

TABLED

CHEROKEE COUNCIL HOUSE
CHEROKEE, NORTH CAROLINA

Date: DEC 06 2018

ORDINANCE NO. 434 (2018)

WHEREAS, the Judicial Branch of the Eastern Band of Cherokee Indians is charged with making recommendations and changes to the laws of the Tribe pursuant to the authority granted in Cherokee Code Sec. 7-12 (1); and

WHEREAS, from time to time the Judicial Branch identifies areas of the law that need to be amended to make the criminal procedure process more efficient; and

WHEREAS, the Judicial Branch has identified several areas of the criminal procedure process that should be amended to make them more efficient and to better serve the administration of justice in the Cherokee Court system; and

WHEREAS, to achieve these goals, the following amendments should be made to the criminal procedure process expressed in Cherokee Code Chapter 15.

THEREFORE, BE IT ORDAINED, by the Eastern Band of Cherokee Indians, in Tribal Council assembled, at which a quorum is present, that Cherokee Code Chapter 15 shall be amended to read as follows:

See Attached Chapter 15 Amendments

BE IT FINALLY ORDAINED that all ordinances that are inconsistent with this ordinance are rescinded, and that this ordinance shall become effective when ratified by the Principal Chief.

Submitted by Kirk G. Saunooke, Chief Justice and Thomas N. Cochran, Chief Judge.

1 EXHIBIT 1

2
3 Part 1

4
5 The Cherokee Rules of Criminal Procedure are published as Appendix A to Cherokee Code Chapter 15.
6 The following subsections of Rule 6(b) of the Cherokee Rules of Criminal Procedure are amended to
7 read as follows:

8
9 Rule 6(b)

10
11 (2)(D) If the defendant exercises his or her right to remain silent, the Magistrate may detain the
12 defendant to determine jurisdiction, without prejudice to the defendant's right to challenge
13 jurisdiction at a later date. If the defendant is too intoxicated or impaired for the Magistrate to
14 conduct this inquiry, the Magistrate shall temporarily detain the defendant and order that the
15 defendant appear before the Magistrate on duty on the following ~~business~~ day for the conclusion
16 of this proceeding. Nothing herein shall prevent the Magistrate from using evidence relevant to
17 the inquiries regarding jurisdiction from any other reliable sources as may be available and making
18 a determination based solely on those other sources.

19
20 (2)(E) Nothing herein shall prevent the Magistrate from continuing the hearing required by this Section,
21 detaining the defendant and referring the case to a Judge of the Cherokee Court for a
22 determination of jurisdiction consistent with the provisions of this Rule. Any referral so made
23 shall be scheduled for a hearing before a Cherokee Court Judge within 96 hours.

24
25 (6) *Conditions of Release.* After the Magistrate has made the appropriate inquiries of the defendant,
26 the Magistrate shall order that such person be released or detained, pending judicial proceedings,
27 pursuant to Cherokee Code Sections 15-11 et seq. establish conditions for the defendant's
28 release. If the Magistrate finds that the defendant is a danger to the community or a risk of flight,
29 and that no conditions will reasonably secure the defendant's attendance or provide for the safety
30 of the community, the Magistrate may Order that the defendant be held without bond until a
31 Release Hearing may be held before the Cherokee Court. Permitted conditions of release,
32 including combinations, are:

33 ——— (A) Cash bond;

34 ——— (B) Secured bond;

35 ——— (1) Surety bond;

- 1 ~~_____ (2) Property bond;~~
2 ~~_____ (3) Bond shall not be secured by per capita garnishment;~~
3 ~~_____ (C) Third Party Custody;~~
4 ~~_____ (D) Pre-trial Supervision by the Probation Office; and~~
5 ~~_____ (E) Unsecured bond (written promise to appear).~~
6 ~~_____ Additionally, the Magistrate may impose restrictions on the defendant in his or her discretion,~~
7 ~~including, but not limited to:~~
8 ~~_____ (A) Prohibiting the defendant from possessing a firearm, ammunition or other weapon;~~
9 ~~_____ (B) Prohibiting the defendant from contacting the alleged victim(s);~~
10 ~~_____ (C) Prohibiting the defendant from possessing or consuming alcohol;~~
11 ~~_____ (D) Restricting the defendant to the jurisdiction of the Cherokee Court at all times, or other~~
12 ~~geographical restrictions; and~~
13 ~~_____ (E) Prohibiting the defendant from violating the laws of this or any other jurisdiction.~~

14 In the event the defendant's release is not authorized, or the defendant is unable to satisfy the
15 conditions of release, the defendant shall be taken by the CIPD to an approved jail facility. In such
16 case, the Magistrate shall notify the defendant of his or her rights and privileges to file a motion
17 with the Cherokee Court to review the Magistrate's detention order or to petition the Federal
18 Court for a writ of habeas corpus and to stay the defendant's detention pursuant to 25 U.S.C. §§
19 1301—1304. If a surety who has posted a bond produces a defendant and requests to be released
20 from the bond, a Judge may discharge the surety from his or her obligations under the bond upon
21 such conditions as the Court thinks appropriate.

22
23 (7) Next Court Appearance. Following a defendant's Initial Appearance, the Magistrate shall consult
24 the Cherokee Court's criminal docket and set the defendant's case for Arraignment. The
25 defendant's arraignment hearing shall occur within 30 days from the date of the defendant's
26 Initial Appearance.

28 Part 2

29 **The Cherokee Rules of Criminal Procedure are published as Appendix A to Cherokee Code Chapter 15.**
30 **Rule 7(c) of the Cherokee Rules of Criminal Procedure is amended to read as follows:**

31
32 Rule 7(c)

1 (c) *Pleas and Arraignments.*

2 (1) The pleas before the Cherokee Court are: guilty, not guilty, nolo contendere or guilty
3 pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970).

4 (2) An arraignment must be conducted in open court before a Judge of the Cherokee Court and
5 must consist of:

6 (A) ensuring that the defendant has a copy of the charges;

7 (B) reading the charges to the defendant, or stating to the defendant the substance of
8 the charges, or inquiring of the defendant if s/he has read the charges, and if so,
9 understands the nature of the charges; and then

10 (C) asking the defendant to enter a plea to the charges filed against him or her. If the
11 defendant fails or refuses to enter a plea, the Court shall enter a plea of not guilty on
12 behalf of the defendant.

13 (3) A defendant need not be present for the arraignment if:

14 (A) the defendant, in a written waiver signed by both the defendant and defense
15 counsel, has waived appearance and has affirmed that the defendant received a
16 copy of the charges and that the plea is not guilty; and

17 (B) the court accepts the waiver.

18 (4) Video conferencing may be used to arraign a defendant if defense counsel is present.

20 **Part 3**

21 **NEW BAIL PROVISIONS – CHEROKEE CODE**

22
23 **Cherokee Code Chapter 15 is hereby amended by adding the following new section, identified as Sec.**
24 **15-11, to read as follows:**

25 **Sec. 15-11. – Release or Detention of the Accused Pending Trial.**

26 (a) Hierarchy of Consideration. Upon the appearance before a Magistrate or Judge of a person
27 charged with an offense, the Magistrate or Judge shall issue an order that, pending trial, the
28 person be—

29 (1) released on personal recognizance or upon execution of an unsecured appearance bond,
30 under subsection (b) of this section;

31 (2) released on a condition or combination of conditions under subsection (c) of this section;

32 (3) temporarily detained to permit revocation of conditional release, deportation, or
33 exclusion under subsection (d) of this section; or

1 (4) detained under subsection (e) of this section.

2 (b) Release on Personal Recognizance or Unsecured Appearance Bond.

3 The Magistrate or Judge shall order the pretrial release of the person on personal
4 recognizance, or upon execution of an unsecured appearance bond in an amount specified by the
5 court, subject to the condition that the person not commit a Federal, State, or Tribal crime during
6 the period of release, unless the Magistrate or Judge determines that such release will not
7 reasonably assure the appearance of the person as required or will endanger the safety of any
8 other person or the community.

9 (c) Release on Conditions.

10 (1) If the Magistrate or Judge determines that the release described in subsection (b) of this
11 section will not reasonably assure the appearance of the person as required or will
12 endanger the safety of any other person or the community, such Magistrate or Judge shall
13 order the pretrial release of the person—

14 (A) subject to the condition that the person not commit a Federal, State, or Tribal
15 crime during the period of release and

16 (B) subject to the least restrictive further condition, or combination of conditions,

17 that such Magistrate or Judge determines will reasonably assure the appearance
18 of the person as required and the safety of any other person and the community,
19 which may include the condition that the person—

20 (i) remain in the custody of a designated person, who agrees to assume
21 supervision and to report any violation of a release condition to the court,
22 if the designated person is able reasonably to assure the Magistrate or
23 Judge that the person will appear as required and will not pose a danger
24 to the safety of any other person or the community;

25 (ii) maintain employment, or, if unemployed, actively seek employment;

26 (iii) maintain or commence an educational program;

27 (iv) abide by specified restrictions on personal associations, places of abode,
28 or travel;

29 (v) avoid all contact with an alleged victim of the crime and with a potential
30 witness who may testify concerning the offense;

31 (vi) report on a regular basis to a designated law enforcement agency,
32 pretrial services agency, or other agency;

1 (vii) comply with a specified curfew;
2 (viii) refrain from possessing a firearm or other dangerous weapon;
3 (ix) refrain from excessive use of alcohol, or any use of a narcotic drug or
4 other controlled substance without a prescription by a licensed medical
5 practitioner;
6 (x) undergo available medical, psychological, or psychiatric treatment,
7 including the assessment and treatment for drug or alcohol dependency,
8 and remain in a specified institution if required for that purpose;
9 (xi) execute an agreement to forfeit upon failing to appear as required,
10 property of a sufficient unencumbered value, including U.S. currency, as
11 is reasonably necessary to assure the appearance of the person as
12 required, and shall provide the court with proof of ownership and the
13 value of the property along with information regarding existing
14 encumbrances as may be required;
15 (xii) execute a bail bond with solvent sureties who will execute an agreement
16 to forfeit in such amount as is reasonably necessary to assure appearance
17 of the person as required and shall provide the court with information
18 regarding the value of the assets and liabilities of the surety if other than
19 an approved surety and the nature and extent of encumbrances against
20 the surety's property; such surety shall have a net worth which shall have
21 sufficient unencumbered value to pay the amount of the bail bond. No
22 bond shall be secured by per capita garnishment;
23 (xiii) satisfy the posting of a bail bond by surrendering an equal amount of U.S.
24 currency;
25 (xiv) submit to electronic monitoring;
26 (xv) return to custody for specified hours following release for employment,
27 schooling, or other limited purposes; and
28 (xvi) satisfy any other condition that is reasonably necessary to assure the
29 appearance of the person as required and to assure the safety of any
30 other person and the community.
31 (2) The Magistrate or Judge may at any time, with or without notice, amend the order
32 to impose additional or different conditions of release.

1 In any case that involves an alleged minor victim or a failure to register offense by a sex offender,
2 any release order shall contain, at a minimum, a condition of electronic monitoring and each of
3 the conditions specified at subsections (iv), (v), (vi), (vii), and (viii). In considering the conditions
4 of release described in subsections (xi), (xii), or (xiii), the Magistrate or Judge may upon his/her
5 own motion, or shall upon the motion of the Tribe, conduct an inquiry into the source of the
6 property to be designated for potential forfeiture or offered as collateral to secure a bond, and
7 shall decline to accept the designation, or the use as collateral, of property that, because of its
8 source, will not reasonably assure the appearance of the person as required. If a surety who has
9 posted a bond produces a person bound thereto and requests to be released from the bond, a
10 Judge may discharge the surety from his or her obligations under the bond upon such conditions,
11 and release or detain the person, as the Court deems appropriate.

12 (d) Temporary Detention To Permit Revocation of Conditional Release, Deportation, or Exclusion.—
13 If the Magistrate or Judge determines that—

14 (1) such person—

15 (A) is, and was at the time the alleged offense was committed,

16 (i) on release pending trial for an offense under Federal, State, or Tribal law;

17 (ii) on release pending imposition or execution of sentence, appeal of

18 sentence or conviction, or completion of sentence, for any offense under

19 Federal, State, or Tribal law;

20 (iii) on probation or post-release supervision for any offense under Federal,

21 State, or Tribal law; or

22 (iv) previously banished and/or excluded from lands of the Eastern Band of

23 Cherokee Indians or held in trust for them by the United States; or

24 (B) is not a citizen of the United States or lawfully admitted for permanent residence,

25 as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C.

26 1101(a)(20));

27 said judicial officer shall order the detention of such person, for a period of not more than ten
28 days, excluding Saturdays, Sundays, and holidays, and direct the attorney for the Tribe to notify
29 the appropriate court, probation or parole official, or law enforcement official, or the appropriate
30 official of the Immigration and Naturalization Service. If said official fails or declines to take such
31 person into custody during that period, such person shall be treated in accordance with the other
32 provisions of this section, notwithstanding the applicability of other provisions of law governing

1 release pending trial or deportation or exclusion proceedings. If temporary detention is sought
2 under paragraph (1)(B) of this subsection, such person has the burden of proving to the court such
3 person's United States citizenship or lawful admission for permanent residence.

4 (e) Detention.

5 (1) If, after a hearing pursuant to the provisions of subsection (f) of this section, the
6 Magistrate or Judge finds that no condition or combination of conditions will reasonably
7 assure the appearance of the person as required and the safety of any other person and
8 the community, such judicial officer shall order the detention of the person before trial.

9 (2) Subject to rebuttal by the person, it shall be presumed that no condition or combination
10 of conditions will reasonably assure the appearance of the person as required and the
11 safety of the community if the Magistrate or Judge finds that there is probable cause to
12 believe that the person committed—

13 (A) an offense for which a maximum term of imprisonment of more than one year is
14 prescribed in the Cherokee Code and has as an element the use, threatened use,
15 or attempted use of physical force against the person or property of another;

16 (B) an offense involving a minor victim under section 14-20.2, 14-20.3, 14-20.4, 14-
17 20.8, 14-30.1, 14-30.4, 14-30.5, 14-30.6, 14-30.7, 14-30.9, 14-30.11, 14-34.10, 14-
18 34.11, 14-90.3, or 14-95.23, of the Cherokee Code;

19 (C) an offense involving a minor victim under Article IX or Article XIII of Chapter 14 of
20 the Cherokee Code;

21 (D) who, during or following arrest, is alleged to have made statements indicating
22 that s/he will flee, obstruct or attempt to obstruct justice, or threaten, injure, or
23 intimidate, or attempt to threaten, injure, or intimidate, a prospective witness,
24 victim or juror; or

25 (E) who is alleged to have committed the offense through the active use, display, or
26 brandishment of a firearm or any other dangerous weapon.

27 (3) A person subject to detention pursuant to the rebuttal presumption contained in
28 subsection (e)(2) hereof, and who meets the conditions of release set forth in section
29 (c)(1) above, may be ordered released, under appropriate conditions, by a Cherokee Court
30 Judge, if it is clearly shown that there are exceptional reasons why such person's
31 detention would not be appropriate.

1 (f) Detention Hearing. Unless the person is released by a Magistrate, a Judge of the Cherokee Court
2 shall hold a hearing to determine whether any condition or combination of conditions set forth in
3 subsection (c) of this section will reasonably assure the appearance of such person as required
4 and the safety of any other person and the community. Further, a Judge of the Cherokee Court
5 shall hold a detention hearing if the person is released by the Magistrate --

6 (1) upon motion of the attorney for the Tribe for a person:

7 (A) otherwise subject to the rebuttable presumption of detention found in
8 subsection (e)(2).

9 (2) upon motion of the attorney for the Tribe or upon the Judge's own motion in a case that
10 involves:

11 (A) a serious risk that such person will flee;

12 (B) a serious risk that such person will obstruct or attempt to obstruct justice, or
13 threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a
14 prospective witness or juror; or

15 (C) who has had two or more FTAs within the past three years.

16 The hearing shall be held immediately upon the person's first appearance before the Cherokee
17 Court Judge unless that person, or the attorney for the Tribe, seeks a continuance. Except for good
18 cause, a continuance on motion of such person may not exceed five days (not including any
19 intermediate Saturday, Sunday, or legal holiday), and a continuance on motion of the attorney for
20 the Tribe may not exceed three days (not including any intermediate Saturday, Sunday, or legal
21 holiday). During a continuance, such person shall be detained, and the Judge, on motion of the
22 attorney for the Tribe or sua sponte, may order that, while in custody, a person who appears to
23 be an unlawful user of controlled substances or excessive user of alcohol receive a medical
24 examination to determine whether such person could benefit from treatment. At the hearing,
25 such person has the right to be represented by counsel, and, if financially unable to obtain
26 adequate representation, to have counsel appointed. The person shall be afforded an opportunity
27 to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to
28 present information by proffer or otherwise. The rules concerning admissibility of evidence in
29 criminal trials do not apply to the presentation and consideration of information at the hearing.
30 The facts the Judge uses to support a finding pursuant to subsection (e) that no condition or
31 combination of conditions will reasonably assure the safety of any other person and the
32 community shall be supported by clear and convincing evidence.

(g) Factors To Be Considered. The Magistrate or Judge shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account the available information concerning—

(1) the nature and circumstances of the offense charged, including whether the offense has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or involves a minor victim, a controlled substance, firearm, or explosive;

(2) the weight of the evidence against the person;

(3) the history and characteristics of the person, including—

(A) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

(B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or Tribal law; and

(4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release.

(h) Contents of Release Order. In a release order issued under subsection (b) or (c) of this section, the Magistrate or Judge shall:

(1) include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the person's conduct; and

(2) advise the person of—

(A) the penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release; and

(B) the consequences of violating a condition of release, including the immediate issuance of a warrant for the person's arrest.

(i) Contents of Detention Order. In a detention order issued under subsection (e) of this section, the Magistrate or Judge shall:

(1) include written findings of fact and a written statement of the reasons for the detention;

1 (2) direct that the person be committed to the custody of the Cherokee Detention Center for
2 confinement therein or in another corrections facility, and if necessary, separate, to the
3 extent practicable, from persons awaiting trial or serving sentences or being held in
4 custody pending appeal;

5 (3) direct that the person be afforded reasonable opportunity for private consultation with
6 counsel; and

7 (4) direct that, on order of a Cherokee Court Judge, based on request of an attorney for the
8 Tribe, the person in charge of the corrections facility in which the person is confined
9 deliver the person to a Cherokee Marshal for the purpose of an appearance in connection
10 with a court proceeding.

11 A Cherokee Court Judge may, by subsequent order, permit the temporary release of the person
12 to the custody of a Cherokee Marshal or another appropriate person, to the extent that the Judge
13 determines such release to be necessary for preparation of the person's defense or for another
14 compelling reason.

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

16
17
18 **Cherokee Code Chapter 15 is hereby amended by adding the following new section, identified as Sec.**
19 **15-12, to read as follows:**

20 **Sec. 15-12. – Release or Detention of the Defendant Pending Sentencing and Appeal.**

21 (a) Release or Detention Pending Sentence.

22 (1) Except as provided in paragraph (2), the Judge shall order that a person who has been
23 found guilty of an offense and who is awaiting imposition or execution of sentence, other
24 than a person for whom the Cherokee Code permits of sentence of probation, be detained
25 unless the Judge finds by clear and convincing evidence that the person is not likely to
26 flee or pose a danger to the safety of any other person or the community if released under
27 section 15-11(a)(1) or (a)(2). If the Judge makes such a finding, such Judge shall order the
28 release of the person in accordance with section 15-11(b) or (c).

29 (2) The Judge shall order that a person who has been found guilty of an offense in a case
30 described in subparagraph (A) or (B) of subsection (f)(1) of section 15-11 and is awaiting
31 imposition or execution of sentence be detained unless:

(A) (i) the Judge finds there is a substantial likelihood that a motion for acquittal or new trial will be granted; or

(ii) an attorney for the Tribe has recommended that no sentence of imprisonment be imposed on the person; and

(B) the Judge finds by clear and convincing evidence that the person is not likely to
flee or pose a danger to any other person or the community.

(b) Release or Detention Pending Appeal by the Defendant.

(1) Except as provided in paragraph (2), the Judge shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for habeas corpus in federal court, be detained, unless the Judge finds:

_____ (A) by clear and convincing evidence that the person is not likely to flee or pose a
_____ danger to the safety of any other person or the community if released under
_____ section 15-11(b) or (c) of this Code; and

(B) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in:

(i) reversal,

(ii) an order for a new trial,

(iii) a sentence that does not include a term of imprisonment, or

(iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.

If the Judge makes such findings, such Judge shall order the release of the person in accordance with section 15-11(b) or (c) of this title, except that in the circumstance described in subparagraph (B)(iv) of this paragraph, the Judge shall order the detention terminated at the expiration of the likely reduced sentence.

(2) The Judge shall order that a person who has been found guilty of an offense in a case described in subparagraph (A) or (B) of section 15-11(f)(1) and sentenced to a term of imprisonment, and who has filed an appeal or a petition for habeas corpus in federal court be detained.

Cherokee Code Chapter 15 is hereby amended by adding the following new section, identified as Sec. 15-13, to read as follows:

1 **Sec. 15-13. – Release or Detention of a Material Witness.**

2 If it appears from an affidavit filed by a party to a criminal proceeding that the testimony of a
3 person is material in such criminal proceeding, and if it is shown that it may become impracticable to
4 secure the presence of the person by subpoena, a Cherokee Court Judge may order the arrest of the
5 person and treat the person in accordance with the provisions of section 15-11 of the Cherokee Code. No
6 material witness may be detained because of inability to comply with any condition of release if the
7 testimony of such witness can adequately be secured by deposition, and if further detention is not
8 necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable
9 period of time until the deposition of the witness can be taken.

10
11
12 **Cherokee Code Chapter 15 is hereby amended by adding the following new section, identified as Sec.**
13 **15-14, to read as follows:**

14 **Sec. 15-14. – Review and Appeal of a Release or Detention Order.**

15 (a) *Review of a Release Order.* If a person is ordered released by a Magistrate —

16 (1) the attorney for the Tribe may file with the Cherokee Court a motion for revocation of the
17 release order or amendment of the conditions of release only pursuant to C.C. § 15-
18 11(f)(1) or if the person is alleged to have later violated the conditions of release; and

19 (2) the person may file with the Cherokee Court a motion for amendment of the conditions
20 of release if subsequent events or information would reasonably provide a basis therefor.

21 Any such motion shall be determined promptly by a Cherokee Court Judge.

22 (b) *Review of a Detention Order.* If a person is ordered detained by a Magistrate, such person may
23 file with the Cherokee Court a motion for revocation or amendment of the detention order. The
24 motion shall be determined promptly by a Cherokee Court Judge. A detention hearing may be
25 reopened, after the first bail determination made by a Cherokee Court Judge, at any time before
26 trial only if such Judge finds that information exists that was not known to the movant at the time
27 of the prior hearing and that has a material bearing on the issue whether there are conditions of
28 release that will reasonably assure the appearance of such person as required and the safety of
29 any other person and the community. The accumulation of time spent in pretrial confinement
30 shall not constitute new information unknown to the movant at the time of the prior hearing.

1 (c) Appeal from a Release or Detention Order. An appeal from a release or detention order or from a
2 decision denying revocation or amendment of such an order made by a Cherokee Court Judge
3 shall be to the Cherokee Supreme Court. The appeal shall be determined expeditiously.
4