

CHAPTER 970
CRIMINAL PROCEDURE – PRELIMINARY PROCEEDINGS

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970.01 Initial appearance before a judge. (1) Any person who is arrested shall be taken within a reasonable time before the Ho-Chunk Nation trial court judge. The initial appearance may be conducted on the record by telephone or live audiovisual means under s. 967.08. If the initial appearance is conducted by telephone or live audiovisual means, the person may waive physical appearance. Waiver of physical appearance shall be placed on the record of the initial appearance and does not waive other grounds for challenging the court's personal jurisdiction. If the person does not waive physical appearance, conducting the initial appearance by telephone or live audiovisual means under s. 967.08 does not waive any grounds that the person has for challenging the court's personal jurisdiction.

(2) When a person is arrested without a warrant and brought before a judge, a complaint shall be filed forthwith.

970.02 Duty of a judge at the initial appearance. (1) At the initial appearance the judge shall inform the defendant:

(a) Of the charge against the defendant and shall furnish the defendant with a copy of the complaint which shall contain the possible penalties for the offenses set forth therein. In the case of a felony, the judge shall also inform the defendant of the penalties for the felony with which the defendant is charged.

(b) Of his or her right to counsel and, in any case required by the Ho-Chunk Nation constitution, that an attorney will be appointed to represent him or her if he or she is financially unable to employ counsel.

(c) That the defendant is entitled to a preliminary examination if charged with a misdemeanor or felony in any complaint, including a complaint issued under s. 968.26, or when the defendant has been returned to this Nation for prosecution through extradition proceedings under ch. 976, or any indictment, unless waived in writing or in open court, or unless the defendant is a corporation or limited liability company.

(2) The judge shall admit the defendant to bail in accordance with ch. 969.

(3) A defendant may waive preliminary examination, with approval of the tribal prosecutor, and upon the waiver, the judge shall bind the defendant over for trial.

(4) If the defendant does not waive preliminary examination, the judge shall forthwith set the action for a preliminary examination under s. 970.03.

(5) In all cases in which the defendant is entitled to legal representation under the constitution or laws of the Ho-Chunk Nation, the judge shall inform the defendant of his or her right to counsel and, if the defendant claims or appears to be indigent, shall refer the person to the authority for indigency determinations specified under ss. 977.301 to 977.307.

(6) If the offense charged is a felony; is a misdemeanor involving burglary tools, commercial gambling, gambling devices contributing to the delinquency of a child, dealing in stolen property, controlled substances or controlled substance analogs under ch. 961, firearms, dangerous weapons, explosives, pandering, prostitution, sex offenses where children are victims, or worthless checks; a fugitive from justice; or any other offense designated by the attorney general, the judge shall determine if the defendant's fingerprints, photographs and other identifying data have been taken and, if not, the judge shall direct that this information be obtained.

(7) If the offense charged is a violent crime, as defined in subsection (8), the judge shall determine if a biological specimen has been obtained from the defendant and, if not, the judge shall direct that a law enforcement agency to obtain a biological specimen from the defendant and submit it to the state crime laboratories as specified in rules promulgated by the Wisconsin department of justice under Wis. Stat. s. 165.76 (4). If the judge requires the defendant to provide a specimen under this subsection or if a biological specimen has already been obtained from the defendant, the judge shall inform the defendant that he or she may request expungement

(8) Definitions. In this subsection:

(a) "violent crime" means any of the following:

1. A felony violation of s. 940.01, 940.05, 940.21, 940.225 (1), (2), or (3), 940.235, 940.30, 940.302 (2), 940.305, 940.31, 940.32 (2), (2e), or (2m), 940.43, 940.45, 941.20, 941.21, 941.327, 943.02, 943.06, 943.10, 943.23 (1g) or (2), 943.32, 948.02 (1) or (2), 948.025, 948.03 (2) (a) or (c), 948.05, 948.051, 948.055, 948.07, 948.08, 948.085, 948.095, or 948.30 (2).

2. A felony violation of s. 940.02, 940.03, 940.06, 940.07, 940.08, 940.09 (1c), 940.10, 940.19 (2), (4), (5), or (6), 940.195 (2), (4), (5), or (6), 940.20, 940.201 (2), 940.203 (2), 940.205 (2), 940.208, 940.23, 941.30, or 948.03 (3).

3. A felony if a penalty enhancer specified in s. 939.621 could be imposed.

4. The solicitation, conspiracy, or attempt, under s. 939.30, 939.31, or 939.32, to commit a violation under subd. 1.

970.03 Preliminary examination. (1) A preliminary examination is a hearing before a court for the purpose of determining if there is probable cause to believe a crime has been committed by the defendant. A preliminary examination hearing will also determine whether the court has personal jurisdiction over the defendant. A preliminary examination may be held in conjunction with a bail revocation hearing under s. 969.08 (5) (b), but separate findings shall be made by the judge relating to the preliminary examination and to the bail revocation.

(2) The preliminary examination shall be commenced within 20 days after the initial appearance of the defendant if the defendant has been released from custody or within 10 days if the defendant is in custody and bail has been fixed in excess of \$500. On stipulation of the parties or on motion and for cause, the court may extend such time.

(3) A plea shall not be accepted in any case in which a preliminary examination is required until the defendant has been bound over following preliminary examination or waiver thereof.

(4) (a) If the defendant is accused of a crime under s. 940.225, 948.02, 948.025, 948.05, 948.051, 948.06, 948.085, or 948.095, or under s. 940.302 (2), if the court finds that the crime was sexually motivated, meaning that one of the purposes for an act is for the actor's sexual arousal or gratification or for the sexual humiliation or degradation of the victim, the court may exclude from the hearing all persons who are not officers of the court, members of the complainant's or defendant's families or others considered by the court to be supportive of the complainant or defendant or other persons required to attend, if the court finds that the Nation or the defendant has established a compelling interest that would likely be prejudiced if the persons were not excluded. The court may consider as a compelling interest, among others, the need to protect a complainant from undue embarrassment and emotional trauma.

(b) In making its order under this subsection, the court shall set forth specific findings sufficient to support the closure order. In making these findings, the court shall consider, and give substantial weight to, the desires, if any, of the complainant. Additional factors that the court may consider in making these findings include, but are not limited to, the complainant's age, psychological maturity and understanding; the nature of the crime; and the desires of the complainant's family.

(c) The court shall make its closure order under this subsection no broader than is necessary to protect the compelling interest under par. (a) and shall consider any reasonable alternatives to full closure of the entire hearing.

(5) All witnesses shall be sworn and their testimony reported by a court reporter. The defendant may cross-examine witnesses against the defendant, and may call witnesses on the defendant's own behalf who then are subject to cross-examination.

(6) During the preliminary examination, the court may exclude witnesses until they are called to testify, may direct that persons who are expected to be called as witnesses be kept separate until called and may prevent them from communicating with one another until they have been examined.

(7) If the court finds probable cause to believe that a crime has been committed by the defendant, it shall bind the defendant over for trial.

(8) If the defendant is charged with a felony, and the court finds that it is probable that only a misdemeanor has been committed by the defendant, it shall amend the complaint to conform to the evidence. The action shall then proceed as though it had originated as a misdemeanor action.

(9) If the court does not find probable cause to believe that a crime has been committed by the defendant, it shall order the defendant discharged forthwith.

(10) In multiple count complaints, the court shall order dismissed any count for which it finds there is no probable cause. The facts arising out of any count ordered dismissed shall not be the basis for a count in any information filed pursuant to ch. 971. Section 970.04, shall apply to any dismissed count.

(12) (a) In this subsection:

1. a. "Hospital" means any building, structure, institution or place devoted primarily to the maintenance and operation of facilities for the diagnosis, treatment of and medical or surgical care for 3 or more nonrelated individuals hereinafter designated patients, suffering from illness, disease, injury or disability, whether physical or mental, and including pregnancy and regularly making available at least clinical laboratory services, and diagnostic X-ray services and treatment facilities for surgery, or obstetrical care, or other definitive medical treatment.

b. "Hospital" may include, but not in limitation thereof by enumeration, related facilities such as outpatient facilities, nurses', interns' and residents' quarters, training facilities and central service facilities operated in connection with hospitals.

c. "Hospital" includes "special hospitals" or those hospital facilities that provide a limited type of medical or surgical care, including orthopedic hospitals, children's hospitals, critical access hospitals, mental hospitals, psychiatric hospitals or maternity hospitals.

2. "Local health department" includes:

a. A health department established by the Nation.

b. A county health department, including a county health department whose powers and duties are transferred to a county department of human services.

c. A city-county health department.

d. A village or town health department.

e. A multiple municipal local health department.

f. A city-city health department.

3. "Local health officer" means the health officer who is in charge of a local health department.

(b) At any preliminary examination, a report of one of the crime laboratory's, the state laboratory of hygiene's, a federal bureau of investigation laboratory's, a hospital laboratory's or a local health department's findings with reference to all or any part of the evidence submitted, certified as correct by the tribal prosecutor, the director of the state laboratory of hygiene, the director of the federal bureau of investigation, the chief hospital administrator, the local health officer or a person designated by any of them, shall, when offered by the Nation or the accused, be received as evidence of the facts and findings stated, if relevant. The expert who made the findings need not be called as a witness.

(13) Testimony may be received into the record of a preliminary examination by telephone or live audiovisual means if the proponent shows good cause or if the testimony is used to prove an element of an offense under s. 943.201 (2) or 943.203 (2).

(14) (a) In this subsection, "child" means a person who is younger than 16 years old when the preliminary examination commences.

1. At any preliminary examination, the court shall admit an audiovisual recording of a statement of a child upon making the findings that:

a. That the trial or hearing in which the recording is offered will commence: Before the child's 12th birthday; or

b. Before the child's 16th birthday and the interests of justice warrant its admission.

2. That the recording is accurate and free from excision, alteration and visual or audio distortion.

3. That the child's statement was made upon oath or affirmation or, if the child's developmental level is inappropriate for the administration of an oath or affirmation in the usual form, upon the child's understanding that false statements are punishable and of the importance of telling the truth.

4. That the time, content and circumstances of the statement provide indicia of its trustworthiness.

5. That admission of the statement will not unfairly surprise any party or deprive any party of a fair opportunity to meet allegations made in the statement.

(b) The child who makes the statement need not be called as a witness and, if the party who offers the statement does not call the child to testify, the court may not be ordered to undergo cross-examination.

970.032 Preliminary examination; juvenile under original adult court jurisdiction. If the court finds probable cause to believe that the juvenile has committed the violation under ss 939 to 948 or 961, of which he or she is accused, the court shall determine whether to retain jurisdiction or to transfer jurisdiction to the court assigned to exercise jurisdiction under the 4 HCC § 3, or Wisconsin chs. 48 and 938. The court shall retain jurisdiction unless the juvenile proves by a preponderance of the evidence all of the following:

(1) That, if convicted, the juvenile could not receive adequate treatment in the criminal justice system.

(2) That transferring jurisdiction to the court assigned to exercise jurisdiction under 4 HCC § 3, or Wisconsin chs. 48 and 938, would not depreciate the seriousness of the offense.

(3) That retaining jurisdiction is not necessary to deter the juvenile or other juveniles from committing the violation of which the juvenile is accused.

970.035 Preliminary examination; juvenile younger than 15 years old. Notwithstanding s. 970.03, if a preliminary examination under s. 970.03 is held regarding a juvenile who is alleged to have committed a crime under, ss. 939 to 948 or 961, which occurred prior to his or her 15th birthday, the court may bind the juvenile over for trial only if there is probable cause to believe that a crime under s. 940.03, 940.06, 940.225 (1) or (2), 940.305, 940.31 or 943.10 (2), 943.32 (2) or 961.41 (1) has been committed or that a crime that would constitute a felony under ss. 939 to

948 or 961 if committed by an adult has been committed at the request of or for the benefit of a criminal gang, as defined in s. 939.22 (9). If the court does not make any of those findings, the court shall order that the juvenile be discharged.

970.038 Preliminary examination; hearsay exception.

(1) Notwithstanding *Federal Rules of Evidence*, Rule 802, hearsay is admissible in a preliminary examination under ss. 970.03, 970.032, and 970.035.

(2) A court may base its finding of probable cause under ss. 970.03 (7) or (8), 970.032 (2), or 970.035 in whole or in part on hearsay admitted under sub. (1).

970.04 Second examination. If a preliminary examination has been had and the defendant has been discharged, the tribal prosecutor may file another complaint if the tribal prosecutor has or discovers additional evidence.

970.05 Testimony at preliminary examination; payment for transcript of testimony. (1) The testimony at the preliminary examination shall be transcribed if requested by the tribal prosecutor, the defendant or an attorney representing the defendant or ordered by the judge to whom the trial is assigned. The reporter shall file such transcript with the clerk within 10 days after it is requested.

(2) (a) When a transcript is requested under sub. (1) by someone other than a person specified in par. (b), the Court shall pay the cost of the original and any additional copies shall be paid for at the statutory rate by the party requesting the copies.

(b) When a transcript is requested under sub. (1) by a defendant who is not indigent under ch. 977 or by an attorney retained by a defendant who is not indigent under ch. 977, the defendant shall pay the cost of the original and any additional copies shall be paid for at the statutory rate by the party requesting the copies.