

## **Title 4 – Criminal Code**

### **Chapter 1 – Preliminary Provisions**

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*Annotations*

#### **Legislative History**

**Enacted:**

- Ordinance 413 Amending STC Title 4, Chapters 1 & 2 and STC Title 7, Chapter 11 (12/15/20).
- 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).
- Ord. 331 Amending STC Title 4, Chapter 1 (4/1/14), BIA (4/14/14).
- Ord. 325 Amending STC Title 4, Chapters 1, 2 & 12 and Title 7, Chapter 11 (5/7/13), BIA (5/10/13).
- Ord. 184 Swinomish Criminal Code (9/30/03), BIA (10/7/03).

**Repealed or Superseded:**

- Ord. 156 Allowing Electronic Home Monitoring (7/2/02), BIA (7/26/02) (amending Ord. 75).
- Ord. 154 Extension of Criminal Jurisdiction to Treaty Rights off Reservation (6/4/02), BIA (6/6/02) (amending Ord. 75).
- Ord. 142 Domestic Violence Ordinance, (9/12/00), BIA (10/2/00).
- Ord. 75 Swinomish Criminal Code (4/2/91), Enacting Res. 91-4-37, BIA (6/13/91) (repealing and superseding Ord. 39 and Article XIII of Ord. 32).
- Ord. 44 Amending Criminal Jurisdiction (7/11/78), BIA (8/4/78) (amending Ords. 32, 38, 39 and 40).
- Ord. 39 Establishing Criminal Offenses (6/7/77) (superseding conflicting provisions of Ord. 32).
- Ord. 32 Swinomish Law and Order Code (3/4/75), BIA (5/30/75).
- Ord. 7 Swinomish Law and Order Code (6/1/38), BIA (3/24/38).
- Ord. 1 Adoption of Swinomish Law and Order Regulations (undated).

[Ed. Note. Ordinance 1 is undated and adopts the Law and Order Regulations approved by the Secretary of the Interior November 27, 1935 as part of the fundamental law governing the Swinomish Reservation. The referenced “regulations” are not located in tribal records.]

Noted:

This note contains the general provisions from Ord. 156.

Ord. 156 (7/2/02).            **Section 1.            Title**

This Ordinance shall be known and referred to as the Swinomish Electronic Home Monitoring Amendment and may be cited as such.

**Section 2.            Constitutional Authority**

This Ordinance is adopted pursuant to authority provided by the following provisions of the Swinomish Constitution and Bylaws, as amended on October 22, 1985:

Article VI, Sections 1(k), 1(l), 1(o) and 1(r) of the Swinomish Constitution.

**Section 3.            Jurisdiction**

The provisions of the Title shall apply to all persons and property subject to the governing authority of the Swinomish Indian Tribal Community as established by the Swinomish Tribal Constitution, By-Laws, and Ordinances.

**Section 4.            Purpose**

The purpose of this Ordinance is to amend all tribal criminal sentencing provisions to allow for electronic home monitoring as an alternative to jail.

**Section 8.            Repeal of Conflicting Ordinances**

All former ordinances or parts thereof conflicting or inconsistent with the provisions of this Ordinance as adopted and amended herein are hereby repealed.

**Section 9.            Severability**

The Swinomish Indian Senate hereby declares that should any section, paragraph, sentence or word of this Ordinance as adopted and amended herein be declared for any reason to be invalid, it is the intent of Swinomish Indian Senate that it would have passed all other portions of this ordinance independent of the elimination herefrom of any such portion as may be declared invalid.

**Section 10.           Effective Date**

This Ordinance shall become effective immediately upon approval by the Secretary of the Interior or the Secretary's designated representative.

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**4-01.010            Title.**

This Title shall be known and may be cited as the "Swinomish Criminal Code".

[History] Ord. 184 (9/30/03); Ord. 75 (4/2/91).

**4-01.020 Authority.**

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

[History] Ord. 184 (9/30/03).

**4-01.030 Purpose and Scope.**

The general purposes of these provisions governing the definition of offenses are:

- (A) To forbid and prevent conduct that inflicts or threatens substantial harm to individual or tribal interests;
- (B) To give fair warning of the nature of the conduct declared to constitute an offense; and
- (C) To differentiate on reasonable grounds between serious and minor offenses and to prescribe proportionate penalties for each.

[History] Ord. 184 (9/30/03); Ord. 75 (4/2/91).

**4-01.040 Definitions.**

- (A) Unless specifically stated otherwise in this Title, the meaning of the terms used in this Title shall be as follows:
  - (1) **“Bodily injury”** or **“bodily harm”** means physical pain or injury or illness, or an impairment of physical condition.
  - (2) **“Child”** means any person under the age of eighteen (18) years and not emancipated.
  - (3) **“Dangerous weapon”** means any explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article or substance, including a “vehicle” as defined in this section that under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily injury. The term “dangerous weapon” includes but is not limited to the following instruments: blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, pistol, revolver, any other firearm, any knife having a blade longer than three (3”) inches, any razor with an unguarded blade, any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas.
  - (4) **“Dating Partner”** means persons who are or have been in a social relationship of a romantic or intimate nature, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

- (5) **“Domestic Partner”** means a relationship wherein two persons are connected through one or more of the following circumstances:
- (a) current or former spouse or intimate partner of one another;
  - (b) current or former cohabitation with one another as a spouse or intimate partner; or
  - (c) current or former relationship similarly situated to a spousal relationship with one another as defined by Swinomish or federal law.
- (6) **“Dwelling”** means any building or structure, including movable or temporary, or a portion thereof, that is used or ordinarily used by a person for lodging.
- (7) **“Family or household member”** means
- (a) domestic partner or intimate partners;
  - (b) dating partners;
  - (c) spouses, parents, grandparents, children, grandchildren, and siblings of an individual, as related by blood, marriage, or adoption; or
  - (d) adult persons who presently reside together or who have resided together in the past.
- (8) **“Firearm”** means a weapon or device from which a projectile may be fired by an explosive such as gunpowder, irrespective of whether it is temporarily inoperable due to disassembly.
- (9) **“Intimate Partner”** means
- (a) persons who are or have been in a marital-like relationship, including same-sex relationships;
  - (b) Persons who have a child in common, regardless of whether they have been married or have lived together at any time in a romantic relationship; or
  - (c) Persons who are or have been dating partners, including same-sex partners.
- (10) **“Jail”** means electronic home monitoring, incarceration, imprisonment or other form of detention.
- (11) **“Law enforcement officer”** or **“police officer”** means an officer of the Swinomish Tribal police or other law enforcement personnel authorized by the Senate to enforce the laws of the Tribe.

- (12) **“Maliciously”** means a desire to cause annoyance or harm of any kind.
- (13) **“Position of trust or authority”** means, but is not limited to, the special authoritative or confidential relationships relating to the provision of education, health care, any kind of counseling, coaching, religious advice, public safety services or other professional services.
- (14) **“Protection Order”** means
- (a) any injunction, restraining order, or other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person; and
  - (b) includes any temporary or final order issued by a civil or criminal court, whether obtained by filing an independent action or as a pendent lite order in another proceeding, if the civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection.
- (15) **“Public official”** means any officer, employee, or representative of any tribal or other governmental organization or agency, including a tribal or other court, or any person acting in an official capacity for or on behalf of any tribal or other government organization, whether that official is paid to perform his or her official duties or not, and whether that official has a temporary or permanent position.
- (16) **“Public place”** means any place to which the general public has unrestricted right of access, and which is generally used by the public, including by way of example, and not limited to, streets and alleys of incorporated cities and towns; state or county or tribal highways or roads; buildings and grounds used for school purposes; public dance halls and grounds adjacent thereto; public buildings, public meeting halls, lobbies, halls and dining rooms of hotels, restaurants, theatres, stores, garages and filling stations which are open to and are generally used by the public and to which the public is permitted to have unrestricted access; railroad trains, stages, and other public conveyances of all kinds and character, and the depots and waiting rooms used in conjunction therewith which are open to unrestricted use and access by the public; publicly owned bathing beaches, parks, and/or playgrounds and all other places of similar nature.
- (17) **“Recklessly”** means being aware of a substantial risk and disregarding the risk when such disregard is a gross deviation from the conduct of a reasonable person.
- (18) **“Reservation”** means all lands and waters within the exterior boundaries of the Swinomish Indian Reservation.

- (19) **“Serious or substantial bodily injury”** means bodily injury that causes serious or substantial disfigurement (temporary or permanent) or that causes a serious or substantial loss or impairment (temporary or permanent) of the function of any bodily part or organ.
- (20) **“Sexual intercourse”** means any genital-genital, oral-genital, oral-anal or anal-genital contact, and also includes any penetration, however slight, of the anal or genital opening of another, with any object or with any part of the body.
- (21) **“Sexual touching”** means any touching of the sexual or other intimate parts of a person done for the purpose of arousing or gratifying the sexual desire of any person or for the purpose of abusing, humiliating, harassing, or degrading another person.
- (22) **“Sexually explicit conduct”** means actual or simulated: sexual intercourse as defined in this Title; bestiality; masturbation; sadistic or masochistic abuse; or lascivious exhibition of the sexual or other intimate parts of a person.
- (23) **“Threat/Threaten”** means a declaration by word or deed of one’s intention to inflict injury to the person, property, or rights of another.
- (24) **“Tribal Court”** means the Swinomish Tribal Court.
- (25) **“Tribe”** means the Swinomish Indian Tribal Community, a federally recognized Indian Tribe organized pursuant to Section 16 of the Indian Reorganization Act of 1934 (25 U. S. C. § 5123).
- (26) **“Unlawful force”** means force that is without lawful authority (see definition below).
- (27) **“Vehicle”** includes automobiles, cars, trucks, trailers, boats, airplanes, motorcycles and motor scooters, and other transportation devices.
- (28) **“Willfully”** or **“intentionally”** means with the purpose of achieving a result that constitutes a crime.
- (29) **“Without lawful authority”** means that no legitimate defense justifies the conduct in question. Legitimate defenses include, but are not limited to: reasonable force and/or detention by an enforcement officer; reasonable discipline by a parent; force reasonably used in self-defense, defense of another or to prevent the commission of a crime; retrieving property when a person knows he or she has the right to it; doing an act pursuant to a lawfully issued permit or government agency, authority or court order; implied invitation by a business and by public organization for members of the public with legitimate business to be on the premises during normal working hours; and exercising a protected legal or civil right. The absence of lawful authority

may be inferred in appropriate circumstances unless the defendant asserts a legitimate defense.

(B) All other terms shall have their ordinary and customary meanings.

[History] Ord. 413 (12/15/20); Ord. 408 (9/15/20); Ord. 184 (9/30/03); Ord. 156 (7/2/02); Ord. 75 (4/2/91).

**4-01.050 Tribal Criminal Jurisdiction.**

(A) The Tribal Court shall have criminal jurisdiction on the Reservation over:

- (1) All tribal members; and
- (2) All other Indians in accordance with applicable Federal laws; and
- (3) Any other person subject to the Tribe's jurisdiction pursuant to Swinomish or federal law.

(B) The Tribal Court shall have criminal jurisdiction outside the Reservation over all tribal members with respect to the exercise of fishing, hunting and gathering rights on all usual and accustomed fishing grounds and stations of the Tribe, on all open and unclaimed lands reserved by treaty for hunting or gathering and on such other lands and waters as are necessary for access to these fishing, hunting and gathering sites.

[History] Ord. 408\_(9/15/20); Ord. 184 (9/30/03); Ord. 154 (6/4/02); Ord. 75 (4/2/91).

**4-01.060 Nonwaiver of Sovereign Immunity.**

Nothing in this Title shall be deemed to constitute a waiver by the Swinomish Indian Tribal Community of its sovereignty, rights, powers, or privileges.

[History] Ord. 184 (9/30/03); Ord. 75 (4/2/91).

**4-01.070 Custom/Other Law.**

(A) Where helpful to the fair and equitable disposition of criminal matters, the Tribal Court may inquire into the tribal customs and usages of the Swinomish Indian Tribal Community.

(B) As to any matters that are not covered by the codes, ordinances and resolutions of the Tribe, or by the traditional customs and usages of the Tribe, the Tribal Court may be guided by common law as developed by other tribal, state or federal courts.

[History] Ord. 184 (9/30/03); Ord. 75 (4/2/91).

#### **4-01.080 Construction of Terms.**

The terms and provisions of this Title shall be construed according to the fair import of their terms, but when the language is susceptible to differing construction, it shall be interpreted to further the general purposes stated in this Title. Where a term is not defined herein, it shall be given its ordinary meaning. Any reference to “he,” “him” or other masculine terms shall include male and female persons. Any reference to a singular term includes the plural.

[History] Ord. 184 (9/30/03); Ord. 75 (4/2/91).

#### **4-01.090 General Principles.**

- (A) **Aiding and Abetting - Accomplice Liability.** Any person who intentionally assists in or encourages the commission of an offense is guilty of commission of that offense. Adults who assist minors in the commission of an offense commit a separate offense defined in STC 4-07.020
- (B) **Attempts.** Whenever some other section of this Title specifically addresses an attempt to commit an offense, that more specific section shall apply. When the issue of attempt is not specifically addressed, any person who attempts to commit a Class A or Class B offense shall be punished under the next lower class of offense than the completed offense. If a Class C offense is attempted, the attempt is also a Class C offense.
- (C) **Capacity.** Children under the age of eight (8) years of age are incapable of committing a crime.
- (D) **Conspiracy.** Any person who with intent that conduct constituting an offense be performed, agrees with one or more persons to commit the offense and any one of them takes a substantial step in pursuance of such agreement, is guilty of conspiracy to commit that offense. Conspiracy is classified at the same level of offense as the offense that is the subject of the agreement.
- (E) **Solicitation of an Offense.** Any person who intentionally offers to pay or otherwise give a thing of value to another to encourage the commission of a crime or attempt to commit a crime commits the offense of solicitation of an offense. Solicitation is classified at the same level of offense as the offense that is the subject of the solicitation.
- (F) **Mental State.** Whenever some other Section of this Title specifically addresses the mental state necessary to commit an offense, that more specific Section shall apply. When a required mental state is not specifically stated and the offense does not state that strict liability applies, the offense carries a required mental state of “willfully”.

[History] Ord. 413 (12/15/20); Ord. 184 (9/30/03); Ord 75 (4/2/91).

#### **4-01.100 Victim’s Rights.**

- (A) Right to Notice.



- (1) A victim in a criminal case shall be afforded the following rights:
    - (a) the right to receive notice of available resources from a law enforcement officer at the time of the report of a crime; and
    - (b) the right to notice of the disposition of the criminal case upon request.
  - (2) In a case involving a report of domestic violence, the survivor of domestic violence has the right to notification of any conditions of Defendant's release, when applicable.
- (B) Right to Protection.
- (1) A victim has the right to assistance from law enforcement upon request.
  - (2) The Swinomish Tribal Court shall ensure that law enforcement personnel or a court bailiff are present in the courtroom to provide security whenever a survivor of violence appears in court to provide testimony concerning the criminal or civil case associated with an incident of violence.
  - (3) The Tribal Judge shall ensure that a victim is not subjected to harassment, fear, intimidation, or retaliation while appearing in court for a criminal or civil case.
- (C) Right to Participation.
- (1) A victim in a criminal case has the right to speak to the prosecuting attorney about the criminal case in which he or she is a named victim.
  - (2) A victim in a criminal case has the right to share an opinion to the prosecuting attorney regarding the preferred disposition of the criminal case for which the victim is a material witness.
  - (3) A survivor of domestic violence has the right to participate in a court proceeding accompanied by an advocate of their choosing or provided by the Tribe.
  - (4) A survivor of domestic violence has the right to refuse a pretrial interview or deposition request and may not be held in contempt for failure to appear when issued a subpoena in the criminal case.
  - (5) A victim may appear before the Law and Order Committee to address any non-compliance with this section by any employee of the Tribe whose conduct is addressed in this Section.
- (D) Right to Speak and Right to Privacy.

- (1) A victim has the right to prepare and submit to the court, verbally or in writing, an impact statement prior to sentencing in a case for which he or she is a listed victim. An impact statement may include the personal impact of the crime, and how the crime affected the individual psychologically, financially, and physically.
- (2) A victim has the right to be present and address the court during sentencing in the criminal case for which he or she is a listed victim.
- (3) A survivor of domestic violence has the right to speak with a victim advocate and retains a qualified privilege of confidentiality. A victim advocate may not divulge any comment or statement made by a victim unless as required by Swinomish law, federal law or federal regulation, or compelled by court order. For purposes of this section, a victim advocate means an individual that provides counseling services to the victim and does not perform work for or report to any law enforcement entity.

(E) Right to Services.

- (1) A victim has the right to receive any available victim advocate services offered by the Tribe at no cost to the victim.
- (2) A victim advocate shall assess a victim's needs and refer a victim to all available resources, with particular focus on the areas of housing, cultural healing, food, transportation, counseling, physical or psychological health, substance abuse services, legal services, and children's services.

[History] Ord. 408 (9/15/20); Ord. 331 (4/1/14); Ord. 325 (5/7/13).

**4-01.110 Defendant's Rights.**

- (A) In addition to any other rights enumerated, granted, or otherwise imputed to a criminal Defendant, a Defendant is entitled to the following rights in all criminal proceedings:
- (1) To have all rights that are guaranteed by the Indian Civil Rights Act and all other rights whose protection is necessary under the Constitution of the United States;
  - (2) To be timely notified of Defendant's rights and responsibilities once detained;
  - (3) To defend oneself in person and through counsel;
  - (4) To be informed of the nature of the charges pending against oneself and to have a copy of those charges;

- (5) To confront and cross-examine all prosecution or hostile witnesses;
  - (6) To compel by subpoena:
    - (a) The attendance of any witnesses necessary to defend against the charge(s); and
    - (b) The production of any books, records, documents, or other tangible items necessary to defend against the charge(s);
  - (7) To have a speedy and public trial by impartial Judge or jury;
  - (8) To not be twice put in jeopardy for the same offense;
  - (9) To not be compelled to testify, and have no inference drawn from a defendant's exercise of the right not to testify;
  - (10) To be sentenced to a facility that passes the Bureau of Indian Affairs jail standards for enhanced sentencing authority under 25 USC 1301, et. seq.;
  - (11) To appeal any final decision of the Tribal Court to the Tribal Court of Appeals;
  - (12) To petition for a writ of habeas corpus as set forth in the Swinomish Tribal Code and 25 U.S.C. 1304(e) and 25 U.S.C. 1303. The Swinomish Tribe shall ensure notice of this right is timely provided to the Defendant as required by 25 U.S.C. 1304(e).
- (B) Right to Counsel.
- (1) The Swinomish Tribe shall bear the cost of providing appointed counsel for every indigent Defendant that does not hire counsel.
  - (2) A Defendant in a criminal case shall be provided with counsel that:
    - (a) provides effective assistance of counsel equal to at least that guaranteed in the U.S. Constitution;
    - (b) is licensed to practice in a jurisdiction in the United States and meets any applicable Swinomish bar requirements for appearance in the Swinomish Tribal Court; and
    - (c) is licensed by a jurisdiction that applies appropriate licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys.

(C) Judicial Competence.

- (1) Judges shall have sufficient legal training to preside over a criminal proceeding.
- (2) Judges presiding over a criminal proceeding shall be a licensed bar member in good standing in a jurisdiction in the United States.

(C) Right to Jury Trial.

- (1) A Defendant shall have the right to a jury trial in every case in which incarceration is a possible sentence upon or following conviction.
- (2) A Defendant shall have the right to be tried by a jury reflecting a fair cross section of the community.
- (3) A Defendant shall have the right to be tried by a jury drawn from sources that do not systematically exclude any distinctive group in the community, including non-Indians.
- (4) A Defendant may waive the right to a jury trial in writing.

(E) Disclosures and Court Recordings.

- (1) The Tribe's criminal laws, rules of evidence, and rules of criminal procedure shall be published and available to a Defendant prior to charging a Defendant.
- (2) The Tribal Court shall retain a record of all criminal proceedings, including audio or other form of recording. The Tribal Court shall establish written rules controlling the creation, storage, and disposal of court records and recordings.

[History] Ord. 408 (9/15/20); Ord. 331 (4/1/14).

## Annotations

### STC 4-01.050

#### NOTES OF DECISIONS

#### Jurisdiction over Canadian Native 1

##### 1. Jurisdiction over Canadian Native

Defendant challenged Swinomish jurisdiction to prosecute a criminal offense on the grounds that she is not a member of a federally recognized tribe. The Indian Civil Rights Act, 25 USC 1301-1305, vests criminal jurisdiction in Indian tribes to exercise criminal jurisdiction over all Indians. The Court looked to a modern statement of the *Rogers* test to determine the definition of the term Indian, and applied the following two prong test: (1) does the person have any degree of Indian blood; and (2) does the person have any affiliation with a federally recognized tribe. *United States v. Zepeda*, 792 F.3d 1103 (9<sup>th</sup> Cir 2015)(interpreting *United States v. Rogers*, 45 U.S. 567 (1845)). The Court held that based on Defendant's membership in a Canadian First Nations band and her demonstrated connections with Swinomish, the Defendant was an Indian for purposes of establishing criminal jurisdiction in Swinomish Tribal Court. *SITC v. Sam*, CRCO-2017-0050, (Swinomish Tribal Ct. June 29, 2017).