 946.43, 946.44, 946.47, 946.48, 948.02 (3), 948.03 (2) (b) or (c), (3), or (4), 948.04, 948.055, 948.095, 948.10 (1) (a), 948.11, 948.13 (2) (a), 948.14, 948.20, 948.23 (1), (2), or (3) (c) 2. or 3., or 948.30 (1).

b. Section 940.285 (2) if s. 940.285 (2) (b) 1m., 1r., or 2. applies; s. 940.295 (3) (a) if s. 940.295 (3) (b) 1m., 1r., 2., or 3. applies; s. 948.05 (1), (1m), or (2) if s. 948.05 (2p) (b) applies; s. 948.12 (1m) or (2m) if s. 948.12 (3) (b) applies; or s. 948.21 if s. 948.21 (1) (b) or (c) applies.

3. A violation of s. 940.03.

4. A violation of s. 946.83 or 946.85, if the racketeering activity is listed in s. 946.82 (4) and in subd. 1., 2., or 3.

4m. A solicitation, conspiracy, or attempt to commit any violation under subd. 1., 2., 3., or 4.

5. Any conduct that is prohibited by state law and punishable by fine or imprisonment or both if the individual who allegedly participated in the conduct was a law enforcement officer; a correctional officer; or a state probation, parole, or extended supervision officer and the individual was engaged in his or her official duties at the time of the alleged conduct.

(b) "Judge" does not include a permanent reserve judge, as defined in s. 753.075 (1) (a), or a temporary reserve judge, as defined in s. 753.075 (1) (b).

(1m) If a district attorney requests a judge to convene a proceeding to determine whether a crime has been committed in the court's jurisdiction, the judge shall convene a proceeding described under sub. (3) and shall subpoena and examine any witnesses the district attorney identifies.

(2) (a) Except in par. (am), in this subsection, "district attorney" includes a prosecutor to whom the judge has referred the complaint under par. (am).

(am) If a person who is not a district attorney complains to a judge that he or she has reason to believe that a crime has been committed within the judge's jurisdiction, the judge shall refer the complaint to the district attorney or, if the complaint may relate to the conduct of the district attorney, to another prosecutor under s. 978.045.

(b) If a district attorney receives a referral under par. (am), the district attorney shall, within 90 days of receiving the referral, issue charges or refuse to issue charges. If the district attorney refuses to issue charges, the district attorney shall forward to the judge in whose jurisdiction the crime has allegedly been committed all law enforcement investigative reports on the matter that are in the custody of the district attorney, his or her records and case files on the matter, and a written explanation why he or she refused to issue charges. The judge may require a law enforcement agency to provide to him or her any investigative reports that the law enforcement agency has on the matter. The judge shall convene a proceeding as described under sub. (3) if he or she determines that a proceeding is necessary to determine if a crime has been committed. When determining if a proceeding is necessary, the judge may consider the law enforcement investigative reports, the records and case files of the district attorney, and any other written records that the judge finds relevant.

(c) In a proceeding convened under par. (b), the judge shall subpoena and examine under oath the complainant and any witnesses that the judge determines to be necessary and appropriate to ascertain whether a crime has been committed and by whom committed. The judge shall consider the credibility of testimony in support of and opposed to the person's complaint.

(d) In a proceeding convened under par. (b), the judge may issue a criminal complaint if the judge finds sufficient credible evidence to warrant a prosecution of the complaint. The judge shall consider, in addition to any testimony under par. (c), the law enforcement investigative reports, the records and case files of the district attorney, and any other written reports that the judge finds relevant.

(3) (a) Except as provided in sub. (5), the extent to which the judge may proceed in an examination under sub. (1m) or (2) is within the judge's discretion.

(b) The examination may be adjourned.

(c) Any witness examined under this section may have counsel present at the examination but the counsel shall not be allowed to examine his or her client, cross−examine other witnesses, or argue before the judge.

(d) A court, on the motion of a district attorney, may compel a person to testify or produce evidence under s. 972.08 (1). The person is immune from prosecution as provided in s. 972.08 (1), subject to the restrictions under s. 972.085.

(4) (a) The judge may enter a secrecy order upon a showing of good cause by the district attorney. A secrecy order under this paragraph may apply to only the judge, a district attorney or other prosecuting attorney who participates in a proceeding under this section, law enforcement personnel admitted to a proceeding under this section, an interpreter who participates in a proceeding under this section, or a reporter who makes or transcribes a record of a proceeding under this section. No secrecy order under this section may apply to any other person.

(b) If a judge enters a secrecy order under par. (a), the judge shall terminate that secrecy order if any person applies to the judge for the termination and establishes that the good cause shown under par. (a) no longer exists. If a judge terminates a secrecy order entered under par. (a), the identity of the subject of the proceeding under this section may not be disclosed without the subject's consent, except as provided in par. (c).

(c) If a criminal complaint is filed following a proceeding in which the judge entered a secrecy order, the order is terminated at the initial appearance and s. 971.23 governs disclosure of information from a proceeding under this section.

(d) Any person who violates a secrecy order entered under par. (a) is subject to a fine not to exceed $10,000 or imprisonment not to exceed 9 months, or both.

(5) (a) 1. Except as provided in subd. 2., no proceeding may last longer than the following:

a. If the proceeding begins under sub. (1m), 6 months beginning on the day the district attorney requests the judge to convene the proceeding.

b. If the proceeding begins under sub. (2), 6 months beginning on the day the district attorney forwards under sub. (2) (b) to a judge all reports, records and case files, and an explanation of his or her refusal.

2. The period under subd. 1. may be extended only if a majority of judicial administrative district chief judges find good cause for the extension and identification of the vote of each judge is available to the public. The period under subd. 1. may be extended an unlimited number of times, but each extension may be for no more than 6 months and, for each extension, a majority of judicial administrative district chief judges must find good cause and the

identification of the vote of each judge must be available to the public.

(b) A proceeding may not investigate a crime that was not part of the original request under sub. (1m) or complaint under sub. (2) (a), whichever is appropriate, unless a majority of judicial administrative district chief judges find good cause to add specified crimes and the identification of the vote of each judge is available to the public. An unlimited number of specified crimes may be added but, for each addition of a specified crime, a majority of judicial administrative district chief judges must find good cause and the identification of the vote of each judge must be available to the public.

(c) A judge may issue a search warrant relating to a proceeding under this section only if the judge is not presiding over that proceeding.

(6) Records reflecting the costs of an investigation and proceedings under sub. (3) are subject to the provisions of subch. II of ch. 19. If a request to inspect or copy a record is received, but no record exists, then, notwithstanding s. 19.35 (1) (L), the recipient of the request shall provide a summary amount of the costs.

(7) If property was seized during a proceeding under this section, the judge shall, at the close of the proceeding, order notice as he or she determines to be adequate to all persons who have or may have an interest in the property.

History: 1989 a. 122; 1991 a. 88, 223, 315; 2009 a. 24; 2015 a. 64.

A defendant must be allowed to use testimony of witnesses at a secret John Doe proceeding to impeach the same witnesses at the trial, even if the prosecution does not use the John Doe testimony. Myers v. State, 60 Wis. 2d 248, 208 N.W.2d 311 (1973).

An immunity hearing must be in open court. State ex rel. Newspapers, Inc. v. Circuit Court, 65 Wis. 2d 66, 221 N.W.2d 894 (1974).

A person charged as a result of a John Doe proceeding has no recognized interest in the maintenance of secrecy in that proceeding. John Doe proceedings are discussed. State v. O'Connor, 77 Wis. 2d 261, 252 N.W.2d 671 (1971).

No restriction under the 4th or 5th amendment precludes the enforcement of an order for handwriting exemplars directed by a presiding judge in a John Doe proceeding. State v. Doe, 78 Wis. 2d 161, 254 N.W.2d 210 (1977).

Due process does not require that a John Doe witness be advised of the nature of the proceeding or that the witness is a "target" of the investigation. Ryan v. State, 79 Wis. 2d 83, 255 N.W.2d 910 (1977).

This section does not violate the constitutional separation of powers doctrine. It does not invest in the John Doe judge an investigatory power that properly can be exercised only by members of the executive branch of government. The judge considers the testimony presented, utilizes his or her training in constitutional and criminal law and in courtroom procedure in determining the need to subpoena witnesses requested by the district attorney, in presiding at the examination of witnesses, and in determining probable cause, and ensures procedural fairness. The John Doe judge must conduct himself or herself as a neutral and detached magistrate in determining probable cause, which is the basic function of the proceeding. State v. Washington, 83 Wis. 2d 808, 266 N.W.2d 597 (1978).

A balance between the public's right to know and the need for secrecy in John Doe proceedings is discussed. In re Wis. Family Counseling Services v. State, 95 Wis. 2d 670, 291 N.W.2d 631 (Ct. App. 1980).

A John Doe judge may not issue a material witness warrant under s. 969.01 (3). State v. Brady, 118 Wis. 2d 154, 345 N.W.2d 533 (Ct. App. 1984).

When a John Doe proceeding is not a joint executive and judicial undertaking, the procedure does not violate the separation of powers doctrine and is constitutional. State v. Unnamed Defendant, 150 Wis. 2d 352, 441 N.W.2d 696 (1989).

A John Doe judge may issue and seal a search warrant, and a district attorney may independently issue a criminal complaint, regardless of the existence of the John Doe. A John Doe cannot be used to obtain evidence against a defendant who has already been charged. State v. Cummings, 199 Wis. 2d 721, 546 N.W.2d 406 (1996), 93–2445.

To be entitled to a hearing, a John Doe complainant must do more than merely allege in conclusory terms that a crime has been committed. The complainant's petition must allege facts that raise a reasonable belief that a crime has been committed. State ex rel. Reimann v. Circuit Court for Dane County, 214 Wis. 2d 605, 571 N.W.2d 385 (1997), 96–2361.

A nonlawyer's questioning of a witness on the state's behalf at a John Doe hearing even if constituting the unauthorized practice of law did not require exclusion of the testimony at trial. State v. Noble, 2002 WI 64, 253 Wis. 2d 206, 646 N.W.2d 38, 99–3271.

Article VII, Section 5 (3), read together with ss. 808.03 (2) and 809.51 (1) is sufficiently broad in scope to permit the court of appeals to exercise supervisory jurisdiction over the actions of a judge presiding over a John Doe proceeding. When rendering judicial decisions in the context of a John Doe proceeding, the judge must create a record for possible review. On review of a petition for a writ stemming from a secret John Doe proceeding, the court of appeals may seal parts of a record in order to comply with existing secrecy orders issued by the John Doe judge. Unnamed Persons Numbers 1, 2, and 3 v. State, 2003 WI 30, 260 Wis. 2d 653, 660 N.W.2d 260, 01–3220.

A John Doe judge must have the authority to disqualify counsel, and may permit argument by counsel when necessary to ensure procedural fairness. Unnamed Persons Numbers 1, 2, and 3 v. State, 2003 WI 30, 260 Wis. 2d 653, 660 N.W.2d 260, 01–3220.

The John Doe judge erred as a matter of law by requiring an oath of secrecy from a witness's counsel when a secrecy order was in effect. Individual Subpoenaed to Appear at Waukesha County John Doe Case No. 2003 JD 001 v. Davis, 2005 WI 70, 281 Wis. 2d 431, 697 N.W.2d 803, 04–1804.

The circuit judge erred when in reviewing a John Doe petition he reviewed police reports containing information casting doubt on assertions in the petition and explained that his review of the petition and the police reports led him to conclude that the petitioner failed to allege facts sufficient to raise a reasonable belief that a crime has been committed. This section does not permit this sort of analysis at the threshold stage of determining whether a petition contains reason to believe that a crime has been committed. Williams v. Fiedler, 2005 WI App 91, 282 Wis. 2d 486, 698 N.W.2d 294, 04–0175.

A John Doe judge has exclusive authority to subpoena witnesses in a John Doe proceeding based upon the language of this section. Hipp v. Circuit Court for Milwaukee County, 2008 WI 67, 310 Wis. 2d 342, 750 N.W.2d 837, 07–0230.

The judge in a John Doe hearing is not required to examine all the witnesses a complainant produces and to issue subpoenas to all the witnesses a complainant wishes to produce. This section extends judicial discretion in a John Doe hearing not only to the scope of a witness's examination, but also to whether a witness need testify at all. Robins v. Madden, 2009 WI 46, 317 Wis. 2d 364, 766 N.W.2d 542, 07–1526.

Under sub. (3), as revised by 2009 Wis. Act 24, a John Doe judge must potentially undertake four inquiries: 1) decide whether to refer the John Doe complaint to the district attorney in the first instance; 2) decide whether it is necessary to conduct any additional proceedings if the district attorney chooses not to issue charges; 3) determine what, if any, witnesses to subpoena and examine if additional proceedings are deemed necessary; and 4) decide whether to issue a criminal complaint if the judge finds that the additional proceedings have produced sufficient credible evidence to warrant prosecution. Naseer v. Miller, 2010 WI App 142, 329 Wis. 2d 724, 793 N.W.2d 209, 09–2578.

Under the statute, as amended by 2009 Wis. Act 24, a judge has a mandatory duty to refer a John Doe complaint to the district attorney only if the four corners of the complaint provide a sufficient factual basis to establish an objective reason to believe that a crime has been committed in the judge's jurisdiction, the same as under the prior statute. Naseer v. Miller, 2010 WI App 142, 329 Wis. 2d 724, 793 N.W.2d 209, 09–2578.

This section grants John Doe judges broad authority to conduct an investigation into alleged crimes. The judge is also given those powers necessary to carry out this duty. The judge is the governor of the proceedings, and is responsible for maintaining the good order, dignity, and insofar as it is compatible with the administration of justice, efficiency of those proceedings. State of Wisconsin ex rel. Schmitz v. Peterson, 2015 WI 85, 363 Wis. 2d 1, 866 N.W.2d 165, 14–0421.

Applicable law allows electronic transmission of certain confidential case information among clerks of circuit court, county sheriff's offices, and the Department of Justice through electronic interfaces involving the Department of Administration's Office of Justice Assistance, specifically including electronic data messages about an arrest warrant if the warrant was issued in John Doe proceedings that have been sealed under this section. OAG 2–10.

Limits of judge's authority in presiding over or conducting John Doe proceedings are discussed. 76 Atty. Gen. 217.

968.265 Lie detector tests; sexual assault victims.

(1) In this section, "lie detector" has the meaning given in s. 111.37 (1) (b).

(2) If a person reports to a law enforcement officer that he or she was the victim of an offense under s. 940.22 (2), 940.225, 948.02 (1) or (2), or 948.085, no law enforcement officer may in connection with the report order, request, or suggest that the person submit to a test using a lie detector, or provide the person information regarding tests using lie detectors unless the person requests information regarding tests using lie detectors.

(3) If a person reports to a district attorney that he or she was the victim of an offense under s. 940.22 (2), 940.225, 948.02 (1) or (2), or 948.085, no district attorney may do any of the following in connection with the report:

(a) Order that the person submit to a test using a lie detector.

(b) Suggest or request that the person submit to a test using a lie detector without first providing the person with notice and an explanation of his or her right not to submit to such a test.

History: 2003 a. 224; 2005 a. 277.

968.27 Definitions.

In ss. 968.28 to 968.375:

(1) "Aggrieved person" means a person who was a party to any intercepted wire, electronic or oral communication or a person against whom the interception was directed.

(2) "Aural transfer" means a transfer containing the human voice at any point from the point of origin to the point of reception.

(3) "Contents," when used with respect to any wire, electronic, or oral communication, includes any information concerning the substance, purport, or meaning of that communication.

(4) "Electronic communication" means any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature wholly or partially transmitted by a wire, radio, electromagnetic,

photoelectronic or photooptical system. "Electronic communication" does not include any of the following:

(a) The radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit.

(b) Any wire or oral communication.

(c) Any communication made through a tone–only paging device.

(d) Any communication from a tracking device.

(5) "Electronic communication service" means any service that provides its users with the ability to send or receive wire or electronic communications.

(6) "Electronic communications system" means any wire, radio, electromagnetic, photooptical or photoelectronic facilities for the transmission of electronic communications, and any computer facilities or related electronic equipment for the electronic storage of those communications.

(7) "Electronic, mechanical or other device" means any device or apparatus which can be used to intercept a wire, electronic or oral communication other than:

(a) Any telephone or telegraph instrument, equipment or facilities, or any component thereof, which is:

1. Furnished to the subscriber or user by a provider of electronic or wire communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business or furnished by the subscriber or user for connection to the facilities of the service and used in the ordinary course of its business; or

2. Being used by a provider of electronic or wire communication service in the ordinary course of its business, or by a law enforcement officer in the ordinary course of his or her duties.

(b) A hearing aid or similar device being used to correct subnormal hearing to not better than normal.

(8) "Electronic storage" means any of the following:

(a) Any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof.

(b) Any storage of a wire or electronic communication by an electronic communication service for purposes of backup protection of the communication.

(9) "Intercept" means the aural or other acquisition of the contents of any wire, electronic or oral communication through the use of any electronic, mechanical or other device.

(10) "Investigative or law enforcement officer" means any officer of this state or political subdivision thereof, who is empowered by the laws of this state to conduct investigations of or to make arrests for violations of the laws that he or she is employed to enforce, and any attorney authorized by law to prosecute or participate in the prosecution of those offenses.

(11) "Judge" means the judge sitting at the time an application is made under s. 968.30 or his or her successor.

(12) "Oral communication" means any oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception under circumstances justifying the expectation. "Oral communication" does not include any electronic communication.

(13) "Pen register" means a device that records or decodes electronic or other impulses that identify the numbers dialed or otherwise transmitted on the telephone line to which the device is attached. "Pen register" does not include any device used by a provider or customer of a wire or electronic communication service for billing, or recording as an incident to billing, for communications services provided by the provider or any device used by a provider or customer of a wire communication service for cost accounting or other like purposes in the ordinary course of its business.

(14) "Readily accessible to the general public" means, with respect to a radio communication, that the communication is not any of the following:

(a) Scrambled or encrypted.

(b) Transmitted using modulation techniques whose essential parameters have been withheld from the public with the intention of preserving the privacy of the communication.

(c) Carried on a subcarrier or other signal subsidiary to a radio transmission.

(d) Transmitted over a communication system provided by a common carrier, including a commercial mobile radio service provider, as defined in s. 196.01 (2g), unless the communication is a tone–only paging system communication.

(e) Transmitted on frequencies allocated under 47 CFR part 25, subpart D, E or F of part 74, or part 94, unless in the case of a communication transmitted on a frequency allocated under 47 CFR part 74 that is not exclusively allocated to broadcast auxiliary services, the communication is a 2–way voice communication by radio.

(14g) "Remote computing service" means computer storage or processing that is provided to the public by means of an electronic communications system.

(15) "Trap and trace device" means a device that captures the incoming electronic or other impulses that identify the originating number of an instrument or device from which a wire or electronic communication was transmitted.

(16) "User" means any person who or entity that:

(a) Uses an electronic communication service; and

(b) Is duly authorized by the provider of the service to engage in that use.

(17) "Wire communication" means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception, including the use of the connection in any switching station, furnished or operated by any person in providing or operating the facilities for the transmission of intrastate, interstate or foreign communications. "Wire communication" includes the electronic storage of any such aural transfer.

History: 1971 c. 40 s. 93; 1987 a. 399; 1991 a. 39; 1997 a. 218; 2009 a. 349; 2013 a. 375; 2015 a. 196.

The constitutionality of ss. 968.27 to 968.30 is upheld. State ex rel. Hussong v. Froelich, 62 Wis. 2d 577, 215 N.W.2d 390.

An informant who is party to a tape recorded telephone conversation also acquired the conversation in his mind, regardless of the use of tape recorder; that acquisition is not an "intercept." The informant may testify to the conversation without use of the recording. State v. Maloney, 161 Wis. 2d 127, 467 N.W.2d 215 (Ct. App. 1991).

An "oral communication" under sub. (12) is a statement uttered under circumstances in which the speaker has a reasonable expectation of privacy. An individual has a reasonable expectation of privacy when he or she has both an actual subjective expectation of privacy in the speech, and a subjective expectation that is one that society is willing to recognize as reasonable, which requires examination of the totality of the circumstances. State v. Duchow, 2008 WI 57, 310 Wis. 2d 1, 749 N.W.2d 913, 05–2175.

Courts have identified a non–exclusive list of factors to discern whether an individual's expectation of privacy in his or her oral statements is objectively reasonable, including: 1) the volume of the statements; 2) the proximity of other individuals to the speaker; 3) the potential for the communications to be reported; 4) the actions taken by the speaker to ensure his or her privacy; 5) the need to employ technological enhancements for one to hear the speaker's statements; and 6) the place or location where the statements are made. State v. Duchow, 2008 WI 57, 310 Wis. 2d 1, 749 N.W.2d 913, 05–2175.

That a global positioning system (GPS) tracking device did not emit any signal but rather received signals and stored data that could be retrieved later did not take it outside the meaning of a tracking device under sub. (4) (d). It is not rational to limit the admission of tracking information based on whether it is obtained in real time by a signal or at a later time by direct access to the device. State v. Sveum, 2009 WI App 81, 319 Wis. 2d 498, 769 N.W.2d 53, 08–0658.
Affirmed on other grounds. 2010 WI 92, 328 Wis. 2d 369; 787 N.W.2d 317, 08–0658.

968.28 Application for court order to intercept communications. The attorney general together with the district attorney of any county may approve a request of an investigative or law enforcement officer to apply to the chief judge of the judicial administrative district for the county where the interception is to take place for an order authorizing or approving the interception of wire, electronic or oral communications. The chief judge may under s. 968.30 grant an order authorizing or approving the interception of wire, electronic or oral communications by investigative or law enforcement officers having responsibility

for the investigation of the offense for which the application is made. The authorization shall be permitted only if the interception may provide or has provided evidence of the commission of the offense of homicide, felony murder, kidnapping, commercial gambling, bribery, extortion, dealing in controlled substances or controlled substance analogs, a computer crime that is a felony under s. 943.70, sexual exploitation of a child under s. 948.05, trafficking of a child under s. 948.051, child enticement under s. 948.07, use of a computer to facilitate a child sex crime under s. 948.075, or soliciting a child for prostitution under s. 948.08, or any conspiracy to commit any of the foregoing offenses.

History: 1971 c. 219; 1977 c. 449; 1983 a. 438; 1987 a. 399; 1995 a. 448; 2011 a. 271.

The authorization of a wiretap for offenses not enumerated in this section did not warrant suppression of the evidence obtained from the wiretap when the order included both enumerated and non–enumerated offenses and contained sufficient probable cause for the enumerated offenses, the evidence obtained by wiretap was for enumerated offenses, and charges were brought only for enumerated offenses. State v. House, 2007 WI 79, 302 Wis. 2d 1, 734 N.W.2d 140, 05–2202.

968.29 Authorization for disclosure and use of intercepted wire, electronic or oral communications. **(1)** Any investigative or law enforcement officer who, by any means authorized by ss. 968.28 to 968.37 or 18 USC 2510 to 2520, has obtained knowledge of the contents of any wire, electronic or oral communication, or evidence derived therefrom, may disclose the contents to another investigative or law enforcement officer only to the extent that the disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(2) Any investigative or law enforcement officer who, by any means authorized by ss. 968.28 to 968.37 or 18 USC 2510 to 2520, has obtained knowledge of the contents of any wire, electronic or oral communication or evidence derived therefrom may use the contents only to the extent the use is appropriate to the proper performance of the officer's official duties.

(3) (a) Any person who has received, by any means authorized by ss. 968.28 to 968.37 or 18 USC 2510 to 2520 or by a like statute of any other state, any information concerning a wire, electronic or oral communication or evidence derived therefrom intercepted in accordance with ss. 968.28 to 968.37, may disclose the contents of that communication or that derivative evidence only while giving testimony under oath or affirmation in any proceeding in any court or before any magistrate or grand jury in this state, or in any court of the United States or of any state, or in any federal or state grand jury proceeding.

(b) In addition to the disclosure provisions of par. (a), any person who has received, in the manner described under s. 968.31 (2) (b), any information concerning a wire, electronic or oral communication or evidence derived therefrom, may disclose the contents of that communication or that derivative evidence while giving testimony under oath or affirmation in any proceeding described in par. (a) in which a person is accused of any act constituting a felony, and only if the party who consented to the interception is available to testify at the proceeding or if another witness is available to authenticate the recording.

(4) No otherwise privileged wire, electronic or oral communication intercepted in accordance with, or in violation of, ss. 968.28 to 968.37 or 18 USC 2510 to 2520, may lose its privileged character.

(5) When an investigative or law enforcement officer, while engaged in intercepting wire, electronic or oral communications in the manner authorized, intercepts wire, electronic or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subs. (1) and (2). The contents and any evidence derived therefrom may be used under sub. (3) when authorized or approved by the judge who acted on the original application where the judge finds on subsequent application, made as soon as practicable but no later than 48 hours, that the contents were otherwise intercepted in accordance with ss. 968.28 to 968.37 or 18 USC 2510 to 2520 or by a like statute.

History: 1971 c. 40 ss. 91, 93; 1987 a. 399; 1989 a. 121, 359; 1993 a. 98; 1995 a. 30.

Evidence of intercepted oral or wire communications can be introduced only if the interception was authorized under s. 968.30; consent by one party to the communication is not sufficient. State ex rel. Arnold v. County Court, 51 Wis. 2d 434, 187 N.W.2d 354 (1971).

Although one–party consent tapes are lawful, they are not authorized by ss. 968.28 to 968.33 and therefore the contents cannot be admitted as evidence in chief, but sub. (3) does not prohibit giving such tapes to the state. State v. Waste Management of Wisconsin, Inc. 81 Wis. 2d 555, 261 N.W.2d 147 (1977).

Although a taped telephone conversation was obtained without a court order, the defendant opened the door to the tape's admission by extensive reference to the tape transcript during his case–in–chief. State v. Albrecht, 184 Wis. 2d 287, 516 N.W.2d 776 (Ct. App. 1994).

Sub. (2) authorizes prosecutors to include intercepted communications in a criminal complaint. A prosecutor is a law enforcement officer under sub. (2), and preparation of complaints is within the prosecutor's official duties. State v. Gilmore, 193 Wis. 2d 403, 535 N.W.2d 21 (Ct. App. 1995).

The state may incorporate intercepted communications in a criminal complaint if the complaint is filed under seal. Unilateral public disclosure of such communications in a complaint while not authorized does not subject the communication to suppression, but may entitle the defendant to remedies under s. 968.31. State v. Gilmore, 201 Wis. 2d 820, 549 N.W.2d 401 (1996), 94–0123.

The state may use one–party consent recordings of criminal activity, the disclosure of which is not authorized under sub. (3) (b), if the evidence inadvertently falls within the "plain hearing" of law enforcement officers conducting authorized surveillance. State v. Gil, 208 Wis. 2d 531, 561 N.W.2d 760 (Ct. App. 1997), 95–3347.

Since interception by government agents of an informant's telephone call was exclusively done by federal agents and was lawful under federal law, Wisconsin law did not govern its admissibility into evidence in a federal prosecution, notwithstanding that the telephone call may have been a privileged communication under Wisconsin law. United States v. Beni, 397 F. Supp. 1086.

968.30 Procedure for interception of wire, electronic or oral communications. **(1)** Each application for an order authorizing or approving the interception of a wire, electronic or oral communication shall be made in writing upon oath or affirmation to the court and shall state the applicant's authority to make the application and may be upon personal knowledge or information and belief. Each application shall include the following information:

(a) The identity of the investigative or law enforcement officer making the application, and the officers authorizing the application.

(b) A full and complete statement of the facts and circumstances relied upon by the applicant, to justify the applicant's belief that an order should be issued, including:

1. Details of the particular offense that has been, is being, or is about to be committed;

2. A particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted;

3. A particular description of the type of communications sought to be intercepted; and

4. The identity of the person, if known, committing the offense and whose communications are to be intercepted.

(c) A full and complete statement whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous.

(d) A statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been obtained, a particular description of facts establishing probable cause to believe that additional communications for the same type will occur thereafter.

(e) A full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any court for authorization to intercept, or for approval of interceptions of, wire, electronic or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the court on each such application; and

(f) Where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The court may require the applicant to furnish additional testimony or documentary evidence under oath or affirmation in support of the application. Oral testimony shall be reduced to writing.

(3) Upon the application the court may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire, electronic or oral communications, if the court determines on the basis of the facts submitted by the applicant that all of the following exist:

(a) There is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in s. 968.28.

(b) There is probable cause for belief that particular communications concerning that offense will be obtained through such interception.

(c) Other investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous.

(d) There is probable cause for belief that the facilities from which, or the place where, the wire, electronic or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of the offense, or are leased to, listed in the name of, or commonly used by the person.

(4) Each order authorizing or approving the interception of any wire, electronic or oral communication shall specify:

(a) The identity of the person, if known, whose communications are to be intercepted;

(b) The nature and location of the communications facilities which, or the place where authority to intercept is granted and the means by which such interceptions shall be made;

(c) A particular description of the type of communication sought to be intercepted and a statement of the particular offense to which it relates;

(d) The identity of the agency authorized to intercept the communications and of the person authorizing the application; and

(e) The period of time during which such interception is authorized, including a statement whether or not the interception shall automatically terminate when the described communication has been first obtained.

(5) No order entered under this section may authorize or approve the interception of any wire, electronic or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than 30 days. The 30–day period begins on the earlier of the day on which the investigative or law enforcement officer first begins to conduct an interception under the order or 10 days after the order is entered. Extensions of an order may be granted, but only upon application for an extension made in accordance with sub. (1) and the court making the findings required by sub. (3). The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event be for longer than 30 days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in 30 days. In the event the intercepted communication is in a code or foreign language, and an expert in that foreign language or code is not reasonably available during the interception period, minimization may be accomplished as soon as practicable after the interception.

(6) Whenever an order authorizing interception is entered pursuant to ss. 968.28 to 968.33, the order may require reports to be made to the court which issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the court requires.

(7) (a) The contents of any wire, electronic or oral communication intercepted by any means authorized by ss. 968.28 to 968.37 shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire, electronic or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order or extensions thereof all such recordings and records of an intercepted wire, electronic or oral communication shall be filed with the court issuing the order and the court shall order the same to be sealed. Custody of the recordings and records shall be wherever the judge handling the application shall order. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be properly kept and preserved for 10 years. Duplicate recordings and other records may be made for use or disclosure pursuant to the provisions for investigations under s. 968.29 (1) and (2). The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, electronic or oral communication or evidence derived therefrom under s. 968.29 (3).

(b) Applications made and orders granted under ss. 968.28 to 968.33 together with all other papers and records in connection therewith shall be ordered sealed by the court. Custody of the applications, orders and other papers and records shall be wherever the judge shall order. Such applications and orders shall be disclosed only upon a showing of good cause before the judge and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for 10 years.

(c) Any violation of this subsection may be punished as contempt of court.

(d) Within a reasonable time but not later than 90 days after the filing of an application for an order of approval under par. (b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served on the persons named in the order or the application and such other parties to intercepted communications as the judge determines is in the interest of justice, an inventory which shall include notice of:

1. The fact of the entry of the order or the application.

2. The date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application.

3. The fact that during the period wire, electronic or oral communications were or were not intercepted.

(e) The judge may, upon the filing of a motion, make available to such person or the person's counsel for inspection in the manner provided in ss. 19.35 and 19.36 such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to the issuing judge the serving of the inventory required by this subsection may be postponed. The judge shall review such postponement at the end of 60 days and good cause shall be shown prior to further postponement.

(8) The contents of any intercepted wire, electronic or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing or other proceeding in any court of this state unless each party, not less than 10 days before the trial, hearing or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This 10–day period may be waived by the judge if he or she finds that it was not possible to furnish the party with the above information 10 days before the trial, hearing or proceeding and that the party will not be prejudiced by the delay in receiving the information.

(9) (a) Any aggrieved person in any trial, hearing or proceeding in or before any court, department, officer, agency, regulatory body or other authority of this state, or a political subdivision thereof, may move before the trial court or the court granting the original warrant to suppress the contents of any intercepted wire, electronic or oral communication, or evidence derived therefrom, on the grounds that the communication was unlawfully intercepted; the order of authorization or approval under which it was intercepted is insufficient on its face; or the interception was not made in conformity with the order of authorization or approval. The motion shall be made before the trial, hearing or proceeding unless there was no opportunity to make the motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire, electronic or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of ss. 968.28 to 968.37. The judge may, upon the filing of the motion by the aggrieved person, make available to the aggrieved person or his or her counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interest of justice.

(b) In addition to any other right to appeal, the state shall have the right to appeal:

1. From an order granting a motion to suppress made under par. (a) if the attorney general or district attorney certifies to the judge or other official granting such motion that the appeal is not entered for purposes of delay and shall be diligently prosecuted as in the case of other interlocutory appeals or under such rules as the supreme court adopts; or

2. From an order denying an application for an order of authorization or approval, and such an appeal shall be ex parte and shall be in camera in preference to all other pending appeals in accordance with rules promulgated by the supreme court.

(10) Nothing in ss. 968.28 to 968.375 shall be construed to allow the interception of any wire, electronic, or oral communication between an attorney and a client.

History: 1971 c. 40 s. 93; 1981 c. 335 s. 26; 1987 a. 399; 1993 a. 486; 2009 a. 349.

Although a taped telephone conversation was obtained without a court order, the defendant opened the door to the tape's admission by extensive reference to the tape transcript during his case–in–chief. State v. Albrecht, 184 Wis. 2d 287, 516 N.W.2d 776 (Ct. App. 1994).

The state may incorporate intercepted communications in a criminal complaint if the complaint is filed under seal. Unilateral public disclosure of such communications in a complaint while not authorized does not subject the communication to suppression, but may entitle the defendant to remedies under s. 968.31. State v. Gilmore, 201 Wis. 2d 820, 549 N.W.2d 401 (1996), 94–0123.

Suppression of wire communications is reserved for those that are illegally intercepted and does not apply to legally intercepted communications that are improperly disclosed. State v. Gilmore, 201 Wis. 2d 820, 549 N.W.2d 401 (1996), 94–0123.

Not every failure to follow wiretapping statutes makes an interception unlawful such that suppression is required. Whether a violation of the wiretapping statutes requires suppression depends upon whether the statutory purpose has been achieved despite the violation. The authorization of a wiretap for offenses not enumerated in this section did not warrant suppression of the evidence obtained from the wiretap when the order included both enumerated and non–enumerated offenses, it contained sufficient probable cause for the enumerated offenses, the evidence obtained by wiretap was for enumerated offenses, and charges were brought only for enumerated offenses. State v. House, 2007 WI 79, 302 Wis. 2d 1, 734 N.W.2d 140, 05–2202.

Sub. (10) does not require that all intercepts by a county jail are unlawful because the telephone intercept system has the potential to record inmates' calls to their attorneys. State v. Christensen, 2007 WI App 170, 304 Wis. 2d 147, 737 N.W.2d 38, 06–1565.

Communications privacy: A legislative perspective. Kastenmeier, Leavy & Beier. 1989 WLR 715 (1989).

968.31 Interception and disclosure of wire, electronic or oral communications prohibited. **(1)** Except as otherwise specifically provided in ss. 196.63 or 968.28 to 968.30, whoever commits any of the acts enumerated in this section is guilty of a Class H felony:

(a) Intentionally intercepts, attempts to intercept or procures any other person to intercept or attempt to intercept, any wire, electronic or oral communication.

(b) Intentionally uses, attempts to use or procures any other person to use or attempt to use any electronic, mechanical or other device to intercept any oral communication.

(c) Discloses, or attempts to disclose, to any other person the contents of any wire, electronic or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire, electronic or oral communication in violation of this section or under circumstances constituting violation of this section.

(d) Uses, or attempts to use, the contents of any wire, electronic or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire, electronic or oral communication in violation of this section or under circumstances constituting violation of this section.

(e) Intentionally discloses the contents of any oral, electronic or wire communication obtained by authority of ss. 968.28, 968.29 and 968.30, except as therein provided.

(f) Intentionally alters any wire, electronic or oral communication intercepted on tape, wire or other device.

(2) It is not unlawful under ss. 968.28 to 968.37:

(a) For an operator of a switchboard, or an officer, employee or agent of any provider of a wire or electronic communication service, whose facilities are used in the transmission of a wire or electronic communication to intercept, disclose or use that communication in the normal course of his or her employment while engaged in any activity which is a necessary incident to the rendition of his or her service or to the protection of the rights or property of the provider of that service, except that a provider of a wire or electronic communication service shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(b) For a person acting under color of law to intercept a wire, electronic or oral communication, where the person is a party to the communication or one of the parties to the communication has given prior consent to the interception.

(c) For a person not acting under color of law to intercept a wire, electronic or oral communication where the person is a party to the communication or where one of the parties to the communication has given prior consent to the interception unless the communication is intercepted for the purpose of committing any criminal or tortious act in violation of the constitution or laws of the United States or of any state or for the purpose of committing any other injurious act.

(d) For any person to intercept or access an electronic communication made through an electronic communication system that is configured so that the electronic communication is readily accessible to the general public.

(e) For any person to intercept any radio communication that is transmitted:

1. By any station for the use of the general public, or that relates to ships, aircraft, vehicles or persons in distress;

2. By any governmental, law enforcement, civil defense, private land mobile or public safety communications system, including police and fire, readily accessible to the general public;

3. By a station operating on an authorized frequency within the bands allocated to the amateur, citizens band or general mobile radio services; or

4. By any marine or aeronautical communications system.

(f) For any person to engage in any conduct that:

1. Is prohibited by section 633 of the communications act of 1934; or

2. Is excepted from the application of section 705 (a) of the communications act of 1934 by section 705 (b) of that act.

(g) For any person to intercept any wire or electronic communication the transmission of which is causing harmful interference to any lawfully operating station or consumer electronic equipment, to the extent necessary to identify the source of the interference.

(h) For users of the same frequency to intercept any radio communication made through a system that utilizes frequencies moni-

tored by individuals engaged in the provision or the use of the system, if the communication is not scrambled or encrypted.

(i) To use a pen register or a trap and trace device as authorized under ss. 968.34 to 968.37; or

(j) For a provider of electronic communication service to record the fact that a wire or electronic communication was initiated or completed in order to protect the provider, another provider furnishing service toward the completion of the wire or electronic communication, or a user of that service, from fraudulent, unlawful or abusive use of the service.

(2m) Any person whose wire, electronic or oral communication is intercepted, disclosed or used in violation of ss. 968.28 to 968.37 shall have a civil cause of action against any person who intercepts, discloses or uses, or procures any other person to intercept, disclose, or use, the communication, and shall be entitled to recover from any such person:

(a) Actual damages, but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;

(b) Punitive damages; and

(c) A reasonable attorney's fee and other litigation costs reasonably incurred.

(3) Good faith reliance on a court order or on s. 968.30 (7) shall constitute a complete defense to any civil or criminal action brought under ss. 968.28 to 968.37.

History: 1971 c. 40 ss. 92, 93; 1977 c. 272; 1985 a. 297; 1987 a. 399; 1989 a. 56; 1991 a. 294; 1997 a. 283; 2001 a. 109.

The testimony of an undercover police officer who was carrying a concealed eavesdropping device under sub. (2) is not the product of the eavesdropping and is admissible even assuming the eavesdropping was unconstitutional. State v. Smith, 72 Wis. 2d 711, 242 N.W.2d 184 (1976).

An individual, who volunteers to aid the authorities in a lawful, albeit surreptitious, investigation does not commit an injury against the investigated party under sub. (2) (c) simply by participation. Undercover informants must surely realize that evidence they receive may be potentially harmful to the target of the investigation, but this is not the type of injurious act contemplated by the statute. State v. Maloney, 2005 WI 74, 281 Wis. 2d 595, 698 N.W.2d 583, 03–2180.

Consent under sub. (2) (b) may be express or implied in fact from surrounding circumstances indicating that the person knowingly agreed to the surveillance. In the prison setting, an inmate has given implied consent to electronic surveillance when he or she has meaningful notice that a telephone call is subject to monitoring and recording and nonetheless proceeds with the call. State v. Riley, 2005 WI App 203, 287 Wis. 2d 244, 704 N.W.2d 635, 04–2321.

If a warrantless intercept complies with sub. (2) (b), commonly referred to as the one–party consent exception, the contents of the intercept may be disclosed in a felony proceeding. The phrase "person acting under color of law" does not exclude law enforcement officers. State v. Ohlinger, 2009 WI App 44, 317 Wis. 2d 445, 767 N.W.2d 336, 08–0135.

When determining whether a minor has the capacity to consent to "color–of–law surveillance" under sub. (2) (b), courts should consider the totality of the circumstances to determine whether consent was voluntarily given. The court should consider the minor's knowledge, intelligence, and maturity. It is also appropriate to consider the minor's education and state of mind, the demeanor and tone of voice of the officers requesting consent, the location at which consent was given, and the duration of the encounter. The court should also consider the police tactics used to elicit consent and any other relevant circumstances. State v. Turner, 2014 WI App 93, 356 Wis. 2d 759, 854 N.W.2d 865, 13–2101.

The use of the "called party control device" by the communications common carrier to trace bomb scares and other harassing telephone calls would not violate any law if used with the consent of the receiving party. 60 Atty. Gen. 90.

968.32 Forfeiture of contraband devices. Any electronic, mechanical, or other intercepting device used in violation of s. 968.31 (1) may be seized as contraband by any peace officer and forfeited to this state in an action by the department of justice under ch. 778.

History: 1979 c. 32 s. 92 (8).

968.33 Reports concerning intercepted wire or oral communications. In January of each year, the department of justice shall report to the administrative office of the United States courts such information as is required to be filed by 18 USC 2519. A duplicate copy of the reports shall be filed, at the same time, with the office of the director of state courts.

History: 1973 c. 12 s. 37; 1977 c. 187 s. 135; Sup. Ct. Order, 88 Wis. 2d xiii (1979).

968.34 Use of pen register or trap and trace device restricted. (1) Except as provided in this section, no person may install or use a pen register or a trap and trace device without first obtaining a court order under s. 968.36 or 18 USC 3123 or 50 USC 1801 to 1811.

(2) The prohibition of sub. (1) does not apply with respect to the use of a pen register or a trap and trace device by a provider of electronic or wire communication service:

(a) Relating to the operation, maintenance and testing of a wire or electronic communication service or to the protection of the rights or property of the provider, or to the protection of users of that service from abuse of service or unlawful use of service;

(b) To record the fact that a wire or electronic communication was initiated or completed in order to protect the provider, another provider furnishing service toward the completion of the wire communication, or a user of that service, from fraudulent, unlawful or abusive use of service; or

(c) Where the consent of the user of that service has been obtained.

(2m) The prohibition of sub. (1) does not apply to a telephone caller identification service authorized under s. 196.207 (2).

(3) Whoever knowingly violates sub. (1) may be fined not more than $10,000 or imprisoned for not more than 9 months or both.

History: 1987 a. 399; 1991 a. 268, 269; 1997 a. 283; 2001 a. 109.

968.35 Application for an order for a pen register or a trap and trace device. (1) The attorney general or a district attorney may make application for an order or an extension of an order under s. 968.36 authorizing or approving the installation and use of a pen register or a trap and trace device, in writing under oath or equivalent affirmation, to a circuit court for the county where the device is to be located.

(2) An application under sub. (1) shall include all of the following:

(a) The identity of the person making the application and the identity of the law enforcement agency conducting the investigation.

(b) A certification by the applicant that the information likely to be obtained is relevant to an ongoing criminal investigation being conducted by that agency.

History: 1987 a. 399.

968.36 Issuance of an order for a pen register or a trap and trace device. (1) Upon an application made under s. 968.35, the court shall enter an ex parte order authorizing the installation and use of a pen register or a trap and trace device within the jurisdiction of the court if the court finds that the applicant has certified to the court that the information likely to be obtained by the installation and use is relevant to an ongoing criminal investigation.

(2) An order issued under this section shall do all of the following:

(a) Specify the identity, if known, of the person to whom is leased or in whose name is listed the telephone line to which the pen register or trap and trace device is to be attached.

(b) Specify the identity, if known, of the person who is the subject of the criminal investigation.

(c) Specify the number and, if known, the physical location of the telephone line to which the pen register or trap and trace device is to be attached and, in the case of a trap and trace device, the geographic limits of the trap and trace order.

(d) Provide a statement of the offense to which the information likely to be obtained by the pen register or trap and trace device relates.

(e) Direct, upon the request of the applicant, the furnishing of information, facilities and technical assistance necessary to accomplish the installation of the pen register or trap and trace device under s. 968.37.

(3) An order issued under this section shall authorize the installation and use of a pen register or a trap and trace device for a period not to exceed 60 days.

(4) Extensions of the order may be granted, but only upon an application for an order under s. 968.35 and upon the judicial finding required by sub. (1). The period of extension shall be for a period not to exceed 60 days.

(5) An order authorizing or approving the installation and use of a pen register or a trap and trace device shall direct that:

(a) The order be sealed until otherwise ordered by the court; and

(b) The person owning or leasing the line to which the pen register or a trap and trace device is attached, or who has been ordered by the court to provide assistance to the applicant, not disclose the existence of the pen register or trap and trace device or the existence of the investigation to the listed subscriber, or to any other person, unless or until otherwise ordered by the court.

History: 1987 a. 399.

968.37 Assistance in the installation and use of a pen register or trap and trace device. (1) Upon the request of the attorney general, a district attorney or an officer of a law enforcement agency authorized to install and use a pen register under ss. 968.28 to 968.37, a provider of wire or electronic communication service, landlord, custodian or other person shall furnish the investigative or law enforcement officer forthwith all information, facilities and technical assistance necessary to accomplish the installation of the pen register unobtrusively and with a minimum of interference with the services that the person so ordered by the court accords the party with respect to whom the installation and use is to take place, if the assistance is directed by a court order under s. 968.36 (5) (b).

(2) Upon the request of the attorney general, a district attorney or an officer of a law enforcement agency authorized to receive the results of a trap and trace device under ss. 968.28 to 968.37, a provider of a wire or electronic communication service, landlord, custodian or other person shall install the device forthwith on the appropriate line and shall furnish the investigative or law enforcement officer all additional information, facilities and technical assistance including installation and operation of the device unobtrusively and with a minimum of interference with the services that the person so ordered by the court accords the party with respect to whom the installation and use is to take place, if the installation and assistance is directed by a court order under s. 968.36 (5) (b). Unless otherwise ordered by the court, the results of the trap and trace device shall be furnished to the officer of a law enforcement agency, designated by the court, at reasonable intervals during regular business hours for the duration of the order.

(3) A provider of a wire or electronic communication service, landlord, custodian or other person who furnishes facilities or technical assistance under this section shall be reasonably compensated for the reasonable expenses incurred in providing the facilities and assistance.

(4) No cause of action may lie in any court against any provider of a wire or electronic communication service, its officers, employees or agents or other specified persons for providing information, facilities or assistance in accordance with the terms of a court order under s. 968.36.

(5) A good faith reliance on a court order, a legislative authorization or a statutory authorization is a complete defense against any civil or criminal action brought under ss. 968.28 to 968.37.

History: 1987 a. 399.

968.373 Warrant to track a communications device. (1) DEFINITION. In this section, "communications device" includes any wireless or mobile device that transmits wire or electronic communications.

(2) PROHIBITION. Except as provided in sub. (8), no investigative or law enforcement officer may identify or track the location of a communications device without first obtaining a warrant under sub. (4).

(3) APPLICATION FOR WARRANT. Upon the request of a district attorney or the attorney general, an investigative or law enforcement officer may apply to a judge for a warrant to authorize a person to identify or track the location of a communications device. The application shall be under oath or affirmation, may be in writing or oral, and may be based upon personal knowledge or information and belief. In the application, the investigative or law enforcement officer shall do all of the following:

(a) Identify the communications device.

(b) Identify, if known, the owners or possessors of the communications device.

(c) Identify, if known, the person who is the subject of the investigation.

(d) Provide a statement of the criminal offense to which the information likely to be obtained relates.

(e) Provide a statement that sets forth facts and circumstances that provide probable cause to believe the criminal activity has been, is, or will be in progress and that identifying or tracking the communications device will yield information relevant to an ongoing criminal investigation.

(4) WARRANT. A judge shall issue a warrant authorizing a person to identify or track the location of a communications device if the judge finds that the application satisfies the requirements under sub. (3). A warrant issued under this subsection may not authorize the action for a period that exceeds 60 days. A judge may extend the authorized period upon the request of the attorney general or a district attorney if the request satisfies the requirements under sub. (3). Each extension may not exceed 60 days but there is no limit on the number of extensions a judge may grant.

(4m) SECRECY. A warrant under sub. (4) shall be issued with all practicable secrecy and the request, application, or other information upon which the warrant is based may not be filed with the clerk or made public until the warrant has been executed and returned to the court. The judge may issue an order sealing the application, request, or other information upon which the warrant is based. The judge may issue an order prohibiting any person who has been ordered by the judge to provide assistance to the applicant from disclosing the existence of the warrant or of the investigation to any other person unless ordered by a judge.

(5) ASSISTANCE. Upon the request of the attorney general, a district attorney, or a law enforcement agency authorized by a warrant issued under sub. (4) to track or identify the location of a communications device, the court shall order a provider of electronic communication service or other person to provide to an investigative or law enforcement officer information, facilities, and technical assistance to identify or track the location of the communications device. A person who is ordered under this subsection to provide assistance shall be compensated for the reasonable expenses incurred.

(6) CONFIDENTIALITY OF INFORMATION. (a) Information obtained under this section regarding the location of a communications device is not subject to the right of inspection and copying under s. 19.35 (1).

(b) The attorney general, a law enforcement agency, or a district attorney that obtains under this section information regarding the location of a communications device, or evidence derived from the information, shall destroy any information or evidence derived from it if the trial court reaches final disposition for all charges in connection with the investigation that was the subject of the warrant under sub. (4) and no person was adjudged guilty of a crime in connection with the investigation.

(c) Information regarding the location of a communications device that is obtained under this section may be disclosed to other investigative or law enforcement officers.

(6m) RETURN. A warrant issued under sub. (4) shall be returned, including in the form of a summary description of the information received, to the court not later than 5 days after the records or information described in the warrant are received by the attorney general, district attorney, or law enforcement agency, whichever is designated in the warrant.

(7) DEFENSE AND IMMUNITY. (a) A person on whom a warrant issued under sub. (4) is served is immune from civil liability for acts or omissions in providing records or information, facilities, or assistance in accordance with the terms of the warrant.

(b) A person who discloses the location of a communications device under sub. (8) (b) is immune from civil liability for the acts or omissions in making the disclosure in accordance with sub. (8) (b).

(c) No cause of action may arise against any provider of electronic communication service, or its officers, employees, or agents or other persons specified in the court order under sub. (5), for providing information, facilities, or assistance in accordance with the terms of a court order under sub. (5).

(7m) TECHNICAL IRREGULARITIES. Evidence disclosed under a warrant issued under sub. (4) may not be suppressed because of technical irregularities or errors not affecting the substantial rights of the defendant.

(8) EXCEPTION. (a) The prohibition in sub. (2) does not apply to an investigative or law enforcement officer who identifies or tracks the location of a communications device if any of the following applies:

1. The customer or subscriber provides consent for the action.

2. An emergency involving danger of death or serious physical injury to any person exists and identifying or tracking the location of the communications device is relevant to preventing the death or injury or to mitigating the injury.

(b) A provider of electronic communication service may disclose the location of a communications device without a warrant if any of the following applies:

1. The customer or subscriber provides consent for the particular disclosure.

2. The provider of electronic communication service believes in good faith that an emergency involving the danger of death or serious physical injury to any person exists and that disclosure of the location is relevant to preventing the death or injury or to mitigating the injury.

(8m) JURISDICTION. For purposes of this section, a person is considered to be doing business in this state and is subject to service and execution of process from this state, if the person makes a contract with or engages in a terms of service agreement with any other person, whether or not the other person is a resident of this state, and any part of the performance of the contract or provision of service takes place within this state on any occasion.

(9) SEIZURE. Any device used in violation of sub. (2) may be seized as contraband by any law enforcement officer and forfeited to this state in an action under s. 973.075.

History: 2013 a. 375.

968.375 Subpoenas and warrants for records or communications of customers of an electronic communication service or remote computing service provider. (1) JURISDICTION. For purposes of this section, a person is considered to be doing business in this state and is subject to service and execution of process from this state, if the person makes a contract with or engages in a terms of service agreement with any other person, whether or not the other person is a resident of this state, and any part of the performance of the contract or provision of service takes place within this state on any occasion.

(2) SUBPOENA. (a) Upon the request of the attorney general or a district attorney and upon a showing of probable cause, a judge may issue a subpoena requiring a person who provides electronic communication service or remote computing service to disclose within a reasonable time that is established in the subpoena a record or other information pertaining to a subscriber or customer of the service, including any of the following relating to the subscriber or customer:

1. Name.

2. Address.

3. Local and long distance telephone connection records, or records of session times and durations.

4. Length of service, including start date, and types of service utilized.

5. Telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address.

6. Means and source of payment for the electronic communication service or remote computing service, including any credit card or bank account number.

(b) A subpoena under this subsection may not require disclosure of the contents of communications.

(3) WARRANT. Upon the request of the attorney general or a district attorney and upon a showing of probable cause, a judge may issue a warrant requiring a person who provides electronic communication service or remote computing service to disclose within a reasonable time that is established in the warrant any of the following:

(a) The content of a wire or electronic communication that is in electronic storage in an electronic communications system or held or maintained by a provider of remote computing service.

(b) A record or information described under sub. (2) (a).

(c) A record or information that identifies the location of a device used to transmit electronic or wire communications.

(4) BASIS, APPLICATION FOR, AND ISSUANCE OF SUBPOENA OR WARRANT. Section 968.12 (2) and (3) applies to the basis and application for, and issuance of, a subpoena under sub. (2) or a warrant under sub. (3) as it applies to the basis and application for, and issuance of, a search warrant under s. 968.12.

(5) MANNER OF SERVICE. A subpoena or warrant issued under this section may be served in the manner provided for serving a summons under s. 801.11 (5) or, if delivery can reasonably be proved, by United States mail, delivery service, telephone facsimile, or electronic transmission.

(6) TIME FOR SERVICE. A subpoena or warrant issued under this section shall be served not more than 5 days after the date of issuance.

(7) MOTION TO QUASH. The person on whom a subpoena or warrant issued under this section is served may file a motion to quash the subpoena or warrant with the judge who issued the subpoena or warrant. If the person files the motion within the time for production of records or information, the judge shall hear and decide the motion within 8 days after the motion is filed.

(8) LAW ENFORCEMENT PRESENCE NOT REQUIRED. The presence of a law enforcement officer is not required for service or execution of a subpoena or warrant issued under this section.

(9) RETURN. A subpoena or warrant issued under this section shall be returned to the court not later than 5 days after the records or information described in the subpoena or warrant are received by the attorney general, district attorney, or law enforcement agency, whichever is designated in the subpoena or warrant.

(10) SECRECY. A subpoena or warrant issued under this section shall be issued with all practicable secrecy and the request, complaint, affidavit, or testimony upon which it is based may not be filed with the clerk or made public until the subpoena or warrant has been executed and returned to the court. The judge may issue an order sealing the subpoena or warrant and the request, complaint, affidavit, or testimony upon which it is based. The judge may issue an order prohibiting the person on whom the subpoena or warrant is served from disclosing the existence of the subpoena or warrant to the customer or subscriber unless the judge subsequently authorizes such disclosure.

(11) IMMUNITY. A person on whom a subpoena or warrant issued under this section is served is immune from civil liability for acts or omissions in providing records or information, facilities, or assistance in accordance with the terms of the subpoena or warrant.

(12) TECHNICAL IRREGULARITIES. Evidence disclosed under a subpoena or warrant issued under this section shall not be suppressed because of technical irregularities or errors not affecting the substantial rights of the defendant.

(13) DISCLOSURE WITHOUT SUBPOENA OR WARRANT. A provider of electronic communication or remote computing service may disclose records or information described under sub. (2) (a) of a customer or subscriber or the content of communications of a customer or subscriber described under sub. (3) without a subpoena or warrant if any of the following applies:

(a) The customer or subscriber provides consent for the particular disclosure.

(b) The provider of electronic communication or remote computing service believes in good faith that an emergency involving the danger of death or serious physical injury to any person exists and that disclosure of the information is required to prevent the death or injury or to mitigate the injury.

History: 2009 a. 349; 2011 a. 260 s. 81; 2013 a. 167, 375; 2015 a. 195 s. 82.

968.38 Testing for HIV infection and certain diseases.

(1) In this section:

(a) "Health care professional" means a physician or a registered nurse or licensed practical nurse who is licensed under ch. 441.

(b) "HIV" means any strain of human immunodeficiency virus, which causes acquired immunodeficiency syndrome.

(bc) "HIV test" has the meaning given in s. 252.01 (2m).

(bm) "Physician" has the meaning given in s. 448.01 (5).

(c) "Sexually transmitted disease" has the meaning given in s. 252.11 (1).

(d) "Significant exposure" has the meaning given in s. 252.15 (1) (em).

(2) In a criminal action under s. 940.225, 948.02, 948.025, 948.05, 948.06, 948.085, or 948.095, if all of the following apply, the district attorney shall apply to the circuit court for his or her county to order the defendant to submit to an HIV test and to a test or a series of tests to detect the presence of a sexually transmitted disease, each of which tests shall be administered by a health care professional, and to disclose the results of the test or tests as specified in sub. (4) (a) to (c):

(a) The district attorney has probable cause to believe that the alleged victim or victim has had contact with body fluid of the defendant that constitutes a significant exposure. If the defendant is convicted or found not guilty by reason of mental disease or defect, this paragraph does not apply.

(b) The alleged victim or victim who is not a minor or the parent or guardian of the alleged victim or victim who is a minor requests the district attorney to so apply for an order.

(2m) In a criminal action under s. 946.43 (2m), the district attorney shall apply to the circuit court for his or her county for an order requiring the defendant to submit to a test or a series of tests administered by a health care professional to detect the presence of communicable diseases and to disclose the results of the test or tests as specified in sub. (5) (a) to (c), if all of the following apply:

(a) The district attorney has probable cause to believe that the act or alleged act of the defendant that constitutes a violation of s. 946.43 (2m) carried a potential for transmitting a communicable disease to the victim or alleged victim and involved the defendant's blood, semen, vomit, saliva, urine or feces or other bodily substance of the defendant.

(b) The alleged victim or victim who is not a minor or the parent or guardian of the alleged victim or victim who is a minor requests the district attorney to apply for an order.

(3) The district attorney may apply under sub. (2) or (2m) for an order at any of the following times, and, within those times, shall do so as soon as possible so as to enable the court to provide timely notice:

(a) At or after the initial appearance and prior to the preliminary examination.

(b) If the defendant waives the preliminary examination, at any time after the court binds the defendant over for trial and before a verdict is rendered.

(c) At any time after the defendant is convicted or is found not guilty by reason of mental disease or defect.

(d) If the court has determined that the defendant is not competent to proceed under s. 971.14 (4) and suspended the criminal proceedings, at any time after the determination that the defendant is not competent to proceed.

(4) The court shall set a time for a hearing on the matter under sub. (2) during the preliminary examination, if sub. (3) (a) applies; after the defendant is bound over for trial and before a verdict is rendered, if sub. (3) (b) applies; after conviction or a finding of not guilty by reason of mental disease or defect, if sub. (3) (c) applies; or, subject to s. 971.13 (4), after the determination that the defendant is not competent, if sub. (3) (d) applies. The court shall give the district attorney and the defendant notice of the hearing at least 72 hours prior to the hearing. The defendant may have counsel at the hearing, and counsel may examine and cross–examine witnesses. If the court finds probable cause to believe that the victim or alleged victim has had contact with body fluid of the defendant that constitutes a significant exposure, the court shall order the defendant to submit to an HIV test and to a test or a series of tests to detect the presence of a sexually transmitted disease. The tests shall be performed by a health care professional. The court shall require the health care professional who performs the test to disclose the test results to the defendant, to refrain from making the test results part of the defendant's permanent medical record, and to disclose the results of the test to any of the following:

(a) The alleged victim or victim, if the alleged victim or victim is not a minor.

(b) The parent or guardian of the alleged victim or victim, if the alleged victim or victim is a minor.

(c) The health care professional who provides care to the alleged victim or victim, upon request by the alleged victim or victim or, if the alleged victim or victim is a minor, by the parent or guardian of the alleged victim or victim.

(5) The court shall set a time for a hearing on the matter under sub. (2m) during the preliminary examination, if sub. (3) (a) applies; after the defendant is bound over for trial and before a verdict is rendered, if sub. (3) (b) applies; after conviction or a finding of not guilty by reason of mental disease or defect, if sub. (3) (c) applies; or, subject to s. 971.13 (4), after the determination that the defendant is not competent, if sub. (3) (d) applies. The court shall give the district attorney and the defendant notice of the hearing at least 72 hours prior to the hearing. The defendant may have counsel at the hearing, and counsel may examine and cross–examine witnesses. If the court finds probable cause to believe that the act or alleged act of the defendant that constitutes a violation of s. 946.43 (2m) carried a potential for transmitting a communicable disease to the victim or alleged victim and involved the defendant's blood, semen, vomit, saliva, urine or feces or other bodily substance of the defendant, the court shall order the defendant to submit to a test or a series of tests administered by a health care professional to detect the presence of any communicable disease that was potentially transmitted by the act or alleged act of the defendant. The court shall require the health care professional who performs the test to disclose the test results to the defendant. The court shall require the health care professional who performs the test to refrain from making the test results part of the defendant's permanent medical record and to disclose the results of the test to any of the following:

(a) The alleged victim or victim, if the alleged victim or victim is not a minor.

(b) The parent or guardian of the alleged victim or victim, if the alleged victim or victim is a minor.

(c) The health care professional who provides care to the alleged victim or victim, upon request by the alleged victim or victim or, if the alleged victim or victim is a minor, by the parent or guardian of the alleged victim or victim.

History: 1991 a. 269; 1993 a. 27, 32, 183, 227, 495; 1995 a. 456; 1997 a. 182; 1999 a. 188; 2005 a. 277; 2009 a. 209.

Acquittal on a charge of sexual intercourse with a minor did not prevent an order for HIV testing following a conviction for sexual assault; the test is probable cause and is not governed by the outcome of the trial. State v. Parr, 182 Wis. 2d 349, 513 N.W.2d 647 (Ct. App. 1994).

968.40 Grand jury. (1) SELECTION OF GRAND JURY LIST. Any judge may, in writing, order the clerk of circuit court to select a grand jury list within a specified reasonable time. The clerk shall select from the prospective juror list for the county the names of not fewer than 75 nor more than 150 persons to constitute the prospective grand juror list. The list shall be kept secret.

(3) EXAMINATION OF PROSPECTIVE JURORS. At the time set for the prospective grand jurors to appear, the judge shall and the district attorney or other prosecuting officer may examine the prospective jurors under oath or affirmation relative to their qualifications to serve as grand jurors and the judge shall excuse those who are disqualified, and may excuse others for any reason which seems proper to the judge.

(4) ADDITIONAL GRAND JURORS. If after such examination fewer than 17 grand jurors remain, additional prospective jurors shall be selected, summoned and examined until there are at least 17 qualified jurors on the grand jury.

(6) TIME GRAND JURORS TO SERVE. Grand jurors shall serve for a period of 31 consecutive days unless more days are necessary to complete service in a particular proceeding. The judge may discharge the grand jury at any time.

(7) ORDERS FILED WITH CLERK. All orders mentioned in this section shall be filed with the clerk of court.

(8) INTERCOUNTY RACKETEERING AND CRIME. When a grand jury is convened pursuant to this section to investigate unlawful activity under s. 165.70, and such activity involves more than one county, including the county where the petition for such grand jury is filed, then if the attorney general approves, all expenses of such proceeding shall be charged to the appropriation under s. 20.455 (1) (d).

History: 1971 c. 125 s. 522 (1); 1977 c. 29 s. 1656 (27); 1977 c. 187 ss. 95, 135; 1977 c. 318; 1977 c. 447 s. 210; 1977 c. 449; Stats. 1977 s. 756.10; 1991 a. 39; Sup. Ct. Order No. 96–08, 207 Wis. 2d xv (1997); Stats. 1997 s. 968.40.

A claim of grand jury discrimination necessitates federal habeas corpus review. Rose v. Mitchell, 443 U.S. 545 (1979).

The grand jury in Wisconsin. Coffey, Richards, 58 MLR 518.

968.41 Oath or affirmation of grand jurors. Grand jurors shall, before they begin performance of their duties, solemnly swear or affirm that they will diligently inquire as to all matters and things which come before the grand jury; that they will keep all matters which come before the grand jury secret; that they will indict no person for envy, hatred or malice; that they will not leave any person unindicted for love, fear, favor, affection or hope of reward; and that they will indict truly, according to the best of their understanding.

History: 1975 c. 94 s. 91 (12); 1977 c. 187 s. 95; Stats. 1977 s. 756.11; Sup. Ct. Order No. 96–08,207 Wis. 2d xv (1997); Stats. 1997 s. 968.41.

968.42 Presiding juror and clerk. The grand jury shall select from their number a presiding juror and a clerk. The clerk shall preserve the minutes of the proceedings before them and all exhibits.

History: 1977 c. 187 s. 95; Stats. 1977 s. 756.12; Sup. Ct. Order No. 96–08, 207 Wis. 2d xv (1997); Stats. 1997 s. 968.42.

968.43 Reporter; salary; assistant. (1) Every grand jury shall when ordered by the judge ordering such grand jury, employ one or more reporters to attend their sessions and to make and transcribe a verbatim record of all proceedings had before them.

(2) Before assuming the duties under this section, each reporter shall make and file an oath or affirmation faithfully to record and transcribe all of the proceedings before the grand jury and to keep secret the matters relative to the proceedings. Each reporter shall be paid out of the county treasury of the county in which the service is rendered such sum for compensation and expenses as shall be audited and allowed as reasonable by the court ordering the grand jury. Each reporter may employ on his or her own account a person to transcribe the testimony and proceedings of the grand jury, but before entering upon the duties under this subsection, the person shall be required to make and file an oath or affirmation similar to that required of each reporter.

(3) Any person who violates an oath or affirmation required by sub. (2) is guilty of a Class H felony.

History: 1977 c. 187 s. 95; Stats. 1977 s. 756.13; Sup. Ct. Order No. 96–08, 207 Wis. 2d xv (1997); Stats. 1997 s. 968.43.; 1997 a. 283; 2001 a. 109.

968.44 Witnesses. The presiding juror of every grand jury and the district attorney or other prosecuting officer who is before the grand jury may administer all oaths and affirmations in the manner prescribed by law to witnesses who appear before the jury for the purpose of testifying in any matter of which the witnesses have cognizance. At the request of the court, the presiding juror shall return to the court a list, under his or her hand, of all witnesses who are sworn before the grand jury. That list shall be filed by the clerk of circuit court.

History: 1977 c. 187 s. 95; 1977 c. 449; Stats. 1977 s. 756.14; Sup. Ct. Order No. 96–08, 207 Wis. 2d xv (1997); Stats. 1997 s. 968.44.

968.45 Witness rights; transcripts. (1) Any witness appearing before a grand jury may have counsel present, but the counsel shall not be allowed to examine his or her client, cross–examine other witnesses or argue before the judge. Counsel may consult with his or her client while before a grand jury. If the prosecuting officer, attorney for a witness or a grand juror believes that a conflict of interest exists for an attorney or attorneys to represent more than one witness before a grand jury, the person so believing may make a motion before the presiding judge to disqualify the attorney from representing more than one witness before the grand jury. A hearing shall be held upon notice with the burden upon the moving party to establish the conflict.

(2) No grand jury transcript may be made public until the trial of anyone indicted by the grand jury and then only that portion of the transcript that is relevant and material to the case at hand. This subsection does not limit the defendant's rights to discovery under s. 971.23.

History: 1979 c. 291; Sup. Ct. Order No. 96–08, 207 Wis. 2d xv (1997); Stats. 1997 s. 968.45.

968.46 Secrecy. Notwithstanding s. 757.14, all motions, including but not limited to those for immunity or a privilege, brought by a prosecuting officer or witness appearing before a grand jury shall be made, heard and decided in complete secrecy and not in open court if the prosecuting officer or witness bringing the motion or exercising the immunity or privilege so requests.

History: 1979 c. 291; Sup. Ct. Order No. 96–08, 207 Wis. 2d xv (1997); Stats. 1997 s. 968.46.

968.47 District attorney, when to attend. Whenever required by the grand jury it shall be the duty of the district attorney of the county to attend them for the purpose of examining witnesses in their presence or of giving them advice upon any legal matter, and to issue subpoenas and other process to bring up witnesses.

History: 1977 c. 187 s. 95; Stats. 1977 s. 756.15; Sup. Ct. Order No. 96–08, 207 Wis. 2d xv (1997); Stats. 1997 s. 968.47.

968.48 Attendance; absence; excuse; number required for grand jury session; number required to concur in indictment. Each grand juror shall attend every session of the grand jury unless excused by the presiding juror. The presiding juror may excuse a grand juror from attending a grand jury session only for a reason which appears to the presiding juror in his or her discretion as good and sufficient cause for the excuse. No business may be transacted at any session of the grand jury at

which less than 14 members of the grand jury are in attendance and no indictment may be found by any grand jury unless at least 12 of their number shall concur in the indictment.

History: 1977 c. 187 s. 95; Stats. 1977 s. 756.16; Sup. Ct. Order No. 96–08, 207 Wis. 2d xv (1997); Stats. 1997 s. 968.48.

968.49 Fine for nonattendance. Any person lawfully summoned to attend as a grand juror who fails to attend without any sufficient excuse shall pay a fine not exceeding $40, which shall be imposed by the court to which the person was summoned and shall be paid into the county treasury.

History: Sup. Ct. Order No. 96–08, 207 Wis. 2d xv (1997).

968.50 Report progress and return indictments. A grand jury may report progress and return indictments to the court from time to time during its session and until discharged.

History: 1977 c. 187 s. 95; Stats. 1977 s. 756.17; Sup. Ct. Order No. 96–08, 207 Wis. 2d xv (1997); Stats. 1997 s. 968.50.

A grand jury performs a judicial rather than a legislative function; therefore, a progress report unconnected to an indictment may not be made public. State ex rel. Caledonia v. Racine County Ct. 78 Wis. 2d 429, 254 N.W.2d 317 (1977).

968.505 Procedure upon discharge of grand jury. When the grand jury is discharged the clerk shall collect all transcripts of testimony, minutes of proceedings, exhibits and other records of the grand jury, and deliver them as the jury directs either to the attorney general or to the district attorney, or upon approval of the court deliver them to the clerk of the court who shall impound them subject to the further order or orders of the court.

History: 1977 c. 187 s. 95; Stats. 1977 s. 756.18; Sup. Ct. Order No. 96–08, 207 Wis. 2d xv (1997); Stats. 1997 s. 968.505; 1997 a. 35 s. 586.

968.51 Indictment not to be disclosed. No grand juror or officer of the court, if the court shall so order, shall disclose the fact that any indictment for a felony has been found against any person not in custody or under recognizance, otherwise than by issuing or executing process on such indictment, until such person has been arrested.

History: 1977 c. 187 s. 95; Stats. 1977 s. 756.19; Sup. Ct. Order, No. 96–08, 207 Wis. 2d xv (1997); Stats. 1997 s. 968.51.

968.52 Votes not to be disclosed. No grand juror may be allowed to state or testify in any court in what manner he or she or any other member of the jury voted on any question before them, or what opinion was expressed by any juror in relation to the question.

History: 1977 c. 187 s. 95; Stats. 1977 s. 756.20; Sup. Ct. Order No. 96–08, 207 Wis. 2d xv (1997); Stats. 1997 s. 968.52.

968.53 When testimony may be disclosed. Members of the grand jury and any grand jury reporter may be required by any court to testify whether the testimony of a witness examined before the jury is consistent with or different from the evidence given by the witness before the court; and they may also be required to disclose the testimony given before the grand jury by any person upon a complaint against the person for perjury, or upon trial for the offense. Any transcript of testimony taken before the grand jury and certified by a grand jury reporter to have been carefully compared by the reporter with his or her minutes of testimony so taken and to be a true and correct transcript of all or a specified portion of the transcript, may be received in evidence with the same effect as the oral testimony of the reporter to the facts so certified, but the reporter may be cross–examined by any party as to the matter.

History: 1977 c. 187 s. 95; Stats. 1977 s. 756.21; Sup. Ct. Order No. 96–08, 207 Wis. 2d xv (1997); Stats. 1997 s. 968.53.