

Title 3 – Tribal Court
Chapter 3 – Rules of Criminal Procedure

Sec.

3-03.010	Title
3-03.020	Authority
3-03.030	Purpose and Scope
3-03.040	Definitions
3-03.050	Time Computation
3-03.060	Assistance from State and Federal Agencies
	<i>Subchapter I - Complaints</i>
3-03.070	Form of Complaint
3-03.080	Time of Complaint
3-03.090	Tolling of Time for Complaint
3-03.100	Amendments to Complaints
	<i>Subchapter II - Arrests, Summons and Warrants</i>
3-03.110	Cause for Arrests
3-03.120	Arrest Warrants or Summons Upon Complaint
3-03.130	Notification of Rights
	<i>Subchapter III - Search Warrants</i>
3-03.140	Who May Issue
3-03.150	Probable Cause
3-03.160	Content and Service
3-03.170	Effective Date of Search Warrant
3-03.180	Search and Seizure
3-03.190	Disposition of Seized Property
	<i>Subchapter IV - Probable Cause Hearing & Arraignments</i>
3-03.200	Bail or Bond - Release Before Trial
3-03.210	Procedure Following Warrantless Arrest
3-03.215	Right to Counsel
3-03.220	Commitment and Arraignment
3-03.230	Receipt of Plea
3-03.240	Copy of Complaint and/or Citation and Order on Release
3-03.250	Withdrawal of Guilty Plea
	<i>Subchapter V - Disclosure of Information and Discovery</i>
3-03.260	Prosecutor's Obligations
3-03.270	Defendant's Obligations
3-03.280	Additional Disclosures
3-03.290	Matters Not Subject to Disclosure
3-03.300	Regulation of Discovery
3-03.310	Depositions

	<i>Subchapter VI - Pretrial Proceedings</i>
3-03.320	Confession Procedure
3-03.330	Pretrial Motion Procedure
	<i>Subchapter VII - Speedy Trial</i>
3-03.340	Speedy and Public Trial
3-03.350	Length of Time
	<i>Subchapter VIII - Juries</i>
3-03.360	Right to Jury Trial Preserved
3-03.370	Demand/Waiver
3-03.380	Impaneling a Jury
3-03.390	Additional Names
3-03.400	Oath of Jurors
3-03.410	Jury Instructions
3-03.420	Jury Deliberations
	<i>Subchapter IX - Verdicts</i>
3-03.430	Proof Beyond a Reasonable Doubt
3-03.440	Jury Verdicts
	<i>Subchapter X - Post Verdict</i>
3-03.450	Motion for New Trial
3-03.460	Appeal Bond
	<i>Subchapter XI - Extradition</i>
3-03.470	Purpose
3-03.480	Definitions
3-03.490	Warrant or Probable Cause Requirement For Extradition Arrest
3-03.500	Procedure for All Extradition Arrests
3-03.510	Detention
3-03.520	Waiver of Extradition Hearing and Determination by Tribal Court
3-03.530	Extradition Hearing – Purpose
	<i>Subchapter XII - Habeas Corpus</i>
3-03.540	Writ of Habeas Corpus
3-03.550	Writ for Appealing an Order of Bail
3-03.560	Application for Writ
3-03.570	Content of Writ
3-03.580	Service of the Writ
3-03.590	Return - What to Contain
3-03.600	Hearing on Return
3-03.610	Judgment Regarding Custody

	<i>Subchapter XIII - Repealer, Severability & Effective Date</i>
3-03.620	Repealer
3-03.630	Severability
3-03.640	Effective Date
<i>Appendix I</i>	Waiver of Right to Extradition Hearing
<i>Annotations</i>	

Legislative History

Enacted:

Rules of Criminal Procedure, Ord. 204 (11/24/03), BIA (11/28/03).

Amended:

Ordinance 410 Amending STC Title 3, Chapter 3 (10/6/20).

Ordinance 408 Amending STC Title 3, Chapters 1 & 3, STC Title 4, Chapters 1 & 2 and STC Title 7, Chapters 11 & 12 (9/15/20).

Amending Ordinance 204, STC 3-03.090, 3-03.130, 3-03.180, 3-03.215 and 3-03.350, Ord. 225 (2/4/05), BIA (3/3/05).

Amending Ordinance 204, STC 3-03.640, Effective Date of Title 3, Chapter 3, Ord. 218 (2/5/04), BIA (3/1/04).

Repealed or Superseded:

Amending Ordinance 89, Ord. 149 (10/2/01), BIA (11/23/01).

Amending Rules for Extradition, Ord. 147 (7/10/01), BIA (7/20/01).

Amending Time for Commencement of Trial & Receipt of Plea, Ord. 112 (10/3/95).

Creating Rules of Criminal Procedure, Ord. 89 (2/6/92), BIA (2/18/92) (“superseding and replacing any conflicting provisions of all prior criminal procedure ordinances”).

Creating Amended Bail Schedule, Ord. 79 (6/17/91), Enacting Res. 91-6-59 and 91-6-60 (6/17/91).

Establishing Criminal Procedure Code, Ord. 38 (6/7/77), BIA (no action taken),

Swinomish Law and Order Code, Ord. 32 (3/4/75), BIA (5/30/75).

The Swinomish Law and Order Code, Ord. 7 (6/1/38), BIA (3/24/38).

Adopting Dept. of Interior Regulations, Ord. 1 (undated).

Noted:

This note contains general provisions from Ord. 147 (7/10/01):

Section 1. Title

This Ordinance amends Ordinance 89 and Title 4 of the Swinomish Tribal Code and which is known and cited as the Swinomish Criminal Procedure Code.

Section 2. Authority

This Ordinance is adopted pursuant to authority provided by Article VI, Sections l(k) , l(l) , l(o) and l(r) of the Swinomish Constitution

Section 3. Purpose

The purpose of this Ordinance is to repeal and replace Chapter 4-12 of the Swinomish Tribal Code which provides for the arrest and extradition of fugitives from other tribes and other foreign jurisdictions.

Section 4. New Chapter 4-12

The provisions of Chapter 4-12 that were previously adopted as part of Ordinance 89 are hereby repealed and the following provisions of new Chapter 4-12 are hereby adopted in their place.

3-03.010 Title.

This Chapter shall be known and may be cited as the “Swinomish Rules of Criminal Procedure.”

[History] Ord. 204 (11/24/03); Ord. 89 (2/6/92).

3-03.020 Authority.

This Chapter is enacted pursuant to authority provided by Article VI, Section 1(b), (i), (k), (l), (o), (p), (r) and (s), and Article VI, Section 3 of the Swinomish Constitution.

[History] Ord. 204 (11/24/03).

3-03.030 Purpose and Scope.

The purpose of this Chapter is to provide rules of procedure to govern the prosecution of offenses in Tribal Court, to support and expedite the truth finding mission at trial and to guarantee defendants those rights deemed essential to an accurate determination of guilt. These rules shall be construed in a manner that promotes justice, fairness and the decision of cases on the merits.

[History] Ord. 204 (11/24/03); Ord. 89 (2/6/92).

3-03.040 Definitions.

Unless specifically stated elsewhere in this Chapter, the meaning of the terms used in this Chapter shall be as follows:

- (A) **“Judge”** means the judge of the Swinomish Tribal Court.
- (B) **“Judicial Officer”** means an officer of the Court appointed by the Swinomish Senate to carry out designated duties of the Court.
- (C) **“Person”** means any natural person, corporation, trust, unincorporated association, partnership, and federal, state or local governments, agencies or subdivisions thereof.

- (D) **“Police,”** and **“tribal police”** means qualified tribal police personnel or police officers of the Bureau of Indian Affairs as established in Title 2, Chapter 8 of the Swinomish Tribal Code.
- (E) **“Reservation”** means all the lands and water within the exterior boundaries of the Swinomish Indian Reservation.
- (F) **“Senate”** means the Swinomish Indian Senate, the governing body of the Swinomish Indian Tribal Community.
- (G) **“Tribe”** or **“Tribal Community”** means the Swinomish Indian Tribal Community, a federally recognized Indian Tribe organized pursuant to Section Sixteen of the Indian Reorganization Act of 1934.
- (H) **“Tribal Court”** or **“Court”** means the Swinomish Tribal Court.

[History] Ord. 204 (11/24/03).

3-03.050 Time Computation.

In computing any period of time prescribed or allowed by this Chapter, or by rules of the court, the day of the act, event or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday or tribal holiday. When the period of time prescribed or allowed is less than seven (7) days, intermediate Saturdays, Sundays and tribal holidays shall not be counted in the computation.

[History] Ord. 204 (11/24/03); Ord. 89 (2/6/92).

3-03.060 Assistance from State and Federal Agencies.

The Court may seek assistance from employees of the Bureau of Indian Affairs, State Department of Social and Health Services, and any other state or federal agency necessary in the presentation of facts in a case and the determination of proper treatment of individual offenders.

[History] Ord. 204 (11/24/03); Ord. 89 (2/6/92).

Subchapter I – Complaints

3-03.070 Filing and Form of Complaint.

- (A) Prosecution of violations of the Swinomish Criminal Code shall be by complaint or citation. No complaint or citation filed in the Tribal Court shall be valid unless it

bears the signature of the tribal prosecutor or the complaining witness or the complainant, and is witnessed by a duly qualified judge of the Court, the Tribe's judicial officer, or contains a declaration that the allegations are made under penalty of perjury.

- (B) A complaint or citation form shall be provided. The form shall also include the following:
- (1) A written statement by the complainant or complaining witness describing in ordinary language the nature of the offense committed, including the time and place as nearly as may be ascertained;
 - (2) The name or description of the person(s) alleged to have committed the offense;
 - (3) The section of the Criminal Code, or other law or regulation allegedly violated; and
 - (4) The alleged grounds for Tribal Court jurisdiction.

[History] Ord. 204 (11/24/03); Ord. 89 (2/6/92).

3-03.080 Time of Complaint.

No complaint or citation shall be filed charging the commission of any offense unless the offense charged was committed within the period of two (2) years prior to the date of the complaint, unless specifically stated otherwise in the Swinomish Criminal Code or laws of the Tribe.

[History] Ord. 204 (11/24/03); Ord. 89 (2/6/92).

3-03.090 Tolling of Time for Complaint.

If the person accused of an offense intentionally absents himself or herself from the jurisdiction of the Tribal Court, the time within which filing of the complaint or citation is to be made is tolled for the duration of the time that the individual absents himself or herself from the jurisdiction of the Court.

[History] Ord. 225 (2/4/05); Ord. 204 (11/24/03); Ord. 89 (2/6/92).

3-03.100 Amendments to Complaints.

The complaining witness or tribal prosecutor may request that the complaint or citation be amended up to one (1) week before trial without the defendant's consent, or at any time if the defendant consents. The Tribal Court may refuse to allow an amendment requested by the

complainant if the defendant objects and the Court finds that allowing the amendment would cause unfair prejudice to the defendant.

[History] Ord. 408 (9/15/20); Ord. 204 (11/24/03); Ord. 89 (2/6/92).

Subchapter II -- Arrests, Summons and Warrants

3-03.110 Cause for Arrests.

- (A) No Swinomish tribal police officer, deputy, reserve officer, or other person properly empowered to function in a law enforcement capacity on the Reservation shall make a custodial arrest of any person for any offense defined by Title 4, Criminal Code, Title 5, Criminal Traffic Code or by other applicable law or custom unless:
- (1) He or she has a warrant commanding the arrest of a suspect;
 - (2) The offense occurs in the presence of the arresting officer;
 - (3) The officer has probable cause to believe that the person arrested has committed an offense identified in the Swinomish Criminal Code or Swinomish Criminal Traffic Code as a Class A offense;
 - (4) The officer has probable cause to believe the person is committing or has committed an assault on a family or household member as defined in Section 7-11.040 or any offense defined in STC 4-02.240;
 - (5) The officer is expressly authorized by the Swinomish Tribal Code or other applicable law to make a warrantless arrest;
 - (6) The officer has probable cause to believe the person has knowledge of an order issued by a court restraining or otherwise directing a person to act and the person has violated the terms of that order;
 - (7) The officer has probable cause to believe the person has committed or is committing any act of indecent exposure as defined in Title 4, Criminal Code;
 - (8) The officer has probable cause to believe that the person has committed or is committing a violation of any of the following criminal traffic violations:
 - (a) Failure to fulfill duty upon striking a vehicle pursuant to Sections 5-02.140 and 5-02.150;
 - (b) Reckless and/or negligent driving pursuant to Sections 5-02.100 and 5-02.110;

- (c) Relating to persons under the influence of intoxicating liquor or drugs pursuant to Sections 5-02.180, 5-02.190, and 5-02.200; or
 - (d) Driving a motor vehicle without being properly licensed pursuant to Section 5-02.170.
- (9) An officer may act upon the request of a law enforcement officer in whose presence a traffic infraction was committed, to stop, detain, arrest, or issue a notice of traffic infraction to the driver who is believed to have committed the infraction. The request by the witnessing officer shall give an officer the authority to take appropriate action under the Swinomish Tribal Code;
- (10) The officer has probable cause to believe that the person arrested has committed an offense identified in Title 4, Criminal Code, as a Class B or Class C Offense involving physical harm or threats of harm to any person or property or the unlawful taking of property; or involving the acquisition, possession, or consumption of alcohol or cannabis by a person under the age of twenty-one (21) years, or involving criminal trespass;
- (11) The officer has probable cause to believe that a person illegally possesses or illegally has possessed a firearm or other dangerous weapon as defined in Section 4-01.040; or
- (12) The officer has probable cause to believe the person has committed an offense identified in Title 4, Criminal Code, or Title 5 Criminal Traffic Code as a Class B or Class C offense and exigent circumstances require an immediate warrantless arrest in order to prevent the person from:
- (a) fleeing the jurisdiction or concealing himself or herself to avoid arrest;
 - (b) destroying or concealing evidence of the commission of an offense;
 - (c) injuring another person; or
 - (d) damaging property belonging to another.
- (B) A resident of the Swinomish Reservation may make a citizen's arrest for an offense identified in Title 4, Criminal Code, committed by a tribal member that occurs in his or her presence.
- (C) If arrested pursuant to a warrant, the accused shall receive a copy of the warrant at the time of the arrest, or as soon thereafter as is reasonably possible.

[History] Ord. 408 (9/15/20); Ord. 204 (11/24/03); Ord. 89 (2/6/92).

3-03.120 Arrest Warrants or Summons Upon Complaint.

- (A) **Issuance of Warrant.** Upon written complaint or affidavit, under oath, before a tribal judge or judicial officer, charging any person of a crime of which the court has jurisdiction, a warrant may be issued causing the individual so charged to be brought before the Tribal Court for trial.
- (B) An arrest warrant shall contain the following:
- (1) Name or description and address, if known, of the person to be arrested;
 - (2) Date of issuance of warrant;
 - (3) Description of the offense being charged, including tribal law allegedly violated;
 - (4) Statement that the Court has found probable cause exists to believe the defendant has committed the charged offense;
 - (5) Signature of issuing judge or judicial officer; and
 - (6) Bail amount.
- (C) The judge or judicial officer shall issue an arrest warrant, or summons in lieu of a warrant, only upon a showing of probable cause in sworn written statements. The judge or judicial officer shall deny the issuance of an arrest warrant if it is found by the Court that there is not probable cause to believe that the offense charged has been committed by the named accused.
- (D) **Issuance of Summons in Lieu of Warrant.** If a complaint or citation is filed pursuant to Subchapter I, the Court may direct the clerk to issue a summons commanding the defendant to appear before the court at a specified time and place.
- (1) The Court shall issue a summons instead of a warrant for arrest unless it finds reasonable cause to believe that the defendant will not appear in response to a summons, or that arrest is necessary to prevent bodily harm to the accused or another, in which case it may issue a warrant.
 - (2) The summons shall be in writing and contain the same information as the warrant. The summons shall inform the defendant that failure to appear may result in the issuance of a warrant for his or her arrest.
- (E) No arrest warrant or summons in lieu of warrant shall be valid unless it bears the signature of a Swinomish Tribal Court judge or judicial officer.

- (F) Warrants shall be served by the Swinomish tribal police or designee thereof. Unexecuted warrants may be canceled by any Swinomish Tribal Court judge or judicial officer. Summons may be served in the same manner as warrants for arrest or may be delivered by the court mailing the same, postage prepaid, to the defendant at his or her last known address.
- (G) A warrant issued on charges that include a Class A or a Class B offense expires after two years, and a warrant on all other matters expires after one year. Prior to the date of expiry, the Court, upon its own motion, may renew the warrant, or the Tribal Prosecutor may request renewal of the warrant from the Court.

[History] Ord. 410 (10/6/20); Ord. 204 (11/24/03); Ord. 89 (2/6/92).

3-03.130 Notification of Rights.

At the time of arrest the suspect shall be advised of the following rights:

- (A) That he or she has a right to remain silent;
- (B) That any statements made by him or her may be used against him or her in court;
- (C) That he or she has the right to the presence of counsel, and that if he or she cannot afford an attorney one will be appointed for him or her prior to any questioning if he or she so desires; and
- (D) That he or she may assert these rights at any time.

[History] Ord. 225 (2/4/05); Ord. 204 (11/24/03); Ord. 89 (2/6/92).

Subchapter III -- Search Warrants

3-03.140 Who May Issue.

A judge or judicial officer of the Swinomish Tribal Court shall have the authority to issue warrants for search and seizure of the premises and property of any person under the jurisdiction of the Court.

[History] Ord. 204 (11/24/03); Ord. 89 (2/6/92).

3-03.150 Probable Cause to Search.

- (A) A warrant may be issued under this rule to search for and seize any:
 - (1) evidence of a crime;

- (2) contraband, the fruits of crime, or things otherwise criminally possessed;
 - (3) weapons or other things by means of which a crime has been committed or reasonably appears to be committed; or
 - (4) person for whose arrest there is probable cause, or who is unlawfully restrained.
- (B) The judge or judicial officer, when satisfied that probable cause exists, may issue a search warrant to search for and seize evidence or contraband of any person under the jurisdiction of the Court. The judge or judicial officer shall determine the existence of probable cause upon written complaint or citation under oath.
- (C) The judge or judicial officer may also orally question the officer requesting the search warrant.

[History] Ord. 204 (11/24/03); Ord. 89 (2/6/92).

3-03.160 Content and Service of Search Warrant.

- (A) A valid warrant for search and seizure must contain the name or adequate description of the person or property to be searched and the article(s) of property to be seized. Service of warrants of search and seizure maybe made only by members of the Swinomish tribal police or designees thereof.
- (B) A copy of the warrant shall be served on the property owner at the time of executing the search if the owner is present. If no such person is present a copy of the warrant shall be posted at the location searched and shall be served upon the owner as soon as possible after the search.

[History] Ord. 204 (11/24/03); Ord. 89 (2/6/92).

3-03.170 Effective Date of Search Warrant.

A warrant for search and seizure is valid for ten (10) days from the date and time of issuance.

[History] Ord. 204 (11/24/03); Ord. 89 (2/6/92).

3-03.180 Search and Seizure.

The Swinomish Tribe shall not violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized, consistent with Section 3-03.150.

[History] Ord. 225 (2/4/05); Ord. 204 (11/24/03); Ord. 89 (2/6/92).

3-03.190 Disposition of Seized Property.

The tribal police officer seizing property shall make an inventory of all property seized by warrant or otherwise and impound said property. Copies of the inventory shall be given to the person from whom the property was taken at the time it is seized. If no such person is present, the police shall post a copy of the inventory at the premises searched. The police will promptly make return of any warrant to the Court and file a copy of the inventory with the clerk of the court. Impounded property may, upon motion of the owner of the property, be released by order of a judge of the Swinomish Tribal Court, or if none is available, by the judicial officer. The Court may return the property on the grounds that the property was illegally seized, or does not appear relevant or reasonably calculated to lead to the discovery of relevant evidence, and the person is lawfully entitled to possession of the property.

[History] Ord. 204 (11/24/03); Ord. 89 (2/6/92).

Subchapter IV – Probable Cause Hearing & Arraignments

3-03.200 Bail or Bond - Release Before Trial.

- (A) **Bail.** Any person charged with an offense may be admitted to bail. Bail may be made by cash, corporate surety bond or by two (2) reliable members of the Swinomish Indian Tribal Community or other residents of the Reservation who shall appear before a Tribal Court judge or judicial officer and execute an agreement guaranteeing bail. In no case shall bail be set for more than five thousand dollars (\$5,000.00) per offense.
- (B) **Bail Schedule.** The judge or judicial officer may, at his or her discretion, set a bail schedule for the use of tribal police.
- (C) **Conditions of Release.** The tribal judge or judicial officer may, at his or her discretion, impose conditions upon the person's release in addition to or instead of the posting of bail or bond to ensure the appearance of the defendant and protect the safety of the community or of any person. The Court may authorize the release of the person on his or her personal recognizance without posting bail or bond.
- (D) **Denial of Release.** The judge may deny a person release on bail if:
 - (1) it appears reasonably certain that the person will pose a serious threat to the safety and well-being of the Reservation, or of others, if released; or
 - (2) if there is a substantial likelihood that the person poses a flight risk.
- (E) **Release of Domestic Violence Offenders.** Notwithstanding other provisions of this Chapter, any person arrested for a crime involving domestic violence or a violation of a domestic violence restraining order shall not be released on bond or on his or her

own recognizance for a period of twenty-four (24) hours after the arrest is made. The Court may enter a “Standing No Contact Order” to be issued by the Swinomish tribal police to all persons arrested and held pursuant to this Subsection.

[History] Ord. 408_(9/15/20); Ord. 204 (11/24/03); Ord. 89 (2/6/92).

3-03.210 Procedure Following Warrantless Arrest.

- (A) **Probable Cause Determination.** A person who is arrested without a warrant shall have a judicial determination of probable cause no later than forty-eight (48) hours following the person’s arrest.
- (B) **How Determined.** The Court shall determine probable cause on evidence presented by a police officer or prosecuting authority in the same manner as provided for a warrant for arrest. The evidence shall be preserved and may consist of an electronically recorded telephonic statement.
- (C) **Court Days.** For the purpose of Subsection (A), Saturday, Sunday and holidays may be considered judicial days.

[History] Ord. 204 (11/24/03).

3-03.215 Right to Counsel.

In all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his or her defense. The Swinomish Indian Tribal Community shall bear the cost of hiring and retaining appointed counsel for any indigent individual that does not hire private counsel.

[History] Ord. 408 (9/15/20); Ord. 225 (2/4/05)

3-03.220 Commitment and Arraignment or Bail Review.

- (A) **Time for Appearance.** No person shall be detained, jailed, imprisoned or subject to conditions of release under this Chapter for a period longer than the next judicial working day following arrest without appearing before the court or a judicial officer for arraignment or bail review hearing or being released from custody. For purposes of this chapter, “next judicial working day” shall mean a Swinomish Tribal Court day; provided that, in no case shall arraignment or a Bail Review Hearing be held more than seventy-two (72) hours, excluding weekends and holidays, after an accused has been arrested and placed in custody.
- (B) **Procedure for Arraignment.** At the arraignment, the following procedure shall be observed:
 - (1) The defendant shall have the complaint read to him or her;

- (2) The judge shall explain to the defendant the offense(s) charged and the penalties prescribed by law and shall determine that the defendant understands the nature of the charge and possible maximum penalties;
- (3) The judge shall advise the defendant of his or her right to remain silent, the right to counsel, and the right to jury trial; and
- (4) The judge shall inform the defendant of his or her right to plead not guilty, guilty or no contest and ask the defendant if he or she is ready to plead. The plea, if any, is to be recorded by the clerk of the court. If the defendant does not choose to plead, his or her failure to do so is to be interpreted and recorded as a plea of not guilty. The defendant shall also be informed that he or she may change his or her plea in an appearance before the Court at any time prior to trial or sentencing.

[History] Ord. 408 (9/15/20); Ord. 204 (11/24/03); Ord. 89 (2/6/92).

3-03.230 Receipt of Plea.

- (A) If the accused pleads “not guilty,” or refuses to plead, the judge or judicial officer shall inform the accused of the next court appearance date and shall set conditions for bail or other release prior to trial.
- (B) If the accused pleads “guilty”, the judge or judicial officer shall determine that the plea is knowing and voluntary and that the accused understands the consequences of the plea. The judge or judicial officer may then impose a sentence or defer sentencing for a reasonable time in order to obtain any information deemed necessary for the imposition of a just sentence. The accused shall be afforded an opportunity to inform the court of facts in mitigation of the sentence.

[History] Ord. 408_(9/15/20); Ord. 204 (11/24/03); Ord. 112 (10/3/95); Ord. 89 (2/6/92).

3-03.240 Copy of Complaint and/or Citation and Order on Release.

At arraignment, the defendant shall be given:

- (A) A copy of the Tribal Court’s order, setting forth time and date of the next court appearance and the condition(s) of release, if any, the penalties applicable to violations of the conditions of release, if any; and
- (B) A copy of the complaint and/or citation.

[History] Ord. 408_(9/15/20); Ord. 204 (11/24/03); Ord. 89 (2/6/92).

3-03.250 Withdrawal of Guilty Plea.

- (A) A guilty plea entered in compliance with this Chapter is presumed valid. A defendant may move for withdrawal of his or her guilty plea upon a showing either that his or her rights have been violated or that the plea was made involuntarily, unknowingly or unintelligently.
- (B) Prior to sentencing the Tribal Court may grant a motion for withdrawal of a guilty plea if it finds that justice so requires. Extraordinary circumstances must be present to withdraw a guilty plea after sentencing.

[History] Ord. 408 (9/15/20); Ord. 204 (11/24/03); Ord. 89 (2/6/92).

Subchapter V – Disclosure of Information and Discovery.

3-03.260 Prosecutor's Obligations.

- (A) Except as otherwise provided by protective orders or as to matters not subject to disclosure, the prosecuting attorney shall, upon the request of the defendant and within twenty days of such request, disclose to the defendant the following material and information:
 - (1) the names and addresses of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial, together with any written or recorded statements and the substance of any oral statements of such witnesses;
 - (2) written or recorded statements and the substance of any oral statements made by the defendant, or made by a codefendant if the trial is to be a joint one;
 - (3) police reports, and any reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and scientific tests, experiments, or comparisons;
 - (4) any books, papers, documents, photographs, or tangible objects, which the prosecuting attorney intends to use in the hearing or trial or which were obtained from or belonged to the defendant; and
 - (5) any record or prior criminal convictions known to the prosecuting attorney of the defendant and of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial.
 - (6) any electronic surveillance, including wiretapping, of the defendant's premises or conversations to which the defendant was a party and any record thereof;
 - (7) within twenty days from the date compiled, any expert witnesses whom the prosecuting attorney will call at the hearing or trial, the subject of their

testimony, and any reports they have submitted to the prosecuting attorney;
and

- (8) any information which the prosecuting attorney has indicating entrapment of the defendant.
- (B) Except as is otherwise provided as to protective orders, the prosecuting attorney shall disclose to defendant's counsel any material or information within the prosecuting attorney's knowledge which tends to negate defendant's guilt as to the offense charged.
- (C) The prosecuting attorney's obligation under this Section extends to material and information within the knowledge, possession or control of members of the prosecuting attorney's staff and the Swinomish Police Department.

[History] Ord. 408 (9/15/20); Ord. 204 (11/24/03).

3-03.270 Defendant's Obligations.

- (A) Except as is otherwise provided as to matters not subject to disclosure and protective orders, the defendant shall, upon request of the prosecuting attorney and within twenty days of such request, disclose to the prosecuting attorney the following material and information within the defendant's control:
 - (1) the names and addresses of persons whom the defendant intends to call as witnesses at the hearing or trial; and
 - (2) written or recorded statements and the substance of any oral statements of such witness.
- (B) Notwithstanding the initiation of judicial proceedings, and subject to limitations in the Swinomish Constitution and the Indian Civil Rights Act, the Court on motion of the prosecuting attorney or the defendant, may require or allow the defendant to:
 - (1) appear in a lineup;
 - (2) speak for identification by a witness to an offense;
 - (3) be fingerprinted;
 - (4) pose for photographs not involving reenactment of the crime charged;
 - (5) try on articles of clothing;

- (6) permit the taking of samples of or from the defendant's blood, hair, and other materials of the defendant's body including materials under the defendant's fingernails which involve no unreasonable intrusion thereof;
 - (7) provide specimens of the defendant's handwriting;
 - (8) submit to a reasonable physical, medical, or psychiatric inspection or examination;
 - (9) state whether there is any claim of incompetency to stand trial;
 - (10) allow inspection of physical or documentary evidence in defendant's possession;
 - (11) state whether the defendant's prior convictions will be stipulated or need to be proved;
 - (12) state whether or not the defendant will rely on an alibi and, if so, furnish a list of alibi witnesses and their addresses;
 - (13) state whether or not the defendant will rely on a defense of insanity at the time of the offense; and
 - (14) state the general nature of the defense.
- (C) Provisions may be made for appearance for the foregoing purposes in an order for pretrial release.

[History] Ord. 408_(9/15/20); Ord. 204 (11/24/03).

3-03.280 Additional Disclosures.

- (A) Except as is otherwise provided as to matters not subject to disclosure, the prosecuting attorney shall, upon request of the defendant, disclose any relevant material and information regarding:
- (1) specified searches and seizures;
 - (2) the acquisition of specified statements from the defendant; and
 - (3) the relationship, if any, of specified persons to the prosecuting authority.
- (B) **Material Held by Others.** Upon defendant's request and a finding by the Court that material or information in the knowledge, possession or control of other persons is discoverable, the Court shall issue suitable subpoenas or orders to cause such material

to be made available to the defendant if such material or persons are subject to the jurisdiction of the Court.

(C) **Discretionary Disclosures.**

(1) Upon a showing of materiality to the preparation of the defense, and if the request is reasonable, the Court in its discretion may require disclosure to the defendant of the relevant material and information covered by Sections 3-03.260 and 3-03.280.

(2) The Court may condition or deny disclosure authorized by this Section if it finds that there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals or unnecessary annoyance or embarrassment, resulting from such disclosure, which outweigh any usefulness of the disclosure to the defendant.

(D) **Medical and Scientific Reports.** Subject to limitations found in the Swinomish Constitution or the Indian Civil Rights Act, the Court may require the defendant to disclose any reports or results, or testimony relative thereto, of physical or mental examinations or of scientific tests, experiments or comparisons, or any other reports or statements of experts which the defendant intends to use at a hearing or trial.

[History] Ord. 408_(9/15/20); Ord. 204 (11/24/03).

3-03.290 Matters Not Subject to Disclosure.

(A) **Work Product.** Disclosure shall not be required of legal research or of records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of investigating or prosecuting agencies except as to material discoverable under Section 3-03.260.

(B) **Informants.** Disclosure of an informant's identity shall not be required where the informant's identity is a prosecution secret and a failure to disclose will not infringe upon the rights of the defendant. Disclosure of the identity of witnesses to be produced at a hearing or trial shall not be denied.

[History] Ord. 204 (11/24/03).

3-03.300 Regulation of Discovery.

(A) **Investigations Not to Be Impeded.** Except as is otherwise provided with respect to protective orders and matters not subject to disclosure, neither the counsel for the parties nor other prosecution or defense personnel shall advise persons other than the defendant having relevant material or information to refrain from discussing the case with opposing counsel or showing opposing counsel any relevant material, nor shall they otherwise impede opposing counsel's investigation of the case.

- (B) **Continuing Duty to Disclose.** If, after compliance with these rules or orders pursuant thereto, a party discovers additional material or information which is subject to disclosure, the party shall promptly notify the other party or their counsel of the existence of such additional material, and if the additional material or information is discovered during trial, the court shall also be notified.
- (C) **Custody of Materials.** Any materials furnished to an attorney pursuant to these rules shall remain in the exclusive custody of the attorney and be used only for the purposes of conducting the party's side of the case, and shall be subject to such other terms and conditions as the Court may provide. The defendant is entitled to a copy of any discovery documents provided to counsel, provided that the Court may order redaction of personal or geographic information of the victim prior to disclosure to the defendant.
- (D) **Protective Orders.** Upon a showing of cause, the Court may at any time order that specified disclosure be restricted or deferred, or make such other order as is appropriate, provided that all material and information to which a party is entitled must be disclosed in time to permit the party's counsel to make beneficial use thereof.
- (E) **Excision.** When some parts of certain material are discoverable under this rule, and other parts are not discoverable, as much of the material shall be disclosed as is consistent with this rule. Material excised pursuant to judicial order shall be sealed and preserved in the records of the Court, to be made available to the appellate court in the event of an appeal.
- (F) ***In Camera* Proceedings.** Upon request of any person, the Court may permit any showing of cause for denial or regulation of disclosure, or portion of such showing, to be made in camera. A record shall be made of such proceedings. If the Court enters an order granting relief following a showing *in camera*, the entire record of such showing shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal.
- (G) **Sanctions.**
- (1) If at any time during the course of the proceedings it is brought to the attention of the Court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the Court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, dismiss the action or enter such other order as it deems just under the circumstances.
 - (2) Willful violation by counsel of an applicable discovery rule or an order issued pursuant thereto may subject counsel to appropriate sanctions by the Court.

[History] Ord. 408 (9/15/20); Ord. 204 (11/24/03).

3-03.310 Depositions.

- (A) **When Taken.** The Court at any time after the filing of complaint or citation may upon motion of a party order that a witness's testimony be taken by deposition and that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place upon a showing that a prospective witness:
- (1) may be unable to attend or prevented from attending a trial or hearing; or
 - (2) is a material witness and refuses to discuss the case with either counsel and it is necessary to take his or her deposition in order to prevent a failure of justice.
- (B) **Notice of Taking.** The party at whose instance a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the Court for cause shown may extend or shorten the time and may change the place of taking.
- (C) **How Taken.** A deposition shall be taken in the manner provided in civil actions. No deposition shall be used in evidence against any defendant who has not had notice of and an opportunity to participate in or be present at the taking thereof through counsel.
- (D) **Use.** Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as witness, or as substantive evidence under circumstances permitted by the rules of evidence utilized by the Court.
- (E) **Objections to Admissibility.** Objections to receiving in evidence a deposition or part thereof may be made as provided in civil actions.

[History] Ord. 408 (9/15/20); Ord. 204 (11/24/03).

Subchapter VI – Pretrial Proceedings.

3-03.320 Confession Procedure.

- (A) **Provision for Hearing.** When an accused's statement is to be offered in evidence, the accused may request the court conduct a hearing for the purpose of determining whether the statement is admissible.
- (B) **Defendant's Rights at Hearing.** At the hearing, the Court shall ascertain whether the defendant has been informed that:

- (1) He or she may, but need not, testify at the hearing on the circumstances surrounding the statement;
 - (2) If the defendant does testify at the hearing, he or she will be subject to cross examination with respect to the circumstances surrounding the statement and with respect to his or her credibility;
 - (3) If the defendant does testify at the hearing, he or she does not by so testifying waive the right to remain silent during the trial; and
 - (4) If the defendant does testify at the hearing, neither this fact nor his or her testimony at the hearing shall be mentioned to the jury unless he or she testifies concerning the statement at trial.
- (C) **Duty of Court to Make Record.** After the hearing, the Court shall state its findings of fact and conclusions of law as to the admissibility or inadmissibility of the statement.
- (D) **Rights of Defendant When Statement is Ruled Admissible.** If the Court finds that the statement is admissible, and it is offered in evidence:
- (1) The defense may offer evidence or cross-examine the witness with respect to the statement without waiving an objection to the admissibility of the statement;
 - (2) Unless the defendant testifies at the trial concerning the statement, no reference shall be made to the fact, if it be so, that the defendant testified at the preliminary hearing on the admissibility of the statement; and
 - (3) If the defendant becomes a witness on this issue, he or she shall be subject to cross examination to the same extent as would any other witness.

[History] Ord. 204 (11/24/03).

3-03.330 Pretrial Motion Procedure

- (A) **Pleadings.** All pretrial motions, including motions to suppress physical, oral or identification evidence other than motions pursuant to rule, shall be in writing supported by an affidavit or declaration setting forth the facts the moving party anticipates will be elicited at a hearing. If there are no disputed facts, the Court shall determine whether an evidentiary hearing is required. If the Court determines that no evidentiary hearing is required, the Court shall set forth its reasons for not conducting an evidentiary hearing.

(B) **Decision.** The Court shall state findings of fact and conclusions of law.

[History] Ord. 204 (11/24/03).

Subchapter VII -- Speedy Trial

3-03.340 Speedy and Public Trial.

The Swinomish Tribal Court shall ensure that each person charged with an offense under the Swinomish Tribal Code receives a speedy and public trial.

[History] Ord. 204 (11/24/03); Ord. 89 (2/6/92).

3-03.350 Length of Time.

- (A) Trial must be held not less than seven (7) days or more than sixty (60) days from the date of arraignment if the accused is in custody, and not more than ninety (90) days from the date of arraignment if the accused is not in custody, unless a longer period is requested or consented to by the accused.
- (B) The court on its own motion may continue or postpone the case when required in the administration of justice and when the defendant will not be substantially prejudiced by the delay.
- (C) If an accused fails to appear for any proceeding at which the defendant's presence was required, a new commencement date shall be established on the date of the defendant's next appearance and the elapsed time shall be reset to zero.

[History] Ord. 225 (2/4/05); Ord. 204 (11/24/03); Ord. 112 (10/3/95); Ord. 89 (2/6/92).

Subchapter VIII – Juries

3-03.360 Right to Jury Trial Preserved.

The right to a trial by jury shall be preserved inviolate to the defendant.

[History] Ord. 204 (11/24/03); Ord. 89 (2/6/92).

3-03.370 Demand/Waiver.

- (A) When trial by jury has been demanded the action shall be designated upon the Court calendar as a jury action.
- (B) The trial of all issues shall be by jury unless:

- (1) The defendant by written stipulation filed with the Court or by an oral stipulation made in open court and entered in the record, waives the right to a jury trial. Prior to accepting the waiver, the judge shall inform the defendant of his or her right to a jury trial and the judge shall determine if the defendant's waiver is knowing, voluntary and intelligent;
 - (2) The defendant is accused of a crime that is not punishable by imprisonment; or
 - (3) The prosecutor, prior to plea, informs the defendant that there shall be no prison time imposed in the event of a successful prosecution.
- (C) If the defendant waives the right to a jury, the trial shall be by the Tribal Court judge.

[History] Ord. 204 (11/24/03); Ord. 89 (2/6/92).

3-03.380 Impaneling a Jury.

- (A) **Jury Selection.** On the day of the trial, a six member jury shall be selected as provided in Section 3-01.190 of this Title or as otherwise provided by statute or Rule of Court.
- (B) Challenges of Jurors.
- (1) **Challenge for Cause.** On the day scheduled for impaneling a jury, the prospective jurors shall be collectively assembled and the parties shall then be permitted to alternately question the jurors as to their impartiality and fairness. The judge may excuse any juror if, in his or her judgment, that juror would not be completely fair and impartial. If the judge does not excuse the juror, any party may challenge the juror for cause.
 - (2) **Peremptory Challenges.** The parties may exercise peremptory challenges. A peremptory challenge is an objection to a juror for which there is no reason given, but upon which the Court shall exclude the juror. Each of the parties shall be entitled to three (3) peremptory challenges starting with the complainant and alternating until each party has exercised up to three (3) peremptory challenges.
- (C) **Alternate Jurors.** The Court may direct that not more than four (4) jurors in addition to the regular jury be called and impaneled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are disqualified or found to be unable to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is

entitled to one (1) peremptory challenge in addition to those otherwise allowed by law if one (1) or two (2) alternate jurors are to be impaneled, two (2) peremptory challenges if three (3) or four (4) alternate jurors are to be impaneled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by law shall not be used against an alternate juror.

[History] Ord. 408 (9/15/20); Ord. 204 (11/24/03); Ord. 89 (2/6/92).

3-03.390 Additional Names.

If for any reason the number of jurors drawn for service shall not be sufficient to impanel a jury, the Tribal Court judge may direct the random selection and summoning from the master jury list such additional names as he or she may consider necessary.

[History] Ord. 204 (11/24/03); Ord. 89 (2/6/92).

3-03.400 Oath of Jurors.

The jury shall be sworn or affirmed well and truly to try the issue between the prosecuting authority and the defendant, according to the evidence and instructions by the Court.

[History] Ord. 204 (11/24/03).

3-03.410 Jury Instructions.

- (A) **Proposed Instructions.** The parties shall present the Court with proposed jury instructions within a time set by the Court. The Court shall supply the parties with copies of the proposed instructions, verdict and special finding forms.
- (B) The parties may, in the absence of the jury, object to the giving of any instructions, the refusal to give a requested instruction or submission of a verdict or special findings form. The Court shall either give or refuse the requested instruction, or shall modify the instruction, indicating the modification made and give it as modified. On the margin of each instruction requested, the Court shall write the word “given” or “refused” or the words “given as modified,” and place the judge’s initials thereon. Any instruction the Court gives may be used by the parties in the argument to the jury.
- (C) The judge shall instruct the jury in the laws governing the case. The judge shall clearly identify for the jurors the elements necessary for conviction of an offense. The judge shall clearly instruct the jurors that the Tribe must prove its case beyond a reasonable doubt. Either party may propose instructions to the jury which may be allowed by the trial judge if he or she finds that such instructions further the interests of justice.

- (D) The written instructions shall be filed with the clerk and constitute a part of the record. At the request and cost of either party, the instructions given by the Court shall be transcribed and filed with the clerk.

[History] Ord. 204 (11/24/03); Ord. 89 (2/6/92).

3-03.420 Jury Deliberations.

- (A) In all jury cases the judge shall instruct the jury that they shall retire to consider the matter and that each juror shall be given an opportunity to state his or her opinion and that they shall select a foreperson.
- (B) The jury shall be instructed that it must be unanimous in order to return a verdict of guilty.

[History] Ord. 204 (11/24/03); Ord. 89 (2/6/92).

Subchapter IX – Verdicts

3-03.430 Proof Beyond a Reasonable Doubt.

Conviction of a criminal offense shall be by a finding that the evidence shows beyond a reasonable doubt that the accused committed the offense with which he or she is charged and tried.

[History] Ord. 204 (11/24/03); Ord. 89 (2/6/92).

3-03.440 Jury Verdicts.

- (A) **Verdicts.**
- (1) **Return of Verdict.** When all members of the jury agree upon a verdict, the presiding juror shall complete and sign the verdict form and return it to the judge in open court. If the defendant is charged with more than one offense the jury shall return a separate verdict form for each offense charged.
- (2) **Several Defendants.** If there are two (2) or more defendants tried together, the jury at any time during its deliberations may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed; if a jury cannot agree with respect to all, the defendant or defendants as to whom it does not agree may be tried again pursuant to Section 3-03.360(E).
- (B) **Special Findings.** The Court may submit to the jury forms for such special findings that may be required or authorized by law. The Court shall give such instruction as may be necessary to enable the jury both to make these special findings or verdicts and to render a general verdict. When a special finding is inconsistent with another

special finding or with the general verdict, the Court may order the jury to retire for further consideration.

(C) **Forms.**

(1) **Verdict.** The verdict of the jury may be in substantially the following form:

We, the jury, find the defendant [guilty or not guilty] of the crime of _____ as charged in count number _____.

Signature of Presiding Juror

(2) **Special Findings.** Special findings may be submitted in accordance with the following format:

Was the defendant [name] armed with a deadly weapon at the time of the commission of the crime charged in count number _____? Yes () No ()

(D) **Poll of Jurors.** When a verdict or special finding is returned and before it is recorded, the jury shall be polled at the request of any party or upon the court's own motion. If, at the conclusion of the poll, all of the jurors do not concur, the jury may be directed to retire for further deliberations or may be discharged by the Court.

(E) After the jury has returned its verdict and special findings, if any, in open court with the parties present, the Court shall thereafter enter judgment upon each verdict.

(F) The judge shall declare a mistrial if, after lengthy deliberation, the judge determines that the jurors will not reach unanimity on any or all of the charges. Upon request of the complaining witness or prosecutor, the defendant shall be re-tried before a new jury or before the judge.

[History] Ord. 204 (11/24/03); Ord. 89 (2/6/92).

Subchapter X – Post Verdict

3-03.450 Motion for New Trial.

(A) **Power of the Court.** When the defendant has been found guilty by a jury or by the Court, the Court on motion of the defendant, or on its own initiative with the consent of the defendant, may order a new trial.

(B) **Timeliness.** A motion for a new trial shall be made no later than ten (10) days after the verdict has been rendered.

(C) **Grounds.** The Court may grant a new trial for any of the following reasons:

- (1) The verdict is contrary to law or to the weight of the evidence;
- (2) The prosecutor is guilty of misconduct;
- (3) A juror or jurors are guilty of misconduct;
- (4) The Court erred in the decision of a matter of law, or in the instruction of the jury on a matter of law to the substantial prejudice of a party; or
- (5) For any other reason not due to his or her own fault, the defendant has not received a fair and impartial trial.

[History] Ord. 408 (9/15/20); Ord. 204 (11/24/03); Ord. 89 (2/6/92).

3-03.460 Appeal Bond.

- (A) At the time of sentencing, the trial court may fix the amount of bond to be posted in the event an appeal is filed, or may specify that the appeal may be taken on the defendant's own recognizance, or may deny bail. In a case in which the defendant has been sentenced to jail time, determinations of the amount of bond, conditions of release, or denial or release shall be based upon an evaluation of the strength of the case on appeal. After conviction, the burden of establishing that the defendant will not flee or pose a danger to the community rests with the defendant.
- (B) Execution of the sentence shall be stayed pending appeal when:
 - (1) the defendant posts an appeal bond in accordance with the order of the trial court; or
 - (2) when the appeal is taken on the defendant's own recognizance.
- (C) If the trial court does not allow the appeal to be taken while the defendant is on his or her own recognizance, or determines that the defendant be held without bond, the defendant may petition the Court of Appeals, at any time after the entry of the order of the trial court setting a bond, or denying release, to stay the execution of sentence and to allow the defendant to be released upon his or her own recognizance or to set a bond, or to otherwise modify conditions of release. If the Court of Appeals denies the requested relief, the appeal may be taken, but the execution of sentence shall not be stayed until the defendant has met the conditions established by the trial court.
- (D) Any defendant in custody during the appeal shall receive the same benefits and credits in the computation of the sentence as if no appeal had been taken.

- (E) Failure of the defendant to prosecute the appeal shall result in revocation of release and execution of the sentence.

[History] Ord. 408_(9/15/20); Ord. 204 (11/24/03); Ord. 89 (2/6/92).

Subchapter XI – Extradition

3-03.470 Purpose.

The dual purpose of this Subchapter is to provide fair and equitable procedures to: (A) arrest and transfer custody of those persons who are fugitives from other jurisdictions or where there is probable cause to believe that they have committed crimes, to federal, state and local governments; and (B) to protect the individual and civil rights of persons subject to the law enforcement authority of the Tribe.

To achieve both of these purposes, it is the intent of this Subchapter that the decision to arrest and extradite an alleged fugitive shall be made by a Swinomish judge or judicial officer who shall consider, among other things, the following factors in making a decision: (A) the civil rights of tribal members and other fugitives; (B) the nature of the crime alleged to have been committed; (C) the welfare and safety of the Reservation community; and (D) whether or not there is reciprocity between the Tribe and the government requesting extradition regarding the extradition of fugitives to Swinomish law enforcement.

[History] Ord. 204 (11/24/03); Ord. 147 (7/10/01).

3-03.480 Definitions.

The following words shall have the following meanings for the purposes of this Subchapter:

- (A) **“Judicial Officer”** means an officer of the Tribal Court appointed by Resolution of the Senate to implement the provisions of this Subchapter.
- (B) **“Extraditable”** or **“Extraditable Violation”** means that a sovereign government has issued an arrest warrant or provided notice to tribal police, that there exists probable cause for arrest, that a violation of the sovereign government’s laws has occurred, and that the sovereign government has agreed to pay for the cost of incarceration and transportation to the sovereign government.
- (C) **“Sovereign Government”** means a federally recognized Indian tribe, the federal government, a state, a county, or a municipality, or political subdivision of any such jurisdiction.

- (D) **“Requesting Sovereign Government”** means a judge or law enforcement officer of a sovereign government.

[History] Ord. 408 (9/15/20); Ord. 204 (11/24/03); Ord. 147 (7/10/01).

3-03.490 Warrant or Probable Cause Requirement For Extradition Arrest.

No request for the extradition of a person charged with a crime by the lawful authority of any sovereign government, or where probable cause exists for a violation of the laws of any sovereign government, shall be recognized by a Swinomish judge unless the violation(s) of law are extraditable and is accompanied by:

- (A) A copy of an extraditable warrant; or
- (B) In cases where probable cause for arrests exists, either:
- (1) a declaration or an affidavit from a lawful authority of the requesting sovereign government that establishes the existence of probable cause and the extraditable nature of the offense; or
 - (2) a declaration by a tribal law enforcement officer, that probable cause for arrest exists and tribal law enforcement receives notice that probable cause exists from a lawful authority of the requesting sovereign government, the tribal law enforcement officer shall sign a written declaration documenting the basis for probable cause and the manner in which notice of probable cause was received. Such declaration may include a police report containing information about the fugitive and /or the offense(s) for which the fugitive is wanted.

[History] Ord. 204 (11/24/03); Ord. 147 (7/10/01).

3-03.500 Procedure for All Extradition Arrests.

- (A) Upon receipt of a valid warrant or adequate proof of probable cause for arrest, the tribal police may immediately apprehend and arrest the person named in the warrant or in the probable cause declaration or affidavit. In addition to advising the fugitive of his or her rights outlined in Section 3-03.130, the arresting officer shall also inform the alleged fugitive of his or her right to an extradition hearing.
- (B) As soon as possible, but no longer than twenty-four (24) hours after arrest, the apprehending officer shall notify a Tribal Court judge or judicial officer and inform him or her of the outstanding warrant or existence of probable cause for arrest and the apprehension of the person named therein. Notice may be provided by facsimile (“fax”) to both the Tribal Court clerk and to the administrative office of the Tribal Court’s chief judge, the administrative offices of the Northwest Intertribal Court System (“NICS”) if the Tribe contracts with NICS to provide judicial services for the

Tribal Court. If no such notice has been made with twenty-four (24) hours, the fugitive shall be released from custody.

- (C) An outstanding warrant or probable cause affidavit must be reviewed by a Tribal Court judge within forty-eight (48) hours of the fugitive's detention.
- (D) Upon a finding that the relevant documentation complies with Sections 3-03.530 and 3-03.490, the Tribal Court judge may issue an order of extradition directing law enforcement to deliver the fugitive into the custody of the requesting sovereign government. Such a finding shall be made during an extradition hearing if the fugitive does not waive the right to an extradition hearing.
- (E) A fugitive shall have the right to an extradition hearing unless the fugitive waives such right by written waiver pursuant to Section 3-03.520.
- (F) At an extradition hearing, the Tribal Court shall:
 - (1) provide the alleged fugitive an opportunity to appear and testify before the court on his or her own behalf. Such hearings shall be held in person and not by telephonic or other means; and
 - (2) consider all relevant facts including those in Section 3-03.530 and the Section 3-03.490 and determine if sufficient cause exists to warrant an order of extradition to the custody of the sovereign government.
- (G) If the Tribal Court judge does not find that the relevant documentation comports with the relevant factors in Section 3-03.530 and requirements of Section 3-03.490, the alleged fugitive shall be released from custody.

[History] Ord. 408_(9/15/20); Ord. 204 (11/24/03); Ord. 147 (7/10/01).

3-03.510 Detention.

- (A) When an alleged fugitive is apprehended, it is the duty of the tribal police to notify the sovereign government requesting the arrest and extradition of the suspect. Unless the alleged fugitive has waived the right to a extradition hearing, the alleged fugitive shall be provided with an opportunity to appear at an extradition hearing before a Swinomish tribal judge or judicial officer within forty-eight (48) hours of his arrest. Weekends and holidays shall not be included in the calculation of the forty-eight (48) hour period.
- (B) Subject to subsection (C), if the sovereign government requesting the apprehension of the alleged fugitive does not take possession of the person within forty-eight (48) hours after an order of extradition has been issued, the alleged fugitive shall be released from custody.

- (C) The judge may order the continued detention of the alleged fugitive beyond the forty-eight (48) hour period if the release of the alleged fugitive might reasonably be expected to endanger the alleged fugitive or if the alleged fugitive is perceived to be a threat to the community. Continued detention shall be ordered only in circumstances in which an order for extradition has been issued. The sovereign government shall take custody of the alleged fugitive at a time no later than forty-eight (48) hours from the order for continued detention.

[History] Ord. 408 (9/15/20); Ord. 204 (11/24/03); Ord. 147 (7/10/01).

3-03.520 Waiver of Extradition Hearing and Determination by Tribal Court.

- (A) When an alleged fugitive from justice is arrested, the alleged fugitive may waive his or her right to an extradition hearing before a Tribal Court judge or judicial officer. In order for the waiver to be valid, the alleged fugitive must read, or have read to him or her, the following written extradition waiver statement and then both the alleged fugitive and the tribal police officer must sign and date the written waiver:
- (1) I understand that I have a right to appear at a hearing before a Swinomish tribal judge or judicial officer and to explain why I should not be placed in the custody of a police department of another city, county, state or tribe and transported to another court for criminal proceedings.
 - (2) I understand that by signing this form, I am waiving and giving up my right to have an extradition hearing in the Swinomish Tribal Court and giving up my right to appear before a Swinomish tribal judge or judicial officer to explain why I should not be arrested and transferred to the jail of another law enforcement agency.
 - (3) I also understand that as soon as I sign this form, I will be taken directly to jail and then transported to an off-Reservation court for further criminal proceedings.
 - (4) I have read, or I have had someone else read to me, this Waiver of Rights Statement and I fully understand the rights that I am giving up.
 - (5) I am signing this waiver voluntarily of my own free will. I have not received any promises or threats of any kind and have not been forced to sign this form.
- (B) The tribal police officer shall provide the Tribal Court judge with the signed waiver form along with any other documentation necessary for the judge to determine whether an order of extradition should be issued.

[History] Ord. 408_(9/15/20); Ord. 204 (11/24/03); Ord. 147 (7/10/01).

3-03.530 Extradition Hearing – Purpose.

The purpose of the extradition hearing shall be to determine if there is good reason to justify an order of extradition. The judge's determination is not limited to but shall include consideration of the following factors:

- (A) Whether the requesting government has jurisdiction over the alleged fugitive;
- (B) Whether the alleged fugitive is being afforded due process of law;
- (C) The nature of the crime alleged to have been committed and whether the alleged crime is a crime under the laws of the Swinomish Indian Tribal Community;
- (D) Whether an order of extradition would be against the public policy of the Swinomish Indian Tribal Community;
- (E) Whether there exists, written or otherwise, a reciprocal agreement or practice between the requesting government and the Tribe for the extradition of fugitives to the jurisdiction of the Tribe; and
- (F) The welfare and safety of the Reservation community.

[History] Ord. 204 (11/24/03); Ord. 147 (7/10/01).

Subchapter XII - Habeas Corpus

3-03.540 Writ of Habeas Corpus.

Every person imprisoned or otherwise restrained of liberty may petition for a writ of habeas corpus to inquire into the reasons for such imprisonment or restraint, and if such reasons are found to be illegal, the detainee shall be released from custody by order of the Court.

Notwithstanding the provisions of this subchapter, a Defendant held pursuant to jurisdiction under Title 4, Chapter 2, Subchapter II is entitled to petition for a writ of habeas corpus in a court in the United States to test the legality of one's detention by order of the Tribe.

[History] Ord. 408_(9/15/20); Ord. 204 (11/24/03); Ord. 89 (2/6/92).

3-03.550 Writ for Appealing an Order of Bail.

When a person is imprisoned, or detained in custody on any criminal charge without bail, such detainee is entitled to a writ of habeas corpus for the purpose of appealing the court's order setting bail, upon alleging that fact in the detainee's petition, without alleging that the detainee is illegally confined.

[History] Ord. 204 (11/24/03); Ord. 89 (2/6/92).

3-03.560 Application for Writ.

- (A) Application for a writ of *habeas corpus* is made by petition, signed either by the detainee for whose relief it is intended, or by some person on that detainee's behalf, and must specify:
 - (1) That the person in whose behalf the writ is applied for is unlawfully imprisoned or restrained of liberty and why the imprisonment or restraint is unlawful;
 - (2) The officer or person by whom the detainee is confined or restrained;
 - (3) The place where the detainee is confined or restrained; and
 - (4) The names of all parties responsible for confinement if they are known, or describing them if they are not known.
- (B) The petition must be verified by the oath or affirmation of the detainee making the application or by the person making the petition on that detainee's behalf.
- (C) Tribal law enforcement shall insure that any person confined in their custody, or held by another for the benefit of the Swinomish Tribe, shall have reasonable access to persons or materials needed to prepare and file a petition.

[History] Ord. 204 (11/24/03); Ord. 89 (2/6/92).

3-03.570 Content of Writ.

- (A) When the judge or judicial officer is satisfied that a writ of *habeas corpus* ought to be issued, it must be issued without delay.
- (B) The writ must be directed to the person having custody of or restraining the detainee on whose behalf the application is made and must command to have the body of such detainee brought before the Swinomish Tribal Court.
- (C) The issue or issues to be determined upon return of the writ must be stated, either in the writ or in an order attached to the writ or in a copy of the petition attached to the writ.

[History] Ord. 204 (11/24/03); Ord. 89 (2/6/92).

3-03.580 Service of the Writ.

A writ of habeas corpus must be served upon the person to whom it is directed in the same manner as a summons.

[History] Ord. 204 (11/24/03); Ord. 89 (2/6/92).

3-03.590 Return - What to Contain.

The person upon whom a writ of habeas corpus is served must make a return to the Court within five (5) days of service and state in the return:

- (A) Whether he or she has the detainee in custody or under power or restraint and the authority for so holding the detainee;
- (B) If he or she had, but no longer has, the detainee in his or her custody or under his or her power or restraint, the return must state particularly to whom, at what time and place, for what cause, and by what authority custody was released; and
- (C) The return must be signed by the person making the return, and except when such person is a sworn public officer and makes such return in an official capacity it must be verified by the oath of the person making the return.

[History] Ord. 204 (11/24/03); Ord. 89 (2/6/92).

3-03.600 Hearing on Return.

- (A) The detainee shall be brought before the court by the person to whom a writ of *habeas corpus* is directed, when possible;
- (B) The hearing must be held within two (2) days of the filing of the return and may be summary in nature; and
- (C) Evidence may be produced and compelled as in criminal and civil actions.

[History] Ord. 204 (11/24/03); Ord. 89 (2/6/92).

3-03.610 Judgment Regarding Custody.

- (A) If the detainee is in official custody, the detainee may not be released on a writ of *habeas corpus* for any technical defect in commitment not affecting the detainee's substantial rights.

- (B) Following the hearing, the judge or judicial officer shall make such judgment regarding the custody of the detained person as the facts and circumstances warrant, and such order shall be effective immediately.

[History] Ord. 204 (11/24/03); Ord. 89 (2/6/92).

Subchapter XIII – Repealer, Severability & Effective Date

3-03.620 Repealer.

This Chapter supersedes and replaces any conflicting provisions of all prior criminal procedures ordinances and laws of the Swinomish Indian Tribal Community.

[History] Ord. 204 (11/24/03); Ord. 89 (2/6/92).

3-03.630 Severability.

The provisions of this Chapter are severable. A judicial declaration of invalidity regarding any portion or application of this Chapter does not affect remaining parts of this Chapter or other circumstances not included within the judicial determination.

[History] Ord. 204 (11/24/03); Ord. 89 (2/6/92).

3-03.640 Effective Date.

This Chapter shall become effective one hundred and fifty (150) days after approval of Ordinance 204 by the Secretary of the Interior or the Secretary's designated representative.

[History] Ord. 218 (2/5/04); Ord. 204 (11/24/03).

Appendix I – Waiver of Right to Extradition Hearing

- (1) I understand that I have a right to appear at a hearing before a Swinomish tribal judge or judicial officer and to explain why I should not be placed in the custody of a police department of another city, county, state or tribe and transported to another court for criminal proceedings.
- (2) I understand that by signing this form, I am waiving and giving up my right to have an extradition hearing in the Swinomish Tribal Court and giving up my right to appear before a Swinomish tribal judge or judicial officer to explain why I should not be arrested and transferred to the jail of another law enforcement agency.
- (3) I also understand that as soon as I sign this form, I will be taken directly to jail and then transported to an off-Reservation court for further criminal proceedings.
- (4) I have read, or I have had someone else read to me, this Waiver Of Rights Statement and I fully understand the rights that I am giving up.
- (5) I am signing this waiver voluntarily of my own free will. I have not received any promises or threats of any kind and have not been forced to sign this form.

..... Signature of Defendant	Signature of Police Officer	
_____ Printed Name of Defendant	Printed Name of Police Officer	
..... DATE	IDA#	CASE NUMBER

Annotations

STC 3-03.110

NOTES OF DECISIONS

Who may arrest? 1

1. Who May Arrest?

Tribal Reserve Officers have the same authority enforce tribal law and to execute tribal bench warrants as full time officers. Where reserve officer arrested defendant for an outstanding bench warrant, reserve officer testified that a copy of the warrant was in his possession at the

time of the arrest, and defendant did not come forward with any evidence that contradicted the officer's testimony, the arrest was lawful. *Edge v. SITC*, Cr-5/94-071, Cr-10/96-400 (Swinomish Ct.App. December 3, 1996).

STC 3-03.120

NOTES OF DECISIONS

Summons required 1

1. Summons Required

Where insufficient facts exist in the record to support a finding that the defendant will not appear in response to a summons or a finding that arrest is necessary to prevent harm to another, a Summons in Lieu of Arrest must issue. *SITC v. Topaum*, CR-10/04-306 (Swinomish Tribal Ct. October 19, 2004).

STC 3-03.130

NOTES OF DECISIONS

General interpretation 1

Advisement of rights - When required 2

Custody 3

Interrogation 4

Remedy - Suppression of statements 5

Voluntariness 6

1. General Interpretation

STC 3-03.130 is consistent with the Indian Civil Rights Act and the Miranda warnings. Tribal Court is not bound to follow federal and state courts opinions regarding the necessity of advisement of rights and custodial interrogation of suspect but finds those rulings to be instructional. While STC 3-03.130 clearly establishes an 'advisement of rights,' interpreting that requirement is left to development of case law. *SITC v. George*, CR-CO-2005-0015 (Swinomish Tribal Ct. April 13, 2006).

Tribal Court will follow precedent in Washington State and Federal courts regarding the necessity of advisement of rights and custodial interrogation of suspect. *SITC v. George*, CR-CO-2005-0015 (Swinomish Tribal Ct. April 11, 2006).

2. Advisement of Rights - When Required

Defendants must be advised of the rights contained in STC 3-03.130 before custodial interrogation by agents of the Tribe. A defendant must be "in custody" at the time the statement was made and the statement must be the result of police "interrogation" before

relief can be granted under STC 3-01.130. *SITC v. George*, CR-CO-2005-0015 (Swinomish Tribal Ct. April 13, 2006).

Suspect must be advised of his or her right against self-incrimination (and other rights provided by statute, tribal constitution, and the Indian Civil Rights Act) prior to custodial interrogation. *SITC v. T.A.*, JV-GO-2005-0012 (Swinomish Tribal Ct. March 7, 2006).

3. Custody

A person is “in custody” for purposes of the requirement to advise them of their right against self-incrimination when the defendant has been formally placed under arrest or his freedom of action or movement has been curtailed to a degree associated with formal arrest. This determination is made based upon how a reasonable person under the same circumstances would perceive the situation. *SITC v. George*, CR-CO-2005-0015 (Swinomish Tribal Ct. April 13, 2006).

Defendant was “in custody” for Miranda purposes when a police officer told the defendant he did not believe the defendant’s story, told the defendant he was being detained for investigation, and placed the defendant in a locked patrol vehicle for a substantial amount of time. *SITC v. George*, CR-CO-2005-0015 (Swinomish Tribal Ct. April 13, 2006).

A suspect is “in custody” as soon as his or her freedom is curtailed to a degree associated with a formal arrest. *SITC v. T.A.*, JV-GO-2005-0012 (Swinomish Tribal Ct. March 7, 2006).

A suspect need not receive an advisement of his or her rights when the person voluntarily goes to the police station, or with an officer in a patrol vehicle, if the person is released after a brief interview, even though the questioning may be in a “coercive” atmosphere, as long as the Defendant is not subject to restraints such as to render her “in custody” or significantly deprived of his or her freedom. *SITC v. T.A.*, JV-GO-2005-0012 (Swinomish Tribal Ct. March 7, 2006).

4. Interrogation

“Interrogation” means direct and express questioning and any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect. *SITC v. George*, CR-CO-2005-0015 (Swinomish Tribal Ct. April 13, 2006).

Where no questioning by a tribal agent occurs after the defendant was taken into custody and the defendant’s custodial statements attempt to clarify or correct non-custodial statements made in response to questions posed by a police officer, custodial statements are voluntary and not the result of custodial interrogation. *SITC v. George*, CR-CO-2005-0015 (Swinomish Tribal Ct. April 13, 2006).

Tribal Police did not violate defendant’s rights by asking him if he had any weapons when the defendant was at the scene of a criminal traffic investigation and in a location that could have interfered with the investigation or posed a risk to officer safety. . *SITV v. Cayou*, CR-CO-2006-0268 (Swinomish Tribal Ct. April 18, 2007).

5. Remedy - Suppression of statements

While STC 3-03.130 clearly establishes an ‘advisement of rights,’ fashioning a remedy for violation of that requirement is left to the development of case law. *SITC v. George*, CR-CO-2005-0015 (Swinomish Tribal Ct. April 13, 2006).

Statements obtained in violation of the advisement of rights requirement are presumed involuntary and must be suppressed if the product of such violation. *SITC v. George*, CR-CO-2005-0015 (Swinomish Tribal Ct. April 13, 2006).

6. Voluntariness

The minority age of a suspect is a factor to consider in evaluating the voluntariness of statements made to police officers, but is not a per se basis for suppression. *SITC v. T.A.*, JV-GO-2005-0012 (Swinomish Tribal Ct. March 7, 2006).

STC 3-03.150

NOTES OF DECISIONS

After-discovered evidence 1

1. After-Discovered Evidence

Information discovered after tribal agents seize property cannot support a finding of probable cause for the seizure or for a subsequent search of the item seized. *In Re the Matter of Application for a Search Warrant*, SW-3/05- 047 (Swinomish Tribal Ct. March 18, 2005).

STC 3-03.180

NOTES OF DECISIONS

General interpretation 1

What is a search? 2

Exception to search warrant requirement - Consent 3

Exception to search warrant requirement - Plain view 4

Exception to search warrant requirement – Arrest Warrant 5

Exception to search warrant requirement – Stop and Frisk 6

Warrantless entry into dwelling 7

1. General Interpretation

Tribal Court will follow the lead of state and federal courts regarding law of search and seizure. *SITC v. Spencer*, CR-CO-2005-0093 (Swinomish Tribal Ct. January 5, 2006).

Warrantless searches and seizures are per se unreasonable and violative of rights under ICRA and Swinomish Tribal Code. The Tribe bears the burden to rebut this presumption and establish that exception to warrant requirement applies. *SITC v. Spencer*, CR-CO-2005-0093 (Swinomish Tribal Ct. January 5, 2006).

Tribal Court will scrutinize more closely those situations where police had an opportunity to obtain a search warrant and chose to proceed without one. *SITC v. Spencer*, CR-CO-2005-0093 (Swinomish Tribal Ct. January 5, 2006).

2. What is a Search?

Field sobriety tests are not a search; therefore, federal and Swinomish statutory protections against unreasonable searches do not apply. *SITC v. George*, CR-CO-2005-0015 (Swinomish Tribal Ct. April 13, 2006).

3. Exception to Warrant Requirement - Consent

Consent to search a dwelling given by a cohabitant with, at best, equal control over the premises is invalid if another cohabitant is present and does not consent to the search. The police must obtain the cohabitant's consent in order to perform a valid warrantless search. *SITC v. Spencer*, CR-CO-2005-0093 (Swinomish Tribal Ct. January 5, 2006).

The age of a party consenting to warrantless search is an element to be considered in determining third-party authority to consent to a search. *SITC v. Spencer*, CR-CO-2005-0093 (Swinomish Tribal Ct. January 5, 2006).

When tribal agents are faced with an ambiguous situation as to the apparent authority of a party to consent to a search, agents have a duty to make further inquiry. If such inquiry does not clarify the party's authority to consent to a search, proceeding with a warrantless search is unlawful. *SITC v. Spencer*, CR-CO-2005-0093 (Swinomish Tribal Ct. January 5, 2006).

Where minor guest in a dwelling allegedly consented to search but defendant, who was a cohabitant over the age of 18, was present at the time of search did not give consent, search was unreasonable and all evidence obtained through the search was inadmissible. *SITC v. Spencer*, CR-CO-2005-0093 (Swinomish Tribal Ct. January 5, 2006).

While consent to search may be given, that consent may be expressly limited. *In Re the Matter of Application for a Search Warrant*, SW-3/05-074 (Swinomish Tribal Ct. March 18, 2005).

Where person who purportedly gave consent to search a dwelling denied ownership of a gym bag found therein and expressly refused officers' request to search the bag, the consent exception did not apply and a search of the bag was denied for lack of independent probable cause. *In Re the Matter of Application for a Search Warrant*, SW-3/05-074 (Swinomish Tribal Ct. March 18, 2005).

4. Exception to Warrant Requirement - Plain View

The plain view exception to the warrant requirement allows tribal agents to seize evidence or contraband in plain view in the location of the arrest. *SITC v. Edwards*, Cr-1/05-011 (Swinomish Tribal Ct. June 3, 2005).

Where tribal agents attempt to execute a valid arrest warrant, follow a suspect through his dwelling to examine documents purporting to show the invalidity of the arrest, and encounter contraband in plain view, the plain view exception to the warrant requirement applies and any contraband seized is admissible. *SITC v. Edwards*, Cr-1/05-011 (Swinomish Tribal Ct. June 3, 2005).

5. Exception to Search Warrant Requirement – Arrest Warrant

An arrest warrant issued upon probable cause implicitly carries with it limited authority to enter a dwelling to locate and place under arrest the suspect. *SITC v. Edwards*, Cr-1/05-011 (Swinomish Tribal Ct. June 3, 2005).

6. Exception to Search Warrant Requirement – Stop and Frisk

An officer has the right to frisk a person and seize the weapon when a person an individual discloses to the police officer that he is carrying a concealed weapon. *SITV v. Cayou*, CR-CO-2006-0268 (Swinomish Tribal Ct. April 18, 2007).

7. Warrantless Entry into Dwellings

Tribal agents do not commit an illegal search or seizure where they initiate a lawful arrest outside a dwelling, cross the threshold of the dwelling to complete the arrest, and then arrest a third party present in the dwelling upon probable cause. *SITC v. Cayou*, CR-CO-2004-0232, CR-CO-2004-0233 (Swinomish Tribal Ct. November 15, 2005).

STC 3-03.190

NOTES OF DECISIONS

Old evidence 1

1. Old Evidence

Ordered: Swinomish Tribal Police must return, destroy, or dispose of any evidence seized and stored before April 23, 2004 in connection with any cases identified by the Prosecutor as “Closed,” with the exception of cases dismissed without prejudice between April 23, 2002 and April 23, 2004. *Standing Order Re: Evidence*, SO-04/04-001 (Swinomish Tribal Ct. April 23, 2004).

STC 3-03.200

NOTES OF DECISIONS

Bail schedule 1

Domestic violence restraining orders 2

1. Bail Schedule

Ordered: Except in those specific cases where bail is set by the Court, the bail schedule is set by schedule. Standing Order Re: Criminal Bail Schedule (Swinomish Tribal Ct. March 27, 2007), *superceding*, Standing Order Re: Criminal Bail Schedule, SO-04/04-001 (Swinomish Tribal Ct. Aug. 13, 2004).

2. Domestic Violence Restraining Orders

Ordered: When a suspect is taken into custody and booked for a crime of domestic violence, an ex parte, temporary restraining order must be issued and the matter must be set for hearing within 14 days. No suspect for a crime of domestic violence is eligible for release in the first 24 hours after he or she is taken into custody. *Standing Order Re: DV No Contact*, SO-04/04-002 (Swinomish Tribal Ct. April 29, 2004).

STC 3-03.215

NOTES OF DECISIONS

General Interpretation 1

Specific proceedings 2

Ineffective assistance of counsel 3

1. General Interpretation

Although ICRA does not require tribes to provide appointed counsel for criminal defendants, STC 3-03.215 imposes that requirement upon the Tribe. *SITC v. Stone*, Cr-2004-0324 (Swinomish Tribal Ct. January 30, 2007).

The Tribal Court is not bound to adopt case law interpreting the Sixth Amendment right to counsel but finds this law instructive in evaluating the due process rights of criminal defendants and will generally follow this case law in interpreting the statutory right to counsel provided for in STC 3-03.215 unless application of this case law is contrary to the Tribe's unique history, customs and practices. *SITC v. Stone*, Cr-2004-0324 (Swinomish Tribal Ct. January 30, 2007).

2. Specific Proceedings

Although probation or parole revocation hearings and preliminary inquiries related thereto are not a stage of 'criminal prosecution' such that the right to court-appointed counsel is

necessarily implicated, the Tribal Court will determine on a case-by-case basis, considering the specific peculiarities of the case and the history, capacity, and therapeutic goals of the Tribal Court, whether due process requires that counsel be appointed to represent the probationer or parolee at such a hearing or inquiry. *SITC v. Stone*, Cr-2004-0324 (Swinomish Tribal Ct. January 30, 2007).

Probationer's due process rights were not violated by the absence of probationer's appointed counsel at a preliminary inquiry on petition to revoke a deferred judgment probation where probationer admitted that probationer had made no effort to satisfy the terms of her probation. *SITC v. Stone*, Cr-2004-0324 (Swinomish Tribal Ct. January 30, 2007).

Sentencing is a stage of 'criminal prosecution' at which the defendant is entitled to be represented by appointed counsel. *SITC v. Stone*, Cr-2004-0324 (Swinomish Tribal Ct. January 30, 2007).

3. Ineffective Assistance of Counsel

Tribal Court will look to state or federal law for guidance for determining whether counsel provided ineffective assistance at trial. *Edge v. SITC*, Cr-5/94-071, Cr-10/96-400 (Swinomish Ct.App. December 3, 1996).

There is a two-part inquiry in an ineffective assistance of counsel claim. The court must first determine whether counsel's representation fell below an objective standard of reasonableness... considering all the circumstances... under prevailing professional norms. A strong presumption exists that counsel's conduct falls within the wide range of reasonable professional assistance. Second, the court must determine whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilty. The inquiry is whether the counsel's performance was deficient and, if so, whether such deficiency prejudiced the defendant. *Edge v. SITC*, Cr-5/94-071, Cr-10/96-400 (December 3, 1996).

Defendant's statement to police officers that she 'was having a bad day' was not probative of criminal intent; therefore, counsel's failure to move to suppress the statement was not ineffective assistance of counsel. In the absence of adequate evidence and authority to the contrary, counsel's failure to warn the defendant a bench warrant had issued on an earlier charge, failure to sever offenses, and stipulation to the validity of the arrest were tactical choices as to how to proceed during trial which would not be second-guessed by the Court. *Edge v. SITC*, Cr-5/94-071, Cr-10/96-400 (December 3, 1996).

STC 3-03.220

NOTES OF DECISIONS

Hearing within 72 hours 1

1. Hearing within 72 Hours

Charges dismissed with prejudice when defendant was held in custody for 6 days following arrest without being brought before the Court for bail review hearing or arraignment. *SITC v. Cayou*, CR-1/02-024 (Swinomish Tribal Ct. July 14, 2003).

STC 3-03.320

NOTES OF DECISIONS

Minority 1

1 Minority

The minority age of a suspect is a factor to consider in evaluating the voluntariness of any statements made by the suspect to an officer, but is not a per se basis for suppression. *SITC v. T.A.*, JV-GO-2005-0012 (Swinomish Tribal Ct. March 7, 2006).