

TABLED

Cherokee Council House
Cherokee, North Carolina

APR 08 2014

Date

ORDINANCE NO. 276 (2010)

WHEREAS, Chapter 14 of the Cherokee Code governs Criminal offences and penalties; and

WHEREAS, Articles V and VII of this chapter should be amended to better protect victims of sexual assault and children that are victims of crime; and

NOW, THEREFORE, BE IT ORDAINED by the Eastern Band of Cherokee Indians in Tribal Council Assembled, at which a quorum is present that the Tribal Council of the Eastern Band of Cherokee Indians amend the Cherokee Code to read as follows:

Chapter 14 CRIMINAL LAW

Article V. Sexual Assault

Sec. 14-20. Reserved.

Sec. 14-20.1. ~~Taking indecent liberties with children. Repealed.~~

Sec. 14-20.2. ~~Aggravated sexual abuse. Repealed.~~

Sec. 14-20.3. ~~Sexual abuse. Repealed.~~

Sec. 14-20.4. ~~Sexual abuse of minor or a ward. Repealed.~~

Sec. 14-20.5. Reserved.

Sec. 14-20.6. Punishment.

Sec. 14-20.7. Repealed.

Sec. 14-20.8. Definitions.

Sec. 14-20.9. First-degree rape.

Sec. 14-20.10. Second-degree rape.

Sec. 14-20.11. Sexual battery.

Sec. 14-20.12. Indecent exposure.

Sec. 14-20.13. Secretly peeping into room occupied by another person.

Sec. 14-20.14. Evidence required in prosecutions under this Article.

Article VII. Crimes Against Children

Sec. 14-30. Reserved.

Sec. 14-30.1. Contributing to the delinquency, undiscipline, neglect, or abuse of minors.

Sec. 14-30.2. Selling cigarettes to minors.

Sec. 14-30.3. Compulsory school attendance.

Sec. 14-30.4. Exposing children to fire.

Sec. 14-30.5. ~~Child abuse in the first degree. Repealed.~~

Sec. 14-30.6. ~~Child abuse in the second degree. Repealed.~~

Sec. 14-30.7. Transporting a child outside the territory of the Eastern Band of Cherokee Indians with intent to violate custody order.

Sec. 14-30.8. Failing to pay minors for doing certain work.

Sec. 14-30.9. ~~Disseminating and exhibiting harmful material or performances to minors. Disseminating harmful material to minors; exhibiting harmful performances to minors.~~

Sec. 14-30.10. Additional fine for certain offenses against children.

Sec. 14-30.11. Child abuse.

Sec. 14-30.12. Rape of a child; adult offender.

Sec. 14-30.13. First-degree sexual offense.

Sec. 14-30.14. Second-degree sexual offense.

Sec. 14-30.15. Intercourse and sexual offenses with certain victims; consent no defense.

Sec. 14-30.16. Statutory rape or sexual offense of person who is 13, 14, or 15 years old.

Sec. 14-30.17. Employing or permitting minor to assist in offense under Article.

Sec. 14-30.18. Displaying material harmful to minors.

Sec. 14-30.19. First degree sexual exploitation of a minor.

Sec. 14-30.20. Second degree sexual exploitation of a minor.

Sec. 14-30.21. Third degree sexual exploitation of a minor.

Sec. 14-30.22. Promoting prostitution of a minor.

Sec. 14-30.23. Participating in prostitution of a minor.

Sec. 14-30.24. Taking indecent liberties with children.

Sec. 14-30.25. Solicitation of child by computer to commit an unlawful sex act.

Sec. 14-30.26. Taking indecent liberties with a student.

Sec. 14-30.27. Punishment.

ARTICLE V. SEXUAL ASSAULT

Sec. 14-20. Reserved.

Sec. 14-20.1. ~~Taking indecent liberties with children.~~

A person shall be guilty of taking indecent liberties with children if they either:

(1) —Willfully take or attempt to take any improper or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or

(2) —Willfully commit or attempt to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.

(3) — For purposes of this section, indecent liberties shall include any sexual contact of the genitalia, anus, groin, breast, inner thigh or buttocks which do or may abuse, humiliate, harass, degrade, arouse or gratify the sexual desire of any person.
(Ord. No. 117, 3-3-2000) Repealed.

Sec. 14-20.2. Aggravated sexual abuse.

A person shall be guilty of aggravated sexual abuse if he or she:

- (1) — Knowingly causes another person to engage in a sexual act by using force against that other person; or
- (2) — Knowingly causes another person to engage in a sexual act by threatening or placing that other person in fear that any person will be subject to death, serious bodily injury, or kidnapping; or
- (3) — Knowingly renders another person unconscious and thereby engages in a sexual act with that other person; or
- (4) — Knowingly administers to another person by force or threat of force or without the knowledge or permission of that person a drug, intoxicant or other similar substance and thereby substantially impairs the ability of that other person to appraise or control conduct and engages in a sexual act with that other person; or
- (5) — Engages in a sexual act with another person who has not attained the age of 13 years.

(Ord. No. 117, 3-3-2000) Repealed.

Sec. 14-20.3. Sexual abuse.

A person shall be guilty of sexual abuse if he or she:

- (1) — Knowingly causes another person to engage in a sexual act by threatening or placing that other person in fear; or
- (2) — Knowingly engages in a sexual act with another person and that other person is:
 - a. — Incapable of appraising the nature of the conduct; or
 - b. — Physically incapable of declining participation in or communicating unwillingness to engage in the sexual act.

(Ord. No. 117, 3-3-2000) Repealed.

Sec. 14-20.4. Sexual abuse of minor or a ward.

A person shall be guilty of sexual abuse of a minor or a ward if he or she:

- (1) — Engages in a sexual act with another person who has not attained the age of 16; or
- (2) — Knowingly engages in a sexual act with another person who is in official detention and under the custodial, supervisory or disciplinary authority of the person so engaging.

(Ord. No. 117, 3-3-2000) Repealed.

Sec. 14-20.5. Reserved.

Sec. 14-20.6. Punishment.

Any person subject to the criminal jurisdiction of the Eastern Cherokee Court of Indian Offenses or any successor Cherokee tribal court who Eastern Band of Cherokee Indians shall be and convicted of any offense defined by this section Article shall be subject to

punishment by imprisonment for up to 12 months or by fine of up to \$5,000.00, or both, for each offense, at the discretion of the court.
(Ord. No. 117, 3-3-2000)

Sec. 14-20.7. Repealed.

Sec. 14-20.8. Definitions.

As used in this Article, unless the context requires otherwise:

- (1) "Mentally disabled" means (i) a victim who suffers from mental retardation, or (ii) a victim who suffers from a mental disorder, either of which temporarily or permanently renders the victim substantially incapable of appraising the nature of his or her conduct, or of resisting the act of vaginal intercourse or a sexual act, or of communicating unwillingness to submit to the act of vaginal intercourse or a sexual act.
- (2) "Mentally incapacitated" means a victim who due to any act committed upon the victim is rendered substantially incapable of either appraising the nature of his or her conduct, or resisting the act of vaginal intercourse or a sexual act.
- (3) "Physically helpless" means (i) a victim who is unconscious; or (ii) a victim who is physically unable to resist an act of vaginal intercourse or a sexual act or communicate unwillingness to submit to an act of vaginal intercourse or a sexual act.
- (4) "Sexual act" means cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body: provided, that it shall be an affirmative defense that the penetration was for accepted medical purposes.
- (5) "Sexual contact" means (i) touching the sexual organ, anus, breast, groin, or buttocks of any person, (ii) a person touching another person with their own sexual organ, anus, breast, groin, or buttocks, or (iii) a person ejaculating, emitting, or placing semen, urine, or feces upon any part of another person.
- (6) "Touching" as used in subdivision (5) of this section, means physical contact with another person, whether accomplished directly, through the clothing of the person committing the offense, or through the clothing of the victim.

Sec. 14-20.9. First-degree rape.

(a) A person is guilty of rape in the first degree if the person engages in vaginal intercourse:

- (1) With a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim; or

(2) With another person by force and against the will of the other person, and:

- a. Employs or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon; or
- b. Inflicts serious personal injury upon the victim or another person; or
- c. The person commits the offense aided and abetted by one or more other persons.

(b) Upon conviction, a person convicted under this section has no rights to custody of or rights of inheritance from any child born as a result of the commission of the rape, nor shall the person have any rights related to the child regarding adoption or under Chapter 7B, the Juvenile Code.

Sec. 14-20.10. Second-degree rape.

(a) A person is guilty of rape in the second degree if the person engages in vaginal intercourse with another person:

- (1) By force and against the will of the other person; or
- (2) Who is mentally disabled, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know the other person is mentally disabled, mentally incapacitated, or physically helpless.

(b) Upon conviction, a person convicted under this section has no rights to custody of or rights of inheritance from any child conceived during the commission of the rape, nor shall the person have any rights related to the child regarding adoption or under Chapter 7B, the Juvenile Code.

Sec. 14-20.11. Sexual battery.

(a) A person is guilty of sexual battery if the person, for the purpose of sexual arousal, sexual gratification, or sexual abuse, engages in sexual contact with another person:

- (1) By force and against the will of the other person; or
- (2) Who is mentally disabled, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know that the other person is mentally disabled, mentally incapacitated, or physically helpless.

Sec. 14-20.12. Indecent exposure.

(a) Unless the conduct is punishable under subsection (a1) of this section, any person violates this section that willfully expose the private parts of his or her person in any public place and in the presence of any other person or persons, except for those places designated for a public purpose where the same sex exposure is incidental to a permitted activity, or aids or abets in any such act, or who procures another to perform such act; or any person, who as owner, manager, lessee, director, promoter or agent, or in any other capacity knowingly hires, leases or permits the land, building, or premises of

which he is owner, lessee or tenant, or over which he has control, to be used for purposes of any such act.

(a1) Unless the conduct is prohibited by another law providing greater punishment, any person at least 18 years of age violates this section, that willfully expose the private parts of his or her person in any public place in the presence of any other person less than 16 years of age for the purpose of arousing or gratifying sexual desire. An offense committed under this subsection shall not be considered to be a lesser included offense under CC 14-30.24.

(b) Notwithstanding any other provision of law, a woman may breast feed in any public or private location where she is otherwise authorized to be.

Sec. 14-20.13. Secretly peeping into room occupied by another person.

(a) Unless covered by another provision of law providing greater punishment, any person violates this section who secretly or surreptitiously peeps underneath or through the clothing being worn by another person, through the use of a mirror or other device, for the purpose of viewing the body of, or the undergarments worn by, that other person without their consent.

(b) For purposes of this section:

(1) The term "photographic image" means any photograph or photographic reproduction, still or moving, or any videotape, motion picture, or live television transmission, or any digital image of any individual.

(2) The term "room" shall include, but is not limited to, a bedroom, a rest room, a bathroom, a shower, and a dressing room.

(c) Unless covered by another provision of law providing greater punishment, any person violates this section who, while in possession of any device which may be used to create a photographic image, shall secretly peep into any room.

(d) Unless covered by another provision of law providing greater punishment, any person violates this section who, while secretly peeping into any room, uses any device to create a photographic image of another person in that room for the purpose of arousing or gratifying the sexual desire of any person.

(e) Any person violates this sections who secretly or surreptitiously uses any device to create a photographic image of another person underneath or through the clothing being worn by that other person for the purpose of viewing the body of, or the undergarments worn by, that other person without their consent.

(f) Any person violates this section who, for the purpose of arousing or gratifying the sexual desire of any person, secretly or surreptitiously uses or installs in a room any device that can be used to create a photographic image with the intent to capture the image of another without their consent.

(g) Any person who knowingly possesses a photographic image that the person knows, or has reason to believe, was obtained in violation of this section shall be guilty of a Class I felony.

(h) Any person violates this section who disseminates or allows to be disseminated images that the person knows, or should have known, were obtained as a result of the violation of this section if the dissemination is without the consent of the person in the photographic image.

(i) If the defendant is placed on probation as a result of violation of this section:

(1) For a first conviction under this section, the judge may impose a requirement that the defendant obtain a psychological evaluation and comply with any treatment recommended as a result of that evaluation.

(2) For a second or subsequent conviction under this section, the judge shall impose a requirement that the defendant obtain a psychological evaluation and comply with any treatment recommended as a result of that evaluation.

(j) Any person whose image is captured or disseminated in violation of this section has a civil cause of action against any person who captured or disseminated the image or procured any other person to capture or disseminate the image and is entitled to recover from those persons actual damages, punitive damages, reasonable attorneys' fees and other litigation costs reasonably incurred.

(k) When a person violates subsection (d), (e), (f), (g), or (h) of this section, or is convicted of a second or subsequent violation of subsection (a), or (c) of this section, the sentencing court shall consider whether the person is a danger to the community and whether requiring the person to register as a sex offender pursuant to Article X of this Chapter would further the purposes of that Article. If the sentencing court rules that the person is a danger to the community and that the person shall register, then an order shall be entered requiring the person to register.

(l) The provisions of subsections (a), (c), (e), (g), (h), and (j) of this section do not apply to:

(1) Law enforcement officers while discharging or attempting to discharge their official duties; or

(2) Personnel of a local confinement facility for security purposes or during investigation of alleged misconduct by a person in the custody of the local confinement facility.

(m) This section does not affect the legal activities of those who are licensed, Private Protective Services, or Alarm Systems, who are legally engaged in the discharge of their official duties within their respective professions, and who are not engaging in activities for an improper purpose as described in this section.

§ 14-20.14. Evidence required in prosecutions under this Article.

It shall not be necessary upon the trial of any charges for an offense under this Article where the sex act alleged is vaginal intercourse or anal intercourse to prove the actual emission of semen in order to constitute the offense; but the offense shall be completed upon proof of penetration only. Penetration, however slight, is vaginal intercourse or anal intercourse.

ARTICLE VII. CRIMES AGAINST CHILDREN

Sec. 14-30. Reserved.

Sec. 14.30.1. Contributing to the delinquency, undiscipline, neglect, or abuse of minors.

- (a) Any person shall be guilty of contributing to the delinquency, undiscipline, neglect, or abuse of a minor who knowingly or willfully causes, encourages, or aids any juvenile to be in a place or condition, or to commit an act whereby the juvenile could be:
- (1) Adjudicated "delinquent" or "undisciplined" (as defined by chapter 7A of the Tribal Code); or
 - (2) Determined to be "abused" (as defined by NCGS 7B-101 and any amendments, until such time as the Tribe adopts its own code to deal with abuse). North Carolina law currently defines an abused juvenile to be any juvenile less than 18 years of age whose parent, guardian, custodian, or caretaker:
 - a. Inflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means;
 - b. Creates or allows to be created a substantial risk of serious physical injury to the juvenile by other than accidental means;
 - c. Uses or allows to be used upon the juvenile cruel or grossly inappropriate procedures or cruel or grossly inappropriate devices to modify behavior;
 - d. Commits, permits, or encourages the commission of a violation of the following by, with, or upon the juvenile: first-degree rape; second degree rape; first-degree sexual offense; sexual act by a custodian; crime against nature; incest; preparation of obscene photographs, slides, or motion pictures of the juvenile; employing or permitting the juvenile to assist in a violation of obscenity laws; dissemination of obscene material to the juvenile; displaying of disseminating material harmful to the juvenile; first and second degree sexual exploitation of the juvenile; promoting the prostitution of the juvenile; taking indecent liberties with the juvenile, regardless of the age of the parties;
 - e. Creates or allows to be created serious emotional damage to the juvenile; serious emotional damage is evidenced by a juvenile's severe anxiety, depression, withdrawal, or aggressive behavior toward himself or others; or
 - f. Encourages, directs or approves of delinquent acts involving moral turpitude committed by the juvenile; or
 - (3) Determined to be "neglected" (as defined by NCGS 7B-101 and any amendments until such time as the Tribe adopts its own code to deal with neglect issues). North Carolina law currently defines a neglected juvenile to be a juvenile who:
 - a. Does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or
 - b. Who has been abandoned; or
 - c. Who is not provided necessary medical care; or
 - d. Who is not provided necessary remedial care; or
 - e. Who lives in an environment injurious to the juvenile's welfare; or
 - f. Who has been placed for care or adoption in violation of law; or
 - (4) In violation of any Tribal, federal or North Carolina criminal law.
- (b) Violation of this section shall be punishable by a fine not to exceed \$5,000.00, by a term of imprisonment not to exceed one year, or both.

(Ord. No. 117, 3-3-2000; Ord. No. 369, 8-9-2000)

Sec. 14-30.2. Selling cigarettes to minors.

If any person shall sell, give away or otherwise dispose of, directly or indirectly, cigarettes or tobacco in the form of cigarettes, or cut tobacco in any form which may be used or intended to be used as a substitute for cigarettes, whether such cigarettes or tobacco are real, simulated, fake or novelties, to any minor under the age of 18 years, or if any person shall aid, assist or abet any other person in selling such articles or novelties to any minor, he or she shall be punished by a fine of not more than \$500.00, or imprisonment for not more than one year, or both.

(Ord. No. 117, 3-3-2000; Ord. No. 369, 8-9-2000)

Sec. 14-30.3. Compulsory school attendance.

Any person who shall, without good cause, neglect or refuse to send his or her children or any children under his or her care to school shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to imprisonment not to exceed one year or a fine of \$500.00, or both. For purposes of this section, children are defined as any person under the age of 16.

(Ord. No. 117, 3-3-2000; Ord. No. 369, 8-9-2000)

Sec. 14-30.4. Exposing children to fire.

(a) It shall be unlawful for any person to leave any child under the age of 12 years locked or otherwise confined in any dwelling, building, enclosure or vehicle and go away from such dwelling, building, enclosure or vehicle without leaving some person of the age of discretion in charge of the same, so as to expose the child to danger by fire.

(b) Exposing children to fire shall be punishable by a fine not to exceed \$250.00, by a term of imprisonment not to exceed three months, or both.

(Ord. No. 117, 3-3-2000; Ord. No. 369, 8-9-2000)

Sec. 14-30.5. Child abuse in the first degree. Repealed.

(a) — It shall be unlawful for any person to:

(1) — Intentionally inflict any serious physical injury upon or to any child under 18 or intentionally commit an assault upon the child which results in any serious physical injury; or

(2) — Commit, permit, or encourage any act of prostitution with or by any child under 18; or

(3) — Commit, permit, or encourage any sexual act with or by any child under 18.

(b) — Child abuse in the first degree is an offense additional to other civil and criminal provisions and is not intended to repeal or preclude any other sanctions or remedies.

(c) — Child abuse in the first degree shall be punishable by a fine of not less than \$500.00 and not more than \$5,000.00, by imprisonment for not less than three months nor more than one year, by exclusion for a period of not less than two years nor more than ten years, or by any combination of them. Should the commission of the offense result in the death or serious bodily injury to any person, a sentence of exclusion may be imposed for any period not exceeding life in addition to the punishment authorized above.

(Ord. No. 117, 3-3-2000; Ord. No. 369, 8-9-2000)

Sec. 14-30.6. Child abuse in the second degree. Repealed.

(a) — It shall be unlawful for any person to inflict physical injury, or to allow physical injury to be inflicted, or to create or allow to be created a substantial risk of physical injury, upon or to any child under 18 by other than accidental means.

(b) — Child abuse in the second degree is an offense additional to other civil and criminal provisions and is not intended to repeal or preclude any other sanctions or remedies.

(c) — Child abuse in the second degree shall be punishable by a fine of not less than \$250.00 not more than \$5,000.00, by imprisonment for not more than one year, or both. (Ord. No. 117, 3-3-2000; Ord. No. 369, 8-9-2000)

Sec. 14-30.7. Transporting a child outside the territory of the Eastern Band of Cherokee Indians with intent to violate custody order.

(a) When any federal court, tribal court or state court in the United States shall have awarded custody of a child under the age of 18 years, it shall be unlawful for any person with the intent to violate the court order to take or transport, or cause to be taken or transported, any such child from any point within the territory of the Eastern Band of Cherokee Indians, to any point outside the territory of the Eastern Band of Cherokee Indians or to keep any such child outside the territory of the Eastern Band of Cherokee Indians.

(b) Keeping a child outside the limits of the territory of the Eastern Band of Cherokee Indians in violation of a court order for a period in excess of 72 hours shall be prima facie evidence that the person charged intended to violate the order at the time of taking.

(c) Transporting a child outside the territory of the Eastern Band of Cherokee Indians with intent to violate custody order shall be punishable by a fine of not less than \$250.00 and not more than ve \$5,000.00, by imprisonment for not more than one year, or both. (Ord. No. 117, 3-3-2000; Ord. No. 369, 8-9-2000)

Sec. 14-30.8. Failing to pay minors for doing certain work.

(a) It shall be unlawful for any person having a contract with any corporation, company or person for the manufacture or change of any raw material by the piece or pound, who shall employ any minor under the age of 18 to assist in the work upon the faith of and by color of such contract, with intent to cheat and defraud such minor, and, having secured the contract price, to willfully fail to pay the minor when he shall have performed his part of the contract work, whether done by the day or by the job.

(b) Failing to pay minors for doing certain work shall be punishable by a fine of not less than \$100.00 not more than \$5,000.00, by imprisonment for not more than one year, or both.

(Ord. No. 117, 3-3-2000; Ord. No. 369, 8-9-2000)

Sec. 14-30.9. Disseminating and exhibiting harmful material or performances to minors.

It shall be unlawful for any person or business entity to knowingly exhibit, display or disseminate any material which is harmful to minors (under 21 year old) in any place of

public accommodation where minors are or may be present and where minors are able to view the material.

(1) — A person or business entity commits this offense if, having custody, control or supervision of such material, he, she or it does any of the following:

a. — Displays the material so that it is open to view by minors as part of the general public. Material is not considered "displayed" if the material is placed behind "blinder racks" that cover the portions of the material that is harmful to minors, is wrapped, is placed behind a counter, or is located so that the portion that is harmful to minors is not open to view by the minors;

b. — Sells, delivers or provides or offers or agrees to sell, deliver or provide any writing, picture, record or other representation or embodiment of material considered to be harmful to minors; or

c. — Presents or directs a play, dance or other performance which is displayed and considered to be harmful to minors or participates in that portion thereof which makes it harmful to minors; or

d. — Publishes, exhibits or otherwise makes available to minors anything considered to be harmful; or

e. — Allows a minor to review or peruse material that is considered to be harmful; or

f. — Exhibits, presents, rents, sells, delivers or provides; or offers or agrees to exhibit, present, rent or to provide: any still or motion picture, film, filmstrip, or projection slide, or sound recording, sound tape, or sound track or any matter or material of whatever form which is a representation, embodiment, performance, or publication which is considered to be harmful to minors.

(2) — For purposes of this section, material considered to be harmful to minors is any material or performance that depicts sexually explicit nudity, sexual activity or sadomasochistic abuse and, taken as a whole, has the following characteristics:

a. — The average adult person applying contemporary community standards would find that the material or performance has a predominant tendency to appeal to a prurient, shameful or morbid interest of minors; and

b. — The average adult person applying contemporary community standards would find that the material or performance is patently offensive to prevailing standards in the adult community concerning what is suitable for minors; and

c. — The material or performance lacks serious literary, artistic, political, or scientific value for minors.

(3) — As used in this section, "material" means:

a. — Any pictures, drawings, video recordings, films, sculpture or image of a person or portion of the human body which depicts nudity, sexual conduct or sadomasochistic abuse; or

b. — Any book, pamphlet, magazine, printed matter however produced, or sound recording which contains any matter enumerated in section (3)a. above, or which contains explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct, or sadomasochistic abuse; or

c. — Any performance, including any play, motion picture, dance or other exhibition performed before an audience which depicts nudity, sexual conduct or sadomasochistic abuse.

(4) — As used in this section, "nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

(5) — As used in this section, "sexual conduct" means any of the conduct described below, whether actual or simulated (i.e., conduct which gives the appearance of being sexual conduct) or whether the conduct is performed alone or between members of the same or opposite sex or between humans and animals:

a. — Sexual intercourse, oral copulation, anal intercourse, anal oral copulation, bestiality, sexual sadism, penetration of the vagina or rectum by any object in a lewd or lascivious manner; or

b. — Masturbation, whether done with another human or an animal;

e. — Exhibition of the genitals or pubic or rectal area for the purpose of sexual stimulation of the viewer;

d. — Touching, in an act of apparent sexual stimulation or sexual abuse of the clothed or unclothed genitals, pubic area, or buttocks of another person or the clothed or unclothed breasts of a human female; or

e. — Excretory functions performed in a lewd or lascivious manner.

(6) — As used in this section, "sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(7) — As used in this section, "sado-masochistic abuse" means flagellation, torture, bondage, beatings, or oxygen deprivation by or upon a nude person or a person clad in undergarments, a mask, or in a revealing or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained.

(8) — Each violation of this section shall be punishable by a fine not to exceed \$5,000.00, by a term of imprisonment not to exceed one year, or both.

(Ord. No. 117, 3-3-2000; Ord. No. 369, 8-9-2000)

Sec. 14-30.9. Disseminating harmful material to minors; exhibiting harmful performances to minors.

(a) Disseminating Harmful Material. — A person commits the offense of disseminating harmful material to minors if, with or without consideration and knowing the character or content of the material, he:

(1) Sells, furnishes, presents, or distributes to a minor material that is harmful to minors; or

(2) Allows a minor to review or read material that is harmful to minors.

(b) Exhibiting Harmful Performance. — A person commits the offense of exhibiting a harmful performance to a minor if, with or without consideration and knowing the character or content of the performance, he allows a minor to view a live performance that is harmful to minors.

(c) Defenses. — Except as provided in subdivision (3), a mistake of age is not a defense to a prosecution under this section. It is an affirmative defense to a prosecution under this section that:

(1) The defendant was a parent or legal guardian of the minor.

(2) The defendant was a school, church, museum, public library, governmental agency, medical clinic, or hospital carrying out its

legitimate function; or an employee or agent of such an organization acting in that capacity and carrying out a legitimate duty of his employment.

- (3) Before disseminating or exhibiting the harmful material or performance, the defendant requested and received a driver's license, student identification card, or other official governmental or educational identification card or paper indicating that the minor to whom the material or performance was disseminated or exhibited was at least 18 years old, and the defendant reasonably believed the minor was at least 18 years old.
- (4) The dissemination was made with the prior consent of a parent or guardian of the recipient.

Sec. 14-30.10. Additional fine for certain offenses against children.

Any person who pleads guilty, nolo contendere, or who is convicted of any crime described in article V (sexual assault), article VII (crimes against children), or any crime in article IX (crimes of bodily injury) applicable to a child as a victim, regardless of the form of judgment and sentence, shall be ordered by the court to pay an additional fine of \$500.00. The fine shall be paid to the Heart to Heart Child Advocacy Center and placed in the Center's budget under a separate line item. The money received from such fines shall be used to further the objectives and programs of the Center. If there is money left in this line item at the end of the fiscal year, the money shall stay within the Center's budget and not returned to the general fund.

(Ord. No. 831, 5-19-2003)

Sec. 14-30.11. Child Abuse

(a) It shall be unlawful for any person to:

- (1) Inflict physical injury, or to allow physical injury to be inflicted, or to create or allow to be created a substantial risk of physical injury, upon or to any child under 18 by other than accidental means; or
- (2) Commit, permit, or encourage any act of prostitution with or by any child under 18; or
- (3) Commit, permit, or encourage any sexual act with or by any child under 18.

(b) Child abuse is an offense additional to other civil and criminal provisions and is not intended to repeal or preclude any other sanctions or remedies.

(c) Child abuse shall be punishable by a fine of not less than \$500.00 and not more than \$5,000.00, by imprisonment for not less than three months nor more than one year, by exclusion for a period of not less than two years nor more than ten years, or by any combination of them. Should the commission of the offense result in the death or serious bodily injury to any person, a sentence of exclusion may be imposed for any period not exceeding life in addition to the punishment authorized above.

Sec. 14-30.12. Rape of a child; adult offender.

(a) A person is guilty of rape of a child if the person is at least 18 years of age and engages in vaginal intercourse with a victim who is a child under the age of 13 years.

(b) A person convicted of violating this section, shall follow the requirements of Article X of Chapter 14, Sex Offender Registration Program.

(c) A person convicted of violating this section, shall be punished by a fine of \$5000.00, imprisonment for up to one year, or both. If the court sentences the defendant pursuant to this subsection, it shall make findings of fact supporting its decision, to include matters it considered as egregious aggravation. Egregious aggravation can include further consideration of existing aggravating factors where the conduct of the defendant falls outside the heartland of cases even the aggravating factors were designed to cover. Egregious aggravation may also be considered based on the extraordinarily young age of the victim, or the depraved torture or mutilation of the victim, or extraordinary physical pain inflicted on the victim.

(d) Upon conviction, a person convicted under this section has no rights to custody of or rights of inheritance from any child born as a result of the commission of the rape, nor shall the person have any rights related to the child regarding adoption or under the Juvenile Code.

(e) The offense under CC 14-20.9(a)(1) is a lesser included offense of the offense in this section.

Sec. 14-30.13. First-degree sexual offense.

(a) A person is guilty of a sexual offense in the first degree if the person engages in a sexual act:

- (1) With a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim; or
- (2) With another person by force and against the will of the other person, and:
 - a. Employs or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon; or
 - b. Inflicts serious personal injury upon the victim or another person; or
 - c. The person commits the offense aided and abetted by one or more other persons.

(b) Any person who commits an offense defined in this section is guilty of a Class B1 felony. (1979, c. 682, s. 1; 1979, 2nd Sess., c. 1316, s. 6; 1981, c. 106, ss. 3, 4; 1983, c. 175, ss. 5, 10; c. 720, s. 4; 1994, Ex. Sess., c. 22, s. 3.)

Sec. 14-30.14. Second-degree sexual offense.

(a) A person is guilty of a sexual offense in the second degree if the person engages in a sexual act with another person:

- (1) By force and against the will of the other person; or
- (2) Who is mentally disabled, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know that the other person is mentally disabled, mentally incapacitated, or physically helpless.

Sec. 14-30.15. Intercourse and sexual offenses with certain victims; consent no defense.

(a) A person is guilty of violation of this section who has assumed the position of a parent in the home of a minor victim engages in vaginal intercourse or a sexual act with a victim who is a minor residing in the home, or if a person having custody of a victim of any age or a person who is an agent or employee of any person, or institution, whether such institution is private, charitable, or governmental, having custody of a victim of any age engages in vaginal intercourse or a sexual act with such victim. Consent is not a defense to a charge under this section.

(b) A person is guilty of violation of this section who is a teacher, school administrator, student teacher, school safety officer, or coach, at any age, or who is other school personnel, and who is at least four years older than the victim engages in vaginal intercourse or a sexual act with a victim who is a student, at any time during or after the time the defendant and victim were present together in the same school, but before the victim ceases to be a student, except when the defendant is lawfully married to the student. The term "same school" means a school at which the student is enrolled and the defendant is employed, assigned, or volunteers. A person is guilty of violation of this section who is school personnel, other than a teacher, school administrator, student teacher, school safety officer, or coach, and is less than four years older than the victim and engages in vaginal intercourse or a sexual act with a victim who is a student. This subsection shall apply unless the conduct is covered under some other provision of law providing for greater punishment. Consent is not a defense to a charge under this section. For purposes of this subsection, the terms "school", "school personnel", and "student" shall have the same meaning as in CC 14-30.26(d). For purposes of this subsection, the term "school safety officer" shall include a school resource officer or any other person who is regularly present in a school for the purpose of promoting and maintaining safe and orderly schools.

Sec. 14-30.16. Statutory rape or sexual offense of person who is 13, 14, or 15 years old.

(a) A person is guilty of violation of this section if the defendant engages in vaginal intercourse or a sexual act with another person who is 13, 14, or 15 years old and the defendant is at least six years older than the person, except when the defendant is lawfully married to the person.

(b) A person is guilty of violation of this section if the defendant engages in vaginal intercourse or a sexual act with another person who is 13, 14, or 15 years old and the defendant is more than four but less than six years older than the person, except when the defendant is lawfully married to the person.

Sec. 14-30.17. Employing or permitting minor to assist in offense under Article.

Every person 18 years of age or older is guilty of violation of this section who intentionally, in any manner, hires, employs, uses or permits any minor under the age of 16 years to do or assist in doing any act or thing constituting an offense under this Article and involving any material, act or thing he knows or reasonably should know to be obscene within the meaning of CC 14-80.7.

Sec. 14-30.18. Displaying material harmful to minors.

A person is guilty of violation of this section that has custody, control, or supervision of a commercial establishment and knowing the character or content of the material, displays material that is harmful to minors at that establishment so that it is open to view by minors as part of the invited general public. Material is not considered displayed under this section if the material is placed behind "blinder racks" that cover the lower two thirds of the material, is wrapped, is placed behind the counter, or is otherwise covered or located so that the portion that is harmful to minors is not open to the view of minors.

Sec. 14-30.19. First degree sexual exploitation of a minor.

(a) A person is guilty of violation of this section that, knowing the character or content of the material or performance:

- (1) Uses, employs, induces, coerces, encourages, or facilitates a minor to engage in or assist others to engage in sexual activity for a live performance or for the purpose of producing material that contains a visual representation depicting this activity; or
- (2) Permits a minor under his custody or control to engage in sexual activity for a live performance or for the purpose of producing material that contains a visual representation depicting this activity; or
- (3) Transports or finances the transportation of a minor through or across this State with the intent that the minor engage in sexual activity for a live performance or for the purpose of producing material that contains a visual representation depicting this activity; or
- (4) Records, photographs, films, develops, or duplicates for sale or pecuniary gain material that contains a visual representation depicting a minor engaged in sexual activity.

(b) In a prosecution under this section, the trier of fact may infer that a participant in sexual activity whom material through its title, text, visual representations, or otherwise represents or depicts as a minor is a minor.

(c) Mistake of age is not a defense to a prosecution under this section.

Sec. 14-30.20. Second degree sexual exploitation of a minor.

(a) A person is guilty of violation of this section that commits the offense of second degree sexual exploitation of a minor if, knowing the character or content of the material, he:

- (1) Records, photographs, films, develops, or duplicates material that contains a visual representation of a minor engaged in sexual activity; or
- (2) Distributes, transports, exhibits, receives, sells, purchases, exchanges, or solicits material that contains a visual representation of a minor engaged in sexual activity.

(b) In a prosecution under this section, the trier of fact may infer that a participant in sexual activity whom material through its title, text, visual representations or otherwise represents or depicts as a minor is a minor.

(c) Mistake of age is not a defense to a prosecution under this section.

Sec. 14-30.21. Third degree sexual exploitation of a minor.

(a) A person is guilty of violation of this section that, knowing the character or content of the material, he possesses material that contains a visual representation of a minor engaging in sexual activity.

(b) In a prosecution under this section, the trier of fact may infer that a participant in sexual activity whom material through its title, text, visual representations or otherwise represents or depicts as a minor is a minor.

(c) Mistake of age is not a defense to a prosecution under this section.

Sec. 14-30.22. Promoting prostitution of a minor.

(a) A person is guilty of violation of this section that commits the offense of promoting prostitution of a minor if he knowingly:

(1) Entices, forces, encourages, or otherwise facilitates a minor to participate in prostitution; or

(2) Supervises, supports, advises, or protects the prostitution of or by a minor.

(b) Mistake of age is not a defense to a prosecution under this section.

Sec. 14-30.23. Participating in prostitution of a minor.

(a) A person is guilty of violation of this section that is not a minor and patronizes a minor prostitute. As used in this section, "patronizing a minor prostitute" means:

(1) Soliciting or requesting a minor to participate in prostitution;

(2) Paying or agreeing to pay a minor, either directly or through the minor's agent, to participate in prostitution; or

(3) Paying a minor, or the minor's agent, for having participated in prostitution, pursuant to a prior agreement.

(b) Mistake of age is not a defense to a prosecution under this section.

Sec. 14-30.24. Taking indecent liberties with children.

(a) A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:

(1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or

(2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.

Sec. 14-30.25. Solicitation of child by computer to commit an unlawful sex act.

(a) A person is guilty of solicitation of a child by a computer if the person is 16 years of age or older and the person knowingly, with the intent to commit an unlawful sex act, entices, advises, coerces, orders, or commands, by means of a computer, a child who is less than 16 years of age and at least 3 years younger than the defendant, or a person the defendant believes to be a child who is less than 16 years of age and who the defendant believes to be at least 3 years younger than the defendant, to meet with the

defendant or any other person for the purpose of committing an unlawful sex act. Consent is not a defense to a charge under this section.

(b) The offense is committed within the tribal boundaries for purposes of determining jurisdiction, if the transmission that constitutes the offense either originates in the tribal boundary or is received in the tribal boundary.

Sec. 14-30.26. Taking indecent liberties with a student.

(a) A person is guilty of violation of this section, who is a teacher, school administrator, student teacher, school safety officer, or coach, at any age, or who is other school personnel and is at least four years older than the victim, takes indecent liberties with a victim who is a student, at any time during or after the time the defendant and victim were present together in the same school but before the victim ceases to be a student. A person is not guilty of taking indecent liberties with a student if the person is lawfully married to the student.

(b) A person is guilty of violation of this section, who is school personnel, other than a teacher, school administrator, student teacher, school safety officer, or coach, and who is less than four years older than the victim, takes indecent liberties with a student as provided in subsection (a) of this section.

(c) Consent is not a defense to a charge under this section.

(d) For purposes of this section, the following definitions apply:

(1) "Indecent liberties" means:

- a. Willfully taking or attempting to take any immoral, improper, or indecent liberties with a student for the purpose of arousing or gratifying sexual desire; or
- b. Willfully committing or attempting to commit any lewd or lascivious act upon or with the body or any part or member of the body of a student.

For purposes of this section, the term indecent liberties does not include vaginal intercourse or a sexual act as defined by CC 14-20.8.

(1a) "Same school" means a school at which (i) the student is enrolled or is present for a school-sponsored or school-related activity and (ii) the school personnel is employed, volunteers, or is present for a school-sponsored or school-related activity.

(2) "School" means any public school, charter school, or nonpublic school.

(3) "School personnel" means

- a. Employee of a local board of education whether full-time or part-time, or
- b. Independent contractor or employee of an independent contractor of a local board of education, if the independent contractor carries out duties customarily performed by school personnel,
- c. Any person who volunteers at a school or a school-sponsored activity.

- (3a) "School safety officer" means any other person who is regularly present in a school for the purpose of promoting and maintaining safe and orderly schools and includes a school resource officer.
- (4) "Student" means a person enrolled in kindergarten, or in grade one through grade 12 in any school.

Sec. 14-30.27. Punishment.

Any person subject to the criminal jurisdiction of the Eastern Band of Cherokee Indians and convicted of any offense defined by this Article shall be subject to punishment by imprisonment for up to 12 months or by fine of up to \$5,000.00, or both, for each offense, at the discretion of the court.

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

Submitted by: Office of the Attorney General

TABLED

Cherokee Council House
Cherokee, Qualla Boundary (NC)

Date: APR 08 2010

ORDINANCE NO. 277 (2010)

WHEREAS, the Eastern Band of Cherokee Indians is a sovereign entity with the authority and powers to establish and regulate membership and enrollment in the Tribe; and

WHEREAS, in 1995 Tribal Council established Cherokee Code Chapter 49 to govern membership in the Tribe; and

WHEREAS, the current version of Cherokee Code Chapter 49 fails to establish an application deadline in order for new applications to be considered for the June per capita distribution; and

WHEREAS, in furtherance of the protection of the Tribe's membership it would be advantageous to require all applicants for Tribal membership to submit DNA results proving eligibility for membership as part of the application process.

NOW THEREFORE BE IT ORDAINED by the Tribal Council of the Eastern Band of Cherokee Indians, in Council assembled, at which a quorum is present, that the Cherokee Code Section 49-5 is amended to read as follows:

Sec. 49-5. Applications for enrollment.

[Subsection (a) remains unchanged]

(b) *When and where to file an application.* All enrollment applications must be filed with the Enrollment Clerk or such other person as may be designated by the membership committee of the Eastern Band of Cherokee Indians. Application forms may be obtained by oral or written request from the Eastern Band Tribal Enrollment Office. Applications for membership may be filed at any time. There are deadlines for applications to be considered for inclusion in distribution of per capita payments.

(1) ~~However,~~ In order to be considered for the per capita payment to be distributed in December ~~of the current year of any year,~~ applications and all documentation required to establish lineage and blood degree must be received by September 15 of ~~the current year.~~ the same year as the per capita payment.

(2) In order to be considered for the per capita distribution payment to be distributed in June of any year, applications and all documentation required to establish lineage and blood degree must be received by March 15 of the same year as the per capita payment.

(3) Any applications received after September 15 or March 15, or any applications received before September 15 or March 15 without all the required documentation, will be processed for consideration for inclusion on the membership roll to be used for distribution of subsequent per capita payments in subsequent years.

(c) *What the application must contain.* Each enrollment application must be completed in its entirety and must contain sufficient personal information to properly determine the applicant's eligibility for enrollment. Applications must show the following:

- (1) All names by which the applicant is known;
- (2) The address of the applicant;
- (3) The applicant's degree of Eastern Cherokee blood;
- (4) The names of Eastern Cherokee ancestors whose names appear on the 1924 Baker Roll of the Eastern Band, together with the names of Eastern Cherokee ancestors in generations between that roll and the applicant;
- (5) The name of the Tribe and degree of Indian blood of any Tribe other than Eastern Cherokee, as certified by other Tribe;
- (6) The Social Security Number and a copy of the Social Security card of the applicant or a copy of the completed application for a Social Security card. An application shall not be considered incomplete due solely to a delay by the Social Security Administration in issuing Social Security cards;
- (7) The county and state of birth and a county certified birth certificate (state certified birth certificates will only be accepted when the county does not issue birth certificates);
- (8) The status of natural or adopted applicant;
- (9) The signature of the applicant or sponsor;
- (10) The date of the filing of the application; and
- (11) A completed, signed, and dated IRS Form W-9.
- (12) The results of a DNA test, from a lab acceptable to the Enrollment Committee, establishing the probability of paternity and/or maternity by the parent(s) through whom lineage is claimed for an applicant.

(d) *Proof of lineage.* The burden of proof is on the applicant. The application for membership must be accompanied by: the original copy of a certified birth certificate a County certified birth certificate issued by the appropriate governmental entity where the birth occurred, and the certified results of a DNA test establishing the probability of paternity and/or maternity of the applicant from a lab acceptable to the Enrollment Committee.

(1) DNA Testing Requirements:

(a) Testing must occur directly between the applicant and the alleged mother and father unless the parent is unavailable for testing through no fault of the applicant.

(b) When a parent of an applicant is unavailable for DNA testing the Enrollment Committee may accept the certified results of a DNA test between the applicant and both of the missing parent's biological parents

(applicant's grandparents) to establish the probability of relatedness to the grandparents.

(c) A certified copy of the test results must be submitted by the testing lab directly to the Enrollment Office.

(d) The applicant is responsible for all fees related to the DNA test.

(2) In addition, the Enrollment Committee may, at its discretion, require the submission of one or more of the following documents to establish to its satisfaction that the applicant has the lineage and blood quantum required by Tribal law:

~~(1) A marriage license for the parents of the applicant;~~

~~(2) A notarized paternity affidavit signed by the biological mother and biological father of the applicant;~~

~~(4) The results of DNA test signifying the probability of paternity; and/or~~

(a) Documentary evidence of an adoption.

(b) Other similar documents which are needed for a specific applicant.

~~*Effect of court order of paternity.* An order determining paternity issued by the court of the Eastern Band is evidence of lineage and shall be given due deference by the Enrollment Committee. An order determining paternity issued by a court other than the court of the Eastern Band shall be appropriately weighed, along with other evidence, by the Enrollment Committee. If information submitted in support of an application for enrollment does not include an order determining paternity issued by the court of the Eastern Band or does not establish, in the discretion of the Enrollment Committee, that the applicant has the lineage and blood quantum required by Tribal law, the Enrollment Committee shall require DNA testing of the applicant and other necessary persons.~~

(e) *Adopted Eastern Band of Cherokee Indians child.* An adopted person's eligibility for enrollment is determined through one or both of the natural parents. Documentary evidence submitted to support an adopted person's application for enrollment must show relationship to the natural parent through whom eligibility for enrollment is determined. In the case of adoptions, DNA testing is not required. The information shall be contained in locked file cabinets, and adequate safeguards shall be installed to ensure that the confidentiality of these records shall not be violated.

[Subsection (f) remains unchanged]

BE IT FURTHER ORDAINED that this amendment shall be effective upon ratification by the Principal Chief, and all prior ordinances and resolutions that are inconsistent with this ordinance are rescinded.

Submitted by the Enrollment Committee of the Eastern Band of Cherokee Indians.

Ordinance 117-blank Council Member Request for Information

Whereas; Individual elected Council Members are asked by members of their respective communities to occasionally investigate actions of the tribe,

And Whereas ; the Big Cove Council Member Teresa McCoy has discovered that obtaining certain information is difficult and sometimes it takes weeks to obtain; not to mention the confusion caused because of political interference and lack of written and policies and procedures;

And Whereas; the tribe has a public records release law that is occasionally cumbersome, however it is the only mechanism available in which a tribal member can get tribal information;

Now Therefore be it resolved; that a section be added to tribal code 117-blank that simply states;

“Any tribal information requested by an elected Council Representative upon written request be made available to the requestor within ten working days of said request , provided the requestor sign a standard prepared form provided by the legal department. The information requested will be provided in its entirety and will be used at the discretion of the Council Member. This information will be the responsibility of the Council Member and will handled responsibly unless a question of criminal activity is discovered upon then and only then will it be remanded to the appropriate tribal, state, federal law enforcement agency.”

Finally Be it Resolved; the intent of this legislation will be carried out by the Chairman of Tribal Council and the Tribal Legal Department.

Submitted by; Teresa McCoy

