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CHEROKEE COUNCIL HOUSE
CHEROKEE, NORTH CAROLINA

Date: AUG 04 2022

ORDINANCE NO.: 367 (2022)

An ordinance amending Tribal criminal laws to incorporate the expansion of special Tribal criminal jurisdiction provided by the Violence Against Women Act (2022).

WHEREAS, the Eastern Band of Cherokee Indians (“EBCI” or “Tribe”) is a federally-recognized Indian tribe with sovereign powers of self-government; and

WHEREAS, Tribal Council is fully authorized and empowered to adopt laws and regulations for the general government of the Tribe (EBCI Charter and Governing Document § 23); and

WHEREAS, in 2015, Tribal Council adopted Ordinance No. 526, allowing the Tribe to expand its criminal jurisdiction over non-Indians in cases involving domestic and dating violence through the exercise of special domestic violence criminal jurisdiction granted to tribes by the Violence Against Women Act (“VAWA”) in 2015; and

WHEREAS, the Tribe successfully launched prosecutions of non-Indians under these VAWA provisions; and

WHEREAS, the EBCI has been a leader in Indian Country in the implementation of prosecutions under special domestic violence criminal jurisdiction; and

WHEREAS, prior to 2022, three categories of conduct were able to be punished under VAWA, 25 U.S.C. 1304: domestic violence, dating violence, and protection order violations; and

WHEREAS, earlier this year, the VAWA reauthorization allowed for tribes that guarantee certain protections to criminal defendants to expand their criminal jurisdiction over non-Indians to include new categories of crimes;

WHEREAS, with the adoption of these changes proposed herein, beginning October 1, 2022, the Tribe will be able to increase the number of offenses available for prosecutions of non-Indian criminal defendants in the Cherokee Court to encompass non-Indians who commit the following additional types of crimes: sexual violence, stalking, sex trafficking, child violence, obstruction of justice, and assault against tribal justice personnel; and

1 **WHEREAS**, the following changes need to be made to the Cherokee Code for the Tribe to
2 begin Cherokee Court prosecutions of non-Indians for these new categories of
3 crimes; and
4

5 **NOW THEREFORE BE IT ORDAINED**, by the Tribal Council of the Eastern Band of
6 Cherokee Indians, in Council assembled at which a quorum is present, that
7 Cherokee Code Chapter 14 and Chapter 15 is hereby modified as set forth below:
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9

10 **Sec. 14.1.1. - Application to persons subject to criminal jurisdiction of the Cherokee Court.**
11

12 (a) The following criminal offenses and penalties contained herein shall apply to all members of
13 any federally recognized Indian tribe who violate the provisions of this chapter within the
14 territorial jurisdiction of the Eastern Band of Cherokee Indians. That territorial jurisdiction
15 shall include all lands held in trust for the Eastern Band of Cherokee or its members and all
16 other lands owned by the Eastern Band of Cherokee.
17

18 (a)(1) Beginning on October 1, 2022, the following criminal offenses and penalties contained
19 herein shall apply to all persons who are subject to special Tribal criminal jurisdiction as
20 defined in the Indian Civil Rights Act, 25 U.S.C. § 1304. The Eastern Band of Cherokee
21 Indians shall exercise special Tribal criminal jurisdiction over a defendant for a covered
22 crime that occurs in the territorial jurisdiction of the Tribe.
23

24 (b) In addition to the penalties contained herein, the court may order a defendant who is found
25 guilty to pay restitution to the victim(s) of the crime, to the Tribe, a Tribal program or a
26 Tribal entity. An order of restitution shall be subject to enforcement as a debt to the Tribe,
27 along with any fine imposed by the court, and the restitution shall be distributed as ordered
28 by the court.
29

30 (c) For offenses that allow exclusion as a punishment, such punishment shall only be imposed in
31 the discretion of the Tribal Council in accordance with chapter 2 of the Cherokee Code.
32

33 ***
34

35 **Sec. 14-5.5. - Stalking.**
36

37 (a) Definition of terms:
38

39 (1) Harass means to engage in a course of conduct directed at a specific person that causes
40 substantial emotional distress in such person and serves no legitimate purpose.
41

42 (2) Course of conduct means the pattern of conduct composed of a series of acts over time,
43 however short, evidencing a continuity of purpose.
44

1 (3) Credible threat means a threat made with the intent to cause the person who is the target
2 of the threat to reasonably fear for his or her safety. The threat must be against the life of,
3 or a threat to cause bodily injury to, a person.
4

5 (b) A person commits the offense of stalking if the person willfully on more than one occasion
6 follows, harasses or is in the presence of another person without legal purpose.
7

8 (c) A person commits the offense of aggravated stalking if the person willfully on more than one
9 occasion follows, harasses or is in the presence of another person without legal purpose, and:
10

11 (1) Makes a credible threat with the intent to place that person in reasonable fear of death or
12 bodily injury; or
13

14 (2) Commits the offense when there is a court order in effect prohibiting similar behavior; or
15

16 (3) Commits the offense within five years of a prior conviction for this offense; or
17

18 (4) The person stalked is a minor under 16 years of age; or
19

20 (5) Causes fear for the person's safety or the safety of others; or
21

22 (6) Causes the person to suffer substantial emotional distress.
23

24 (d) Penalty:
25

26 (1) A violation of subsection (b) of this section shall be punished by a fine of \$500.00,
27 imprisonment for up to six months, or both.
28

29 (2) A violation of subsection (c) of this section shall be punished by fine of not more than
30 \$15,000.00, imprisonment for up to three years, or both.
31

32 ***

33 **Sec. 14-40.1.— Domestic violence; covered crimes.**

34 (a) *Purpose.* The purpose of the domestic violence criminal ordinance is to recognize that the
35 crime of domestic violence is an extremely serious crime against society, the Tribe, and the
36 family, and to provide the victim of domestic violence the maximum protection from further
37 violence which the law can provide. Furthermore, the purpose of this section is to recognize
38 that the strength of the Tribe is founded on healthy families, and that the safety of victims of
39 domestic violence must be ensured by immediate intervention by law enforcement,
40 prosecution, education, counseling, and other appropriate services.

41 It is the intent of the Eastern Band of Cherokee Indians Tribal Council that the official
42 response to cases of domestic violence is that violent crime will not be excused or tolerated.
43 Furthermore, it is the explicit intent of the Eastern Band of Cherokee Indians Tribal Council
44 that domestic violence be prosecuted without requiring that the alleged victim and
45 perpetrator be married, share a residence, or be presently involved in a relationship.

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- (b) It shall be unlawful to commit the crime of domestic violence which occurs when a person commits one of the following acts against an intimate partner or against a member of such intimate partner's family or household:
- (1) Attempting to cause or causing physical harm, bodily injury, or assault to an intimate partner or to a member of such intimate partner's family or household, or to an animal of such intimate partner;
 - (2) Placing an intimate partner or a member of the intimate partner's family or household in fear of the infliction of physical harm, bodily injury or assault;
 - (3) Willfully attempting to cause or causing emotional distress to an intimate partner or to a member of such intimate partner's family or household;
 - (4) Causing an intimate partner or a member of such intimate partner's family or household to engage involuntarily in sexual activity by force, threat of force, or duress; or
 - (5) Committing any willful violation of a court order intended to protect the intimate partner or a member of such person's family or household;
 - (6) Committing one of the following offenses, as defined by the Eastern Band of Cherokee Indians Criminal Code, against an intimate partner or against a family member, household member:
 - a. Injuring real property (§ 14-10.11);
 - b. Injuring telephone, wires or other telephone equipment (§ 14-10.14);
 - c. Criminal trespass (§§ 14-10.15, 14-10.16, and/or 14-10.17);
 - d. Burglary (§ 14-10.40);
 - e. Breaking and entering (§ 14-10.41);
 - f. Criminal mischief (§ 14-10.9);
 - g. Arson (§§ 14-10.50, 14-10.51, and/or 14-10.52);
 - h. Assault (§§ 14-40.49, 14-40.50, 14-40.54, 14-40.55, 14-40.56, 14-40.57, 14-40.59, 14-40.60, 14-40.62);
 - i. Maiming (§ 14-40.14);
 - j. Discharging a firearm into an occupied building (§ 14-40.15);
 - k. Harassment; telephone harassment (§§ 14-25.13 and/or 14-5.3);
 - l. Kidnapping (§ 14-40.30);
 - m. False imprisonment (§ 14-40.31);
 - n. Custodial interference (§ 14-40.32);
 - o. Homicide (§§ 14-40.40 and/or 14-40.41);

- p. Sex offenses - including aggravated sexual abuse, sexual abuse, sexual abuse of minor or ward, abusive sexual contact (§§ 14-20.2, 14-20.3, 14-20.4, 14-20.8);
- q. Stalking (§ 14-5.5);
- r. Communicating threats (§ 14-5.2);
- s. Harassment (§§ 14-5.3 and/or 14-25.13);
- t. Weapons law violations (§§ 14-34.10, 14-34.11, 14-34.12, 14-34.13, and/or 14-34.14);
- u. Cruelty to animals (§ 14-5.20);
- v. Robbery and robbery with a dangerous weapon (§§ 14-10.30 and 14-10.31).

The commission of one of the above-referenced crimes against an intimate partner or against a member of such party's family or household shall trigger the application of this ordinance.

- (c) It shall be unlawful to commit ~~the crime of special domestic violence~~ a covered crime as defined by 25 U.S.C. 1304. Special domestic violence is defined as follows: A covered crime is:

~~(1) The commission of any one of the following offenses against an intimate partner:~~

~~a. Any one of the following offenses, as defined by the Eastern Band of Cherokee Indians Criminal Code:~~

~~1. Assault (§§ 14-40.49, 14-40.50, 14-40.54, 14-40.55, 14-40.56, 14-40.59, 14-40.60, 14-40.62); or~~

~~2. Maiming (§ 14-40.14); or~~

~~3. Kidnapping (§ 14-40.30); or~~

~~4. False imprisonment (§ 14-40.31); or~~

~~5. Homicide (§§ 14-40.40 and/or 14-40.41); or~~

~~6. Sex offenses, including aggravated sexual abuse, sexual abuse, abusive sexual contact (§§ 14-20.2, 14-20.3, 14-20.8); or~~

~~7. Communicating threats (§ 14-5.2); or~~

~~8. Robbery with a dangerous weapon (§ 14-10.30); or~~

~~b. Any other crime of violence as defined by 18 U.S.C. § 16, as amended and all applicable federal law interpreting said statute in existence at the time of the commission of the offense; or~~

~~(2) Any act occurring in the Indian Country of the Eastern Band of Cherokee Indians which violates the portion of a protection order that:~~

~~a. Prohibits or provides protection against violent or threatening acts or harassment against, sexual violence against, with, or physical proximity to, another person;~~

- 1 b. ~~Was issued against the defendant;~~
2 e. ~~Is enforceable by the Eastern Band of Cherokee Indians; and~~
3 d. ~~Is consistent with the provisions of 18 U.S.C. § 2265(b), as amended.~~

4 (1) Assault of Tribal justice personnel. The term “assault of Tribal justice personnel” means
5 any violation of the criminal laws of the Eastern Band of Cherokee Indian that involves the
6 use, attempted use, or threatened use of physical force against an individual authorized to
7 act for, or on behalf of, the Tribe or serving the Tribe during, or because of, the performance
8 or duties of that individual in—

9
10 (A) preventing, detecting, investigating, making arrests relating to, making
11 apprehensions for, or prosecuting a covered crime;

12
13 (B) adjudicating, participating in the adjudication of, or supporting the adjudication
14 of a covered crime;

15
16 (C) detaining, providing supervision for, or providing services for persons charged
17 with a covered crime; or

18
19 (D) incarcerating, supervising, providing treatment for, providing rehabilitation
20 services for, or providing reentry services for persons convicted of a covered crime.

21
22 (2) Child violence. The term “child violence” means the use, threatened use, or attempted
23 use of violence against a child proscribed by the criminal laws of the Eastern Band of
24 Cherokee Indians.

25
26 (3) Dating violence. The term “dating violence” means any violation of the criminal laws of
27 the Eastern Band of Cherokee Indians that is committed by a person who is or has been in a
28 social relationship of a romantic or intimate nature with the victim, as determined by the
29 length of the relationship, the type of relationship, and the frequency of interaction between
30 the persons involved in the relationship.

31
32 (4) Domestic violence. The term “domestic violence” means any violation of the criminal
33 laws of the Eastern Band of Cherokee Indians that is committed by—

34
35 (A) a current or former spouse or intimate partner of the victim;

36
37 (B) a person with whom the victim shares a child in common;

38
39 (C) a person who is cohabitating with or who has cohabitated with the victim as a
40 spouse or intimate partner; or

41
42 (D) a person similarly situated to a spouse of the victim under the domestic- or
43 family-violence laws of the Tribe.

1 (5) Obstruction of justice. The term “obstruction of justice” means any violation of the
2 criminal laws of the Eastern Band of Cherokee Indians that involves interfering with the
3 administration or due process of the laws of the Tribe, including any Tribal criminal
4 proceeding or investigation of a crime.

5
6 (6) Sex trafficking. The term “sex trafficking” means conduct within the meaning of
7 section 1591(a) of title 18, United States Code.

8
9 (7) Sexual violence. The term “sexual violence” means any nonconsensual sexual act or
10 contact proscribed by the criminal laws of the Eastern Band of Cherokee Indians
11 including in any case in which the victim lacks the capacity to consent to the act.

12
13 (8) Stalking. The term “stalking” means engaging in a course of conduct directed at a
14 specific person proscribed by the criminal laws of the Eastern Band of Cherokee Indians
15 that would cause a reasonable person—

16
17 (A) to fear for the person’s safety or the safety of others; or

18
19 (B) to suffer substantial emotional distress.

20
21 (9) Violation of a protection order. The term “violation of a protection order” means an
22 act that—

23
24 (A) occurs in the jurisdiction of Eastern Band of Cherokee Indians; and

25
26 (B) violates a provision of a protection order that—

27
28 (i) prohibits or provides protection against violent or threatening acts
29 or harassment against, sexual violence against, contact or
30 communication with, or physical proximity to, another person;

31
32 (ii) was issued against the defendant;

33
34 (iii) is enforceable by the Eastern Band of Cherokee Indians; and

35
36 (iv) is consistent with section 2265(b) of title 18.

37
38 (c)(1) ~~(3) The crime of special domestic violence~~ Special Tribal criminal jurisdiction over a
39 covered crime shall only be applicable to cases in which the Court determines the following in
40 accordance with procedures outlined in § 14-40.1~~(n)(1)~~, (n)(2), and Rule 6(b)(1) of the Cherokee
41 Rules of Criminal Procedure:

42
43 a. (1) That either the defendant or the victim is an Indian, ~~and~~

1 (2) Exception if victim and defendant both non-Indians. The Court shall exercise
2 jurisdiction over covered crimes involving obstruction of justice or assault of Tribal
3 justice personnel if neither the victim nor the alleged victim is an Indian.

4 ~~b. That the defendant either:~~

- 5 ~~1. Resides in the Indian Country of the Eastern Band of Cherokee Indians; or~~
6 ~~2. Is employed in the Indian Country of the Eastern Band of Cherokee Indians; or~~
7 ~~3. Is an intimate partner of an enrolled member of the Eastern Band of Cherokee~~
8 ~~Indians; or~~
9 ~~4. Is an intimate partner of an Indian who resides in the Indian Country of the~~
10 ~~Eastern Band of Cherokee Indians.~~

11
12 ~~(c)(2) (4) The commission of the crime of special domestic violence a covered crime shall trigger~~
13 ~~the application of this section.~~

14
15 (d) *Indian*, as used in this Section shall have the same meaning as described in 25 U.S.C. §
16 1301(4), as amended, and all applicable federal law interpreting said statute in existence at
17 the time of the commission of the offense.

18
19 (e) *Indian Country*, as used in this Section shall have the same meaning as described in 18
20 U.S.C. § 1151, as amended and all applicable federal law interpreting said statute in
21 existence at the time of the commission of the offense.

22
23 (f) *Intimate partner/family member*.

24
25 (1) "Intimate partner" means:

- 26 a. A spouse or former spouse, persons who share a child in common, or persons
27 who cohabit or have cohabitated as spouses; or
28
29 b. Persons who are or have been in a social relationship of a romantic or intimate
30 nature, as determined by the length of the relationship, the type of relationship,
31 and the frequency of interaction between the persons involved in the
32 relationship; or
33
34 c. Any other person similarly situated to a spouse who is protected by the
35 domestic or family violence laws of the Eastern Band of Cherokee Indians
currently in existence or hereinafter adopted.

36 (2) Intimate partner's family includes: Any immediate family relationship that an
37 intimate partner, as defined above, may have. Such relationship may include, a
38 relationship between parent/child, siblings, grandparents/grandchild,
39 stepparent/step-child, foster parent/foster child, or any relationship where
40 circumstances have created a close family-type relationship, such as cousins raised
41 as siblings.

42 ~~(f)(1) Child. The term "child" means a person who has not attained the lesser of—~~

1 violence, ~~special domestic violence~~, willful violation of court order, or any crimes
2 involving domestic violence.

3
4 (2) *Mandatory arrest.*

5
6 a. *Violation of order.* A law enforcement officer must, without unnecessary delay,
7 arrest and charge a person with the appropriate crime if the officer has probable
8 cause to believe that person has willfully violated a court order, as defined in this
9 section.

10
11 b. *Commission of domestic violence or ~~special domestic violence~~ covered*
12 *crime.* A law enforcement officer must, without unnecessary delay, arrest and
13 charge a person with the appropriate crime if the officer has probable cause to
14 believe that the person has committed or is committing the offense of domestic
15 violence or ~~special domestic violence~~ a covered crime of dating violence,
16 domestic violence, or violation of a protection order, even if a warrant has not
17 been issued and the offense was committed outside the presence of the officer. If
18 the conditions for arrest are present, the officer shall arrest the alleged perpetrator
19 of domestic violence or ~~special domestic violence~~ a covered crime of dating
20 violence, domestic violence, or violation of a protection order, regardless of
21 whether the alleged victim signs a complaint and whether the arrest is against the
22 expressed wishes of the alleged victim. If a law enforcement officer receives
23 complaints of domestic violence or ~~special domestic violence~~ a covered crime of
24 dating violence, domestic violence, or violation of a protection order from two or
25 more opposing persons, the officer must evaluate each complaint separately to
26 determine who was the predominant aggressor. If the officer determines that one
27 person was the predominant aggressor, the officer need not arrest the other person
28 believed to have committed an offense. The law enforcement officer must not
29 threaten, suggest, or otherwise indicate the possible arrest of all parties to
30 discourage requests for intervention by law enforcement by any party. In addition,
31 the law enforcement officer shall not consider the use or abuse of alcohol or
32 controlled substance by either party in making a determination as to whether the
33 crime of domestic violence has been committed. Further, the law enforcement
34 officer shall not make an arrest based on who hit who first, but shall consider the
35 dynamics of domestic violence. In determining whether a person is the
36 predominant aggressor, the officer must consider:

37
38 1. The history of domestic violence, both documented prior complaints and
39 convictions and the law enforcement officer's own prior knowledge of the
40 family,

41
42 2. The relative severity of the injuries inflicted on each person, or serious
43 threats creating reasonable fear of bodily injury;

44
45 3. The degree to which one of the persons has acted with deliberate intent
46 to control, isolate, intimidate, emotionally demean, cause injury or pain or

1 fear of harm to the person or to a member of the person's family or
2 household;

3
4 4. The likelihood of future injury to each person;

5
6 5. Whether one of the persons acted in self-defense.
7

8 (3) *Familial relationships of law enforcement.* In instances where law enforcement
9 officers respond to a call involving a relative by blood or marriage, the officer shall note
10 the relationship on the case report. The supervisor reviewing the report shall review the
11 report for accuracy and will ensure that the appropriate action has been taken.
12

13 (4) *Authority to seize weapons.* Incident to an arrest for a crime of domestic
14 violence, ~~special domestic violence or a covered crime of dating violence, domestic~~
15 ~~violence, or violation of a protection order, or willful violation of court order,~~ as defined
16 herein, a law enforcement officer:
17

18 a. Must seize all weapons that are alleged to have been involved or threatened to
19 be used in the commission of the crime;
20

21 b. Must seize any weapon that is in plain view of the officer or was discovered
22 pursuant to a consensual search if an existing order or condition of release
23 prohibits the use or possession of a firearm or other weapon;
24

25 c. Must seize any weapon that is in plain view of the officer or was discovered
26 pursuant to a consensual search, as necessary for the protection of the officer or
27 other persons.
28

29 (5) *Report to domestic violence program.* Whenever a police officer completes the
30 investigation of an alleged act of domestic violence, ~~special domestic violence or a~~
31 ~~covered crime of dating violence, domestic violence, or violation of a protection order, or~~
32 ~~willful violation of court order,~~ regardless of whether an arrest is made, the investigating
33 party shall make a written incident report of the alleged abuse and make that report
34 available to the Eastern Band of Cherokee Indians' Domestic Violence Program within 48
35 hours for purposes of program coordination. When the investigating party does not bring
36 charges, make a warrantless arrest, or arrests two or more persons for a crime involving
37 domestic violence or ~~special domestic violence a covered crime of dating violence,~~
38 ~~domestic violence, or violation of a protection order,~~ the written report must set forth the
39 grounds for not bringing charges, for not arresting, or for arresting both parties. In
40 addition, all reports, regardless of who is arrested or not arrested, must contain:
41

42 a. A description of the circumstances surrounding any action which could
43 constitute the crime of domestic violence, ~~special domestic violence or a covered~~
44 ~~crime of dating violence, domestic violence, or violation of a protection order, or~~
45 ~~willful violation of court order under this section,~~ such as a description of all
46 parties, any witnesses, and surrounding environment;

1
2 b. A description of the injuries or harm inflicted upon either or both parties; and
3

4 c. Summaries of all statements from the parties and witnesses describing the
5 circumstances surrounding any action which could constitute the crime of
6 domestic violence under this section.
7

8 (m) *Duties of Tribal Prosecutor.*
9

10 (1) The Tribal Prosecutor should seek to adhere to the following guidelines when
11 prosecuting cases of domestic violence, ~~special domestic violence~~ a covered crime, and
12 willful violation of court order:
13

14 a. The prosecutor should seek to ensure that the employment, economic,
15 educational, physical and/or mental health and political status of the alleged
16 perpetrator and victim will not factor into determinations regarding domestic
17 violence crimes;
18

19 b. The prosecutor should seek to prohibit victims from withdrawing charges;
20

21 c. The prosecutor should seek to utilize advocates during every phase of criminal
22 justice proceedings;
23

24 d. The prosecutor will not dismiss a domestic violence case without prior
25 consultation and review with the arresting officer and advocate;
26

27 e. The prosecutor will expedite proceedings with a minimum of continuances and
28 shall consider the present residency of the victim as it relates to continuances,
29 especially if the victim has relocated off the reservation for safety;
30

31 f. In instances calling for "victimless" prosecution, the prosecution should seek to
32 enlist any and all evidentiary avenues, including photographs, other witness,
33 medical records, testimony from law enforcement, history of past abuse, excited
34 utterances, etc.
35

36 (2) The Prosecutor and/or the Eastern Band of Cherokee Indians' Domestic Violence
37 Program shall make all reasonable efforts to notify the alleged victim of the following
38 rights:
39

40 a. The right to be informed of all hearing dates and continuances;
41

42 b. The right to provide the court with a victim-impact statement and an
43 assessment of the likelihood of future harm;
44

45 c. The right to be present at sentencing and to address the court at such time;
46

1 d. If the alleged perpetrator is eligible for probation, the right to advise the court
2 of conditions of probation required to assure the safety of the alleged victim; and
3

4 e. If the domestic violence, ~~special domestic violence~~ or covered crime involving
5 dating violence, domestic violence, or violation of a protection order, ~~or willful~~
6 ~~violation of court order~~ resulted in damage to or loss of property, the ability to ask
7 the court to order restitution for those losses.
8

9 (3) If the alleged victim has cooperated with the prosecution and provided current contact
10 information to the prosecutor, the prosecutor shall notify the alleged victim of domestic
11 violence, ~~special domestic violence~~ a covered crime, or willful violation of court order
12 when the prosecutor declines to prosecute a case, or when the prosecutor dismisses the
13 criminal charges, or when the prosecutor enters into a plea agreement.
14

15 (4) The prosecutor shall be educated in the psycho-social aspects of domestic violence,
16 including the fear and self-doubt that could lead an alleged victim to find it difficult to
17 testify against the defendant. Alleged victims shall be treated with dignity, respect and
18 sensitivity.
19

20 (n) *Initial appearance.*

21 ~~(1) Determining jurisdiction. In addition to the procedures contained in Rule 6(b)(1) of the~~
22 ~~Cherokee Rules of Criminal Procedure, in cases involving charges for violations of~~
23 ~~Cherokee Code Section 14-40.1(c), the Magistrate shall conduct a further inquiry as~~
24 ~~follows:~~

25 a. ~~Inquire as to whether the defendant resides in the Indian Country of the Eastern~~
26 ~~Band of Cherokee Indians; and~~

27 b. ~~Inquire as to whether the defendant is employed in the Indian Country of the~~
28 ~~Eastern Band of Cherokee Indians; and~~

29 c. ~~Inquire as to whether the defendant is an intimate partner of an enrolled member~~
30 ~~of the Eastern Band of Cherokee Indians; and~~

31 d. ~~Inquire as to whether the defendant is an intimate partner of an Indian who resides~~
32 ~~in the Indian Country of the Eastern Band of Cherokee Indians.~~

33 ~~In addition to the defendant's answers to the above inquiries, the Magistrate may also~~
34 ~~receive evidence relevant to the above inquiries from any other reliable sources as may~~
35 ~~be available. The Magistrate shall also determine whether the alleged victim is an~~
36 ~~Indian using the same inquiries as for the defendant contained in Rule 6(b)(1) of the~~
37 ~~Cherokee Rules of Criminal Procedure and considering all evidence available from any~~
38 ~~other sources the Magistrate deems reliable.~~

39 [Reserved.]

40 (2) In cases involving criminal charges for violations of covered crimes as defined by
41 Cherokee Code Section 14-40.1(c) and (c)(1), upon the conclusion of the hearing
42 required by Rule 6(b)(1) ~~and Subsection (n)(1) above~~, the Magistrate shall make
43 findings relative to ~~the~~ these inquiries.

- 1 a. If the Magistrate finds that either the defendant or the victim is an Indian; ~~and that~~
2 ~~the defendant either:~~
3 1. ~~Resides in the Indian Country of the Eastern Band of Cherokee Indians; or~~
4 2. ~~Is employed in the Indian Country of the Eastern Band of Cherokee Indians;~~
5 ~~or~~
6 3. ~~Is an intimate partner of an enrolled member of the Eastern Band of~~
7 ~~Cherokee Indians; or~~
8 4. ~~Is an intimate partner of an Indian who resides in the Indian Country of the~~
9 ~~Eastern Band of Cherokee Indians;~~

10 then the Court has jurisdiction over the defendant, and the Magistrate shall
11 proceed with the remainder of the procedures contained in this Section and the
12 Cherokee Code.

13 a1. If the Magistrate finds that if neither the defendant nor the victim is an Indian, and
14 the crime alleged is a covered crime of obstruction of justice or assault of Tribal
15 justice personnel, then the Court has jurisdiction over the defendant, and the
16 Magistrate shall proceed with the remainder of the procedures contained in this
17 Section and the Cherokee Code.

18 b. If the Magistrate does not make findings consistent with Subsection (n)(2)(a.) or
19 (a1.) above, then the Magistrate shall notify the CIPD of same, dismiss the Tribe's
20 charges and turn the defendant over to the CIPD for transport to the appropriate
21 state or local judicial or law enforcement officer or to the federal authorities.

22 c. If the defendant exercises his or her right to remain silent, the Magistrate may
23 detain the defendant to determine jurisdiction, without prejudice to the defendant's
24 right to challenge jurisdiction at a later date. If the defendant is too intoxicated or
25 impaired for the Magistrate to conduct this inquiry, the Magistrate shall order that
26 the defendant appear before the Magistrate on duty on the following business day
27 for the conclusion of this proceeding. Nothing herein shall prevent the Magistrate
28 from using evidence relevant to the inquiries regarding jurisdiction from any other
29 reliable sources as may be available and making a determination based solely on
30 those other sources.

31 d. Nothing herein shall prevent the Magistrate from continuing the hearing required
32 by this Section, detaining the defendant and referring the case to a Judge of the
33 Cherokee Court for a determination of jurisdiction consistent with the provisions
34 of this Section and Rule 6 of the Cherokee Rules of Criminal Procedure.

35 e. If the Magistrate orders the detention of a defendant pursuant to a charge for
36 violation of Section 14-40.1(c) and (c)(1) then the Magistrate shall notify the
37 defendant of his or her rights and privileges to petition the Federal Court for a writ
38 of habeas corpus and to stay the defendant's detention pursuant to 25 U.S.C. **SS**
39 §§1303 and 1304(e), (f), and (g).

40 (3) No person charged with a crime of domestic violence, special domestic violence a
41 covered crime involving dating violence, domestic violence, or violation of a
42 protection order, or willful violation of a court order shall be released from detention

1 until after the expiration of 72 hours from arrest, notwithstanding the ability to post a
2 cash or surety bond, unless released by a Magistrate or Judge of the Cherokee Court
3 after a formal release hearing, which hearing shall be held immediately upon the
4 defendant's first appearance before the Magistrate or Judge of the Cherokee Court,
5 unless for good cause shown, the defendant or the Tribe seeks a continuance. During
6 the 72 hours, it shall be a rebuttable presumption that the defendant poses a risk of
7 violence and/or intimidation to the alleged victim and that no condition or combination
8 of conditions will reasonably assure the appearance of the defendant as required and
9 the safety of the alleged victim and the community. In no case shall any person
10 arrested for domestic violence, special domestic violence, or willful violation of court
11 order be released prior to the expiration of 72 hours from arrest unless the Court has
12 made all reasonable efforts to inform the alleged victim that the defendant's release is
13 imminent and has been given the alleged victim an opportunity to be heard at the
14 formal release hearing. The Magistrate or Judge may hear from the alleged victim via
15 telephone and may consider any written statement submitted by the victim. At the
16 release hearing, the Magistrate or Judge must review the probable cause supporting the
17 charge of domestic violence, special domestic violence or a covered crime involving
18 dating violence, domestic violence, or violation of a protection order, or willful
19 violation of court order under this section and determine whether:

- 20 a. The person poses a credible threat of violence, repeated harassment or bodily
21 injury to the alleged victim or to the victim's family or household,
22 b. Is a threat to public safety; and
23 c. Is reasonably likely to appear in court.

24 At the hearing, the defendant has the right to be represented by counsel, and, if
25 financially unable to obtain adequate representation, to have counsel appointed. The
26 person shall be afforded an opportunity to testify, to present witnesses, to cross-
27 examine witnesses who appear at the hearing, and to present information by proffer or
28 otherwise. The rules concerning admissibility of evidence in criminal trials do not
29 apply to the presentation and consideration of information at the hearing, and the
30 Magistrate or Judge may consider any and all evidence available at the time of the
31 hearing. The facts the judicial officer uses to support a finding that no condition or
32 combination of conditions will reasonably assure appearance of the defendant as
33 required and the safety of the alleged victim or the community shall be supported by
34 clear and convincing evidence. If, after the hearing, the Magistrate or Judge finds that
35 no condition or combination of conditions will reasonably assure the appearance of the
36 defendant as required and the safety of the alleged victim or the community, the
37 Magistrate or Judge shall order the detention of the defendant for the remainder of the
38 72 hours from arrest. Upon such finding the Magistrate or Judge may also order the
39 detention of the defendant pending trial or may order the defendant be released, upon
40 the expiration of 72 hours from arrest, on a condition or combination of conditions
41 under subsection (n)(5).

42 (4) In making the determination regarding detention required by subsection (n)(3), the
43 court will consider whether the arrested person's pattern of violent or threatening
44 behavior towards a victim or victim's family or household member is chronic, and

1 whether the seriousness of the behavior has been escalating, indicating a heightened
2 danger of severe or lethal injury to the alleged victim.

3 (5) Before releasing a person charged with a crime involving domestic violence, ~~special~~
4 ~~domestic violence or a covered crime involving dating violence, domestic violence, or~~
5 ~~violation of a protection order or willful violation of court order~~, the Court must make
6 written findings concerning the determination made in accordance with subsection (n)(3)
7 and may impose conditions of release or bail on the defendant to protect the alleged
8 victim of domestic or family violence and to ensure the defendant's appearance at a
9 subsequent court hearing. The conditions may include, but are not limited to, an order:

10 a. That the defendant stay away from the home, school, business or place of
11 employment of the alleged victim and/or other members of the victim's household
12 or family;

13 b. That the defendant refrain from harassing, annoying, telephoning, contacting or
14 otherwise communicating with the alleged victim, household members of the
15 victim, family members of the victim, either directly or indirectly;

16 c. That the defendant refrain from assaulting, beating, molesting, or wounding the
17 alleged victim, as well as household members, family, and animals of the alleged
18 victim,

19 d. That the defendant refrain from removing, damaging property belonging to the
20 victim, household members of the victim, and the victim's family;

21 e. That the defendant be prohibited from using or possessing a firearm or other
22 weapon specified by the court;

23 f. That the defendant report within ninety-six (96) hours to a tribal health program
24 for a domestic violence evaluation and comply with all treatment
25 recommendations. If alcohol and/or drugs is indicated, the defendant shall also be
26 prohibited from possessing or consuming alcohol or controlled substances and
27 will be required to complete a chemical dependency evaluation conducted by a
28 tribal chemical dependency program and comply with treatment
29 recommendations. A copy of the order will be ~~faxed~~ forwarded to the appropriate
30 tribal program to ensure compliance with this provision.

31 g. To remain within the jurisdiction of the Cherokee Tribal Court at all times;

32 h. Any other conditions required to protect the safety of the alleged victim and to
33 ensure the appearance of the defendant in court.

34 (6) Once these conditions of release are imposed, the court shall:

35 a. Issue a written order for conditional release;

36 b. Immediately distribute a copy of the order to the Tribal Prosecutor's office and
37 to the Cherokee Police Department;

38 c. Provide the Cherokee Police Department with any available information
39 concerning the location of the defendant to ensure that the safety of the alleged
40 victim, as well as members of the alleged victim's household and family are
41 protected;

1 d. Use all reasonable means to immediately notify the alleged victim of the
2 alleged crime of the defendant's release from custody and furnish the alleged
3 victim with an official copy of all conditions of release. The location of the
4 alleged victim is confidential and law enforcement, the prosecutor, and court are
5 prohibited from divulging it, except in accordance with subsection (r) below.

6 (7) Nothing in this section shall be construed as modifying or limiting the presumption of
7 innocence.

8 (o) *Court-ordered and court-referred mediation prohibited.* The court shall not order defendants
9 and victims of the crime of domestic violence, ~~special domestic violence~~ or a covered crime
10 involving dating violence, domestic violence, or violation of a protection order, ~~or willful~~
11 ~~violation of court order~~ into mediation or any other type of couples counseling, alternative
12 justice, restorative justice, peace-making, circle sentencing, or any other mediation type of
13 situation that would put the victim in the position of dealing directly with the defendant, even if
14 the victim has the right to refuse to participate.

15 (p) *Privileges.*

16 (1) The following evidentiary privileges do not apply in any criminal proceeding in
17 which a spouse or other family or household member is the victim of an alleged crime
18 involving domestic violence, ~~special domestic violence~~ or a covered crime involving
19 dating violence, domestic violence, or violation of a protection order, ~~or willful violation~~
20 ~~of court order~~ perpetrated by the other spouse:

- 21 a. The privilege of confidential communications between spouses;
22 b. The testimonial privilege of spouses.

23 (2) The victim/advocate privilege. A victim of domestic violence, ~~special domestic~~
24 ~~violence~~ or a covered crime involving dating violence, domestic violence, or violation of
25 a protection order, ~~or willful violation of court order~~ may refuse to disclose and may
26 prevent any volunteer or employee of a program for victims of domestic violence from
27 disclosing the content of oral communications and written records and reports concerning
28 the victim.

29 (q) *Diversion prohibited; deferred sentencing permitted.*

30 (1) The court shall not approve diversion of a perpetrator of domestic violence, ~~special~~
31 ~~domestic violence~~ or a covered crime involving dating violence, domestic violence, or
32 violation of a protection order ~~or willful violation of court order~~. The court may defer
33 sentencing of such a perpetrator if:

- 34 a. Consent of the prosecutor is obtained after consultation with the victim;
35 b. A hearing is held in which the perpetrator enters a plea or judicial admission to
36 the crime; and
37 c. Reasonable efforts are made to notify the victim and provide an opportunity for
38 the victim to be heard; and
39 d. The court orders conditions of the deferred sentence that are necessary to
40 protect the victim, prevent future violence, and rehabilitate the perpetrator.

1 (2) The case against a perpetrator of domestic violence, ~~special domestic violence a~~
2 ~~covered crime~~, or willful violation of court order may be dismissed if the perpetrator
3 successfully completes all conditions imposed by the court.

4 (r) *Location of victim.* The court shall waive any requirement that the victim's location be
5 disclosed to any person, other than the attorney of a criminal defendant, upon a showing that
6 there is a possibility of further violence. Provided, that the court shall order a criminal defense
7 attorney not to disclose to his client the victim's location.

8 (s) *Penalties.* Any person subject to the criminal jurisdiction of the Cherokee Court who shall be
9 convicted of the crime of domestic violence, ~~special domestic violence a covered crime~~, or
10 willful violation of court order shall be subject to punishment by imprisonment for up to 12
11 months, by a fine of up to \$5,000.00, or any combination of these penalties, unless the conviction
12 is pursuant to another crime ~~listed described~~ in subsection (b)(6) or (c)(1), in which case the
13 penalties shall be as defined in the relevant law cited therein. In no case shall the Court impose a
14 penalty of imprisonment greater than three years or a fine greater than \$15,000.00 for any one
15 offense. A court may not sentence a person convicted of the crime of domestic violence, ~~special~~
16 ~~domestic violence a covered crime~~, or willful violation of court order to community service in
17 lieu of jail. Further, the court may not order residential confinement in the home of the victim.
18 The use of alcohol or any controlled substance in the committing of domestic violence or any
19 crime related to domestic violence shall not diminish the seriousness of domestic violence. The
20 fact that the perpetrator was under the influence at the time of the offense shall not be used by
21 law enforcement, the prosecution, or the court to mitigate the severity of the violence.

22 (t) *Conditions of probation or parole.*

23 (1) In determining whether a defendant convicted of domestic violence, ~~special domestic~~
24 ~~violence a covered crime~~, or violation of court order should be placed on probation or
25 parole, the court must consider the safety and protection of the victim and any member of
26 the victim's family or household.

27 (2) After reviewing the facts and determining that the defendant poses a credible threat of
28 violence, repeated harassment or bodily injury to the alleged victim or family or
29 household of the victim, the court will make findings of fact and will condition any
30 probation or parole upon compliance with certain conditions, including but not limited to
31 the following:

32 a. That the defendant stay away from the home, school, business or place of
33 employment of the victim and/or other members of the victim's household or
34 family;

35 b. That the defendant refrain from harassing, annoying, telephoning, contacting or
36 otherwise communicating with the victim, household members of the victim, or
37 family members of the victim;

38 c. That the defendant refrain from assaulting, beating, molesting, or wounding the
39 victim, as well as household members, family, and animals of the alleged victim;

40 d. That the defendant refrain from removing or damaging property belonging to
41 the victim, household member(s) and family of the victim;

1 e. That the defendant be prohibited from using or possessing a firearm or other
2 weapon specified by the Court and surrender any weapons owned or possessed;

3 f. That the defendant may visit his or her child or children at times and places
4 provided by the terms of any existing order entered by a judge or magistrate;

5 g. That the defendant begin a batterer's treatment program and/or continue with
6 any treatment recommendations of an approved batterer's treatment program as
7 ordered as a condition of pretrial release. If alcohol and/or drugs is indicated, the
8 defendant shall also be prohibited from possessing or consuming alcohol or
9 controlled substances and will be required to complete a chemical dependency
10 evaluation conducted by an approved chemical dependency program and comply
11 with treatment recommendations. A copy of the order will be transmitted to the
12 appropriate program to ensure compliance with this provision.

13 h. That the defendant pay restitution to the victim, to the victim's family or
14 household member, or to a program or agency which has provided services to the
15 victim as a result of the defendant's present domestic violence case.

16 i .Any other conditions required to protect the safety of the victim and/or the
17 victim's family or household.

18 (3) The court shall establish policies and procedures for responding to reports of
19 nonattendance or noncompliance by a defendant with the conditions of probation
20 imposed pursuant to subsection (2).
21

22 (u) *Revocation of bond, probation, parole.* The court, in consultation with the Tribal Prosecutor,
23 will maintain policies and procedures for responding to reports of noncompliance with any
24 conditions of a bond, probation or parole imposed pursuant to subsections (b), (c), (k), (n) and
25 (t).
26

27 (v) *Child discipline.* Nothing within this section shall be construed to prohibit the reasonable,
28 lawful actions of a parent to discipline a child in their custody.
29

30 (w) *Protections of this section.* The provisions of subsections (l), (m), (n), (o) and (p) of this
31 section will be extended to the victim of any crime which would qualify as domestic violence
32 under this section, regardless of whether the defendant was charged with domestic violence or
33 another crime under this chapter.
34

35 (x) *Exclusion.* All persons who are subject to the civil jurisdiction of the Cherokee Court who are
36 guilty of committing domestic violence, ~~special domestic violence~~ a covered crime, or willful
37 violation of court order shall be subject to exclusion from Tribal territory by Tribal Council
38 pursuant to Chapter 2 of the Cherokee ~~Court Code~~.
39

40 (y) *Willful violation of the prohibition on possessing a firearm.* No person convicted of the crime
41 of domestic violence, ~~special domestic violence~~ or a covered crime involving dating violence,
42 domestic violence, or violation of a protection order, ~~or willful violation of court order~~ or any
43 comparable crime in any federal, state or tribal jurisdiction may ever possess a firearm once they

1 have been convicted, irrespective of the sentence received. Willful violation of this prohibition
2 will subject the defendant to a period of confinement not less than 30 days and not to exceed one
3 year and a fine of not less than \$1,000.00, but not more than \$5,000.00, plus costs, except when
4 the prior conviction is for ~~special domestic violence~~ a covered crime involving dating violence,
5 domestic violence, or violation of a protection order, or a comparable crime in a federal, state or
6 tribal jurisdiction, in which case, the violation shall be punishable by imprisonment of up to three
7 years, a fine of up to \$15,000.00 or any combination of these.

8
9 (z) *Order of protection, Chapter 50B.* No provision or penalty enumerated in this section is
10 meant to infringe upon the right of an alleged victim to file an Order of Protection against the
11 perpetrator under the provisions of Chapter 50B of the Cherokee Code.

12
13 (aa) *Ethics; familial relationships of law enforcement, prosecution and judges.* All public
14 servants shall be expected to perform their duties and proceed in accordance with this code no
15 matter what the employment, education, social and political status of the alleged perpetrator
16 and/or victim. Public servants shall be held to the highest professional standards in response to
17 the crime of domestic violence.

18
19 (bb) *Severability.* In the event of a court finding of invalidity of any clause or section of this
20 article, such invalid clause or section shall be severed from the remaining body of the article, and
21 the remainder of this article shall remain in full force and effect.

22
23 (cc) *Prior inconsistent laws repealed.* Any existing laws which are inconsistent with his
24 ordinance are specifically repealed.

25
26 (dd) In addition to the rights listed in this Section and elsewhere in the Cherokee Code, all
27 defendants charged pursuant to this Section shall have all other rights whose protection is
28 necessary under the Constitution of the United States in order for Congress to recognize and
29 affirm the inherent power of the Eastern Band of Cherokee Indians to exercise ~~special domestic~~
30 ~~violence~~ special Tribal criminal jurisdiction as defined by 25 U.S.C. § 1304.

31
32 ***

33 Chapter 15 – Appendix A.

34 35 Rule 6. - Initial Appearance.

36
37 (b)(2)(F) Subsection (b)(2) of Rule 6 of the Cherokee Rules of Criminal Procedure shall not
38 apply to cases involving violations of § 14-40.1(c) and (c)(1). In such cases, upon a finding of
39 probable cause for violation(s) of § 14-40.1(c) and (c)(1), the Magistrate shall proceed with the
40 remainder of the procedures contained in this Rule and in § 14-40.1 ~~(n)(1) and~~ (n)(2).

41
42 **BE IT FINALLY ORDAINED** that all ordinances which are inconsistent with this ordinance
43 are rescinded, and that this ordinance shall become effective upon ratification by the
44 Principal Chief.

45
46 *Submitted by the Office of the Attorney General.*