

CHEROKEE COUNCIL HOUSE
CHEROKEE, NORTH CAROLINA

MAR 11 2021

Date: _____

ORDINANCE NO.: 393 (2021)

Short Title: an ordinance to clarify Cherokee law regarding the capacity of criminal defendants to proceed to trial in the Cherokee Court.

WHEREAS, the Eastern Band of Cherokee Indians is a federally-recognized Indian tribe with sovereign powers of self-government, which encompasses the powers of prosecution of defendants for committing certain criminal acts; and

WHEREAS, pursuant to Cherokee Code Sec. 7-2(b) the Cherokee Court has jurisdiction over criminal defendants who are charged with violating the Cherokee Code; and

WHEREAS, at times it is necessary for prosecutors, defense attorneys, or judges to call into question the capacity of a criminal defendant to be put on trial in the Court, and certain procedures are necessary to ensure that everyone involved in the criminal process is treated fairly and equitably; and

WHEREAS, fundamental principles of criminal justice require that criminal defendants be tried when they have capacity to proceed under the law; and

WHEREAS, it is necessary to expand and strengthen the Eastern Band's criminal laws to recognize these principles so as to eliminate possible confusion about which standards govern in the Cherokee Court to ensure that all criminal defendants have the capacity to be tried and punished in accordance with law;

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 Cherokee Code Chapter 15 Appendix A Rule 7 shall be amended, and Chapter 15B shall be created, as follows:

Chapter 15 Appendix A Rule 7. - Pretrial Proceedings.

(e) *Notice of Insanity*~~*Incompetence*~~ Defense. A defendant who intends to assert a defense of insanity at the time of the offense ~~or incompetence to stand trial~~ must file a notice of such in writing and serve the Prosecutor before trial or the defendant cannot rely on ~~either of these the~~ defenses. The Court may conduct such proceedings and Order such examinations of the defendant as is necessary ~~to determine such Motions.~~

1 ***

2
3 **Chapter 15B.**

4
5 **Incapacity to Proceed.**

6
7 **Sec. 15B-1. No proceedings when defendant mentally incapacitated; exception.**

8
9 (a) No person may be tried, convicted, sentenced, or punished for a crime when by reason of
10 mental illness or defect he is unable to understand the nature and object of the proceedings
11 against him, to comprehend his own situation in reference to the proceedings, or to assist in his
12 defense in a rational or reasonable manner. This condition is hereinafter referred to as
13 "incapacity to proceed."

14
15 (b) This section does not prevent the court from going forward with any motions which can
16 be handled by counsel without the assistance of the defendant.

17
18 **Sec. 15B-2. Determination of incapacity to proceed; evidence; temporary commitment;**
19 **temporary orders.**

20
21 (a) The question of the capacity of the defendant to proceed may be raised at any time on
22 motion by the prosecutor, the defendant, the defense counsel, or the court. The motion shall
23 detail the specific conduct that leads the moving party to question the defendant's capacity to
24 proceed.

25
26 (b) (1) When the capacity of the defendant to proceed is questioned, the court shall hold
27 a hearing to determine the defendant's capacity to proceed. If an examination is ordered
28 pursuant to subdivision (2) or (3) of this subsection, the hearing shall be held after the
29 examination. Reasonable notice shall be given to the defendant and prosecutor. The
30 Tribal Prosecutor, the defendant, and the court, may introduce evidence.

31
32 (2) In the case of a defendant charged with any crime, the court may appoint one or
33 more impartial medical experts to examine the defendant and return a written report
34 describing the present state of the defendant's mental health regarding his capacity to
35 proceed in the matter before the court. Reports so prepared are admissible at the hearing.
36 The court may call any expert so appointed to testify at the hearing on the motion of the
37 Tribal Prosecutor or the defendant, or on the Court's own motion.

38
39 (3) At any time in the case of a defendant charged with any criminal offense other than
40 a petty offense as defined in Sec. 15-9(b), the court may order the defendant to a mental

1 health facility for observation and treatment for a period not to exceed 60 days, when
2 necessary to determine the defendant's capacity to proceed. If a defendant is ordered to a
3 facility without first having an examination pursuant to subsection (b)(2) of this section,
4 the judge shall make a finding that an examination pursuant to this subsection would be
5 more appropriate to determine the defendant's capacity. The Cherokee Indian Police
6 Department shall assist the return of the defendant to the Qualla Boundary when notified
7 that the mental health observation, evaluation, and any necessary treatment has been
8 completed. The director of the facility shall direct a report on defendant's condition and
9 capacity to proceed to the defense attorney and to the clerk of the Cherokee court, who
10 shall bring it to the attention of the judge. The report is admissible at the hearing.
11

12 (4) A Cherokee court judge who orders an examination shall order the release of
13 relevant confidential information to the examiner, including, but not limited to, the
14 warrant or criminal process, arrest records, the law enforcement incident report, the
15 defendant's criminal record, jail records, any prior medical and mental health records of
16 the defendant, and any school records of the defendant after providing the defendant with
17 reasonable notice and an opportunity to be heard and then determining that the
18 information is relevant and necessary to the hearing of the matter before the court and
19 unavailable from any other source. This subdivision shall not be construed to relieve the
20 court of its duty to conduct hearings and make findings required under relevant federal
21 law before ordering the release of any private medical or mental health information or
22 records related to substance abuse or HIV status or treatment. The records may be
23 surrendered to the court for in camera review if surrender is necessary to make the
24 required determinations. The records shall be withheld from public inspection and, except
25 as provided in this subdivision, may be examined only by order of the court.
26

27 (c) The order of the court shall contain findings of fact to support its determination of the
28 defendant's capacity to proceed. The parties may stipulate, subject to the final approval of the
29 court, that the defendant is capable of proceeding, but shall not be allowed to stipulate that the
30 defendant lacks capacity to proceed. If the court concludes that the defendant lacks capacity to
31 proceed, proceedings for involuntary civil commitment may be instituted on the basis of the
32 report and consistent with the criteria for involuntary commitment under applicable tribal law.
33

34 (d) Reports made to the court pursuant to this section shall be completed and provided to the
35 court as follows:
36

37 (1) The report in the case of a defendant charged with any crime shall be completed and
38 provided to the court no later than 30 days following the completion of the examination.
39

1 (2) In cases where the defendant challenges the determination made by the court-ordered
2 examiner, and the court orders an independent psychiatric examination, that examination
3 and report to the court must be completed within 60 days of the entry of the order by the
4 court.

5
6 The court may, for good cause shown, extend the time for the provision of the report to the court
7 for up to 30 additional days. The court may renew an extension of time for an additional 30 days
8 upon request of the Tribe or the defendant prior to the expiration of the previous extension.
9 Generally, in no case shall the court grant extensions totaling more than 120 days beyond the
10 time periods otherwise provided in this subsection.

11
12 (e) The court may make appropriate temporary orders for the confinement or security of the
13 defendant pending the hearing or ruling of the court on the question of the capacity of the
14 defendant to proceed.

15
16 (f) Any report made to the court pursuant to this section shall be forwarded to the clerk of the
17 Cherokee court in a sealed envelope addressed to the attention of a presiding judge, with a
18 covering statement to the clerk of the fact of the examination of the defendant and any
19 conclusion as to whether the defendant has or lacks capacity to proceed. A copy of the full report
20 shall be forwarded to defense counsel or to the defendant if he is not represented by counsel. If
21 the question of the defendant's capacity to proceed is raised at any time, a copy of the full report
22 must be forwarded to the Tribal Prosecutor.

23
24 **Sec. 15B-3. Referral of incapable defendant for civil commitment proceedings.**

25
26 (a) When a defendant is found to be incapable of proceeding, the presiding judge, upon such
27 additional hearing, if any, as he determines to be necessary, shall determine whether there are
28 reasonable grounds to believe the defendant meets the criteria for involuntary commitment under
29 applicable law. If the presiding judge finds reasonable grounds to believe that the defendant
30 meets the criteria, he shall make findings of fact and issue a custody order in the same manner,
31 upon the same grounds and with the same effect as an order issued by a clerk or magistrate
32 pursuant to applicable law.

33
34 (b) The court may make appropriate orders for the temporary detention of the defendant
35 pending that proceeding.

36
37 (c) Evidence used at the hearing regarding capacity to proceed is admissible in the
38 involuntary civil commitment proceedings.

39
40 **Sec. 15B-4. Orders for safeguarding of defendant and return for trial.**

1
2 (a) When a defendant is found to be incapable of proceeding, the trial court must make
3 appropriate orders to safeguard the defendant and to ensure his return for trial in the event that he
4 subsequently becomes capable of proceeding.

5
6 (b) If the defendant is not placed in the custody of a hospital or other institution in a
7 proceeding for involuntary civil commitment, appropriate orders may include any of the
8 procedures, orders, and bail conditions provided in the applicable law specifically including the
9 power to place the defendant in the custody of a designated person or organization agreeing to
10 supervise him.

11
12 (c) If the defendant is placed in the custody of a hospital or other institution in a proceeding
13 for involuntary civil commitment, the orders must provide for reporting to the clerk if the
14 defendant is to be released from the custody of the hospital or institution. The original or
15 supplemental orders may make provisions as in subsection (b) in the event that the defendant is
16 released. The court shall also order that the defendant shall be examined to determine whether
17 the defendant has the capacity to proceed prior to release from custody. A report of the
18 examination shall be provided pursuant to Sec. 15B-2(f).

19
20 (d) If the defendant is placed in the custody of a hospital or institution pursuant to
21 proceedings for involuntary civil commitment, or if the defendant is placed in the custody of
22 another person pursuant to subsection (b), the orders of the trial court must require that the
23 hospital, institution, or individual report the condition of the defendant to the clerk at times as
24 deemed necessary by the court. The order must also require the report to state the likelihood of
25 the defendant's gaining capacity to proceed, to the extent that the hospital, institution, or
26 individual is capable of making such a judgment.

27
28 (e) The orders must require and provide for the return of the defendant to stand trial in the
29 event that he gains capacity to proceed, unless the charges have been dismissed pursuant to Sec.
30 15B-8 and may also provide for the confinement or pretrial release of the defendant in that event.

31
32 (f) The orders of the court may be amended or supplemented from time to time as changed
33 conditions require.

34
35 **Sec. 15B-5. Reporting to court with regard to defendants incapable of proceeding.**

36
37 The clerk of the Cherokee court must keep a docket of defendants who have been determined to
38 be incapable of proceeding.

39
40 **Sec. 15B-6. Return of defendant for trial upon gaining capacity.**

1
2 If a defendant who has been determined to be incapable of proceeding, and who is in the custody
3 of an institution or an individual, has been determined by the institution or individual having
4 custody to have gained capacity to proceed, the individual or institution shall provide written
5 notification to the Cherokee court clerk. The clerk shall provide written notification to the Tribal
6 Prosecutor, the defendant's attorney, and the presiding judge.

7
8 **Sec. 15B-7. Supplemental hearings.**
9

10 (a) When it has been reported to the court that a defendant has gained capacity to proceed, or
11 when the defendant has been determined by the individual or institution having custody of him to
12 have gained capacity and has been returned for trial, the clerk shall notify the Tribal Prosecutor,
13 defense attorney, and the presiding judge. Upon receiving the notification, the clerk shall
14 calendar the matter for hearing at the next available session of court but no later than 30 days
15 after receiving the notification. The court may hold a supplemental hearing to determine whether
16 the defendant has capacity to proceed. The court may take any action at the supplemental hearing
17 that it could have taken at an original hearing to determine the capacity of the defendant to
18 proceed.

19
20 (b) The court may hold a supplemental hearing any time upon its own determination that a
21 hearing is appropriate or necessary to inquire into the condition of the defendant.

22
23 (c) The court must hold a supplemental hearing if it appears that any of the conditions for
24 dismissal of the charges have been met.

25
26 (d) If the court determines in a supplemental hearing that a defendant has gained the capacity
27 to proceed, the case shall be calendared for trial at the earliest practicable time. Continuances
28 that extend beyond 60 days after initial calendaring of the trial shall be granted only in
29 extraordinary circumstances when necessary for the proper administration of justice, and the
30 court shall issue a written order stating the grounds for granting the continuance.

31
32 **Sec. 15B-8. Dismissal of charges.**
33

34 (a) When a defendant lacks capacity to proceed, the court shall dismiss the charges upon the
35 earliest of the following occurrences:

36
37 (1) When it appears to the satisfaction of the court that the defendant will not gain
38 capacity to proceed.
39

1 (2) When as a result of incarceration, involuntary commitment to an inpatient
2 facility, or other court-ordered confinement, the defendant has been substantially
3 deprived of his liberty for a period of time equal to or in excess of the maximum term of
4 imprisonment the defendant is subject to as provided by law.

5
6 (b) A dismissal entered pursuant to subdivision (2) of subsection (a) of this section shall be
7 without leave.

8
9 (c) A dismissal entered pursuant to subdivision (1) of subsection (a) of this section shall be
10 issued without prejudice to the refiling of the charges. Upon the defendant becoming capable of
11 proceeding, the prosecutor may reinstitute proceedings dismissed pursuant to subdivision (1) of
12 subsection (a) of this section by filing written notice with the clerk, with the defendant, and with
13 the defendant's attorney of record.

14
15 (d) Dismissal of criminal charges pursuant to this section shall be upon motion of the
16 prosecutor or the defendant or upon the court's own motion.

17
18
19 **BE IT FINALLY ORDAINED** that all ordinances which are inconsistent with this ordinance
20 are rescinded, and that this ordinance shall become effective upon ratification by the
21 Principal Chief.

22
23 *Submitted by the Office of the Attorney General*