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CHEROKEE COUNCIL HOUSE
CHEROKEE, NORTH CAROLINA

Date: DEC 07 2023

ORDINANCE NO.: 48 (2023)

An ordinance amending the Elder and Vulnerable Adult Protection Criminal Code to create a rebuttable presumption that a defendant charged with certain violent criminal offenses against elders or vulnerable adults will serve 72 hours in detention prior to release conditions being set.

WHEREAS, the Eastern Band of Cherokee Indians is a federally-recognized Indian tribe with sovereign powers of self-government; and

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

WHEREAS, the Tribe has sovereign authority to amend its criminal laws and procedures to make more efficient use of court time and to streamline court processes and to ensure criminal defendants receive fair and just conditions of release when charged with certain offenses against elders and vulnerable adults; and

WHEREAS, it is necessary to offer protections to our elders and vulnerable adults while also maintaining fundamental fairness to the criminal justice system.

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 14 shall be amended as follows:

Sec. 14-40.13. Elder and Vulnerable Adult Protection Criminal Code.

(a) *Purpose.* The purpose of the Elder and Vulnerable Adult Protection Criminal Code is to protect elders and vulnerable adults to the greatest extent possible pursuant to the inherent authority of the Eastern Band of Cherokee Indians.

(b) *Definitions.* The following definitions shall apply in this Section:

(1) *Agency.* The word "Agency" means Eastern Band of Cherokee Indians Public Health and Human Services Division as set out in Cherokee Code of Ordinances section 130A-1.

(2) *Caretaker.* The word "caretaker" means a person who has the care, custody, or control of, or who stands in a position of trust with, an elder or vulnerable adult.

- 1 (3) *CIPD*. The term "CIPD" means the Cherokee Indian Police Department.
2 (4) *Elder*. The word "elder" means a person who is 60 years of age or older.
3 (5) *Protective order*. The term "protective order" shall have the same meaning as the
4 definition provided in section 50E-2(d) of the Cherokee Code (Vulnerable Adult
5 Protective Order Code).
6 (6) *Tribe*. The word "Tribe" means the Eastern Band of Cherokee Indians.
7 (7) *Vulnerable adult*. The term "vulnerable adult" means a person who is 18 years of age
8 or older or a lawfully emancipated minor, and who is unable to make decisions or take
9 action to protect him or herself from exploitation, neglect, or physical abuse, due to a
10 physical or mental disease, illness or chronic condition, including but not limited to
11 alcohol or chemical addiction, a developmental disability, or a disability caused by
12 degenerative conditions associated with advanced age.

13 (c) *Crimes and penalties*.

14 (1) *Exploitation of an elder or vulnerable adult*.

15 a. It shall be unlawful to:

- 16 i. make a false representation, abuse a position of trust or fiduciary duty, or
17 coerce, command, or threaten, with the intent to permanently deprive an
18 elder or vulnerable adult of property, and, as a result of the act, the elder or
19 vulnerable adult gives or loses possession and control of property, assets, or
20 money; or
21 ii. use the property or personal identifying information of an elder or vulnerable
22 adult to commit, or commit against an elder or vulnerable adult, any one of
23 the following offenses, as defined by the Eastern Band of Cherokee Indians
24 Criminal Code:
25 1. extortion (section 14-60.2);
26 2. blackmail (section 14-60.3);
27 3. fraudulent use of a credit, debit, or bank card (section 14-60.4);
28 4. forgery (section 14-60-10);
29 5. criminal simulation (section 14-60-11);
30 6. fraudulent handling of recordable instruments (section 14-60.12);
31 7. tampering with records (section 14-60.13);
32 8. embezzlement (section 14-60.20);
33 9. false pretenses (section 14-60.30);
34 10. securing execution of documents by deception (section 14-60.31);
35 11. worthless checks (section 14-60.32);
36 12. obtaining property in return for worthless check, draft, or order
37 (section 14-60.33);

- 1 13. defrauding creditors (section 14-60.37); or
- 2 14. making a false credit report (section 14-60.38).
- 3 15. larceny (section 14-60.60)

4 Any person in violation of this section shall be guilty of the offense of
 5 exploitation of an elder or vulnerable adult.

6 b. It shall be unlawful for a caretaker of an elder or vulnerable adult to commit an
 7 offense in (c)(1)a(i) or (c)(1)a(ii) of this section. Any person in violation of this
 8 section shall be guilty of the offense of caretaker exploitation of elder or
 9 vulnerable adult.

10 c. Penalties.

11 i. Unless a person's conduct is covered under some other provision of law
 12 providing greater punishment, exploitation of an elder or vulnerable adult
 13 shall be subject to punishment by a fine of up to \$5,000.00, by imprisonment
 14 for up to 12 months, by exclusion for a period of not less than two years nor
 15 more than five years; or any combination of these penalties.

16 ii. Unless a person's conduct is covered under some other provision of law
 17 providing greater punishment, caretaker exploitation of an elder or
 18 vulnerable adult shall be subject to punishment by a fine of up to \$15,000.00,
 19 by imprisonment for up to three years, by exclusion for a period of not less
 20 than two years nor more than ten years; or any combination of these
 21 penalties.

22 (2) *Neglect of an elder or vulnerable adult.*

23 a. It shall be unlawful to wantonly or recklessly

24 i. fail to exercise a degree of care that a reasonable person in a like situation
 25 would exercise to

26 A. assist an elder or vulnerable adult in personal hygiene, or the
 27 provision of food, clothing, or shelter; or

28 B. provide to an elder or vulnerable adult medical care for physical
 29 and mental health needs; or

30 C. protect an elder or vulnerable adult from health and safety hazards;
 31 or

32 D. prevent malnutrition or dehydration

33 ii. interfere in the delivery of necessary services or resources to an elder or
 34 vulnerable adult;

35 Any person in violation of this section shall be guilty of neglect of an elder or
 36 vulnerable adult.

37 b. It shall be unlawful for a caretaker of an elder or vulnerable adult to commit an
 38 offense in (c)(2)a(i) or (c)(2)a(ii) of this section. Any person in violation of this

1 section shall be guilty of the offense of caretaker neglect of elder or vulnerable
2 adult.

3 c. Penalties:

- 4 i. Unless a person's conduct is covered under some other provision of law
5 providing greater punishment, a first conviction of neglect of an elder or
6 vulnerable adult shall be punishable by a fine of up to \$5,000.00 by
7 imprisonment for up to six months, by exclusion for a period of not less than
8 one year nor more than five years; or any combination of these penalties.
- 9 ii. Unless a person's conduct is covered under some other provision of law
10 providing greater punishment, a second or subsequent conviction of neglect
11 of an elder or vulnerable adult shall be punishable by a fine of up to
12 \$5,000.00, by imprisonment for up to 12 months, by exclusion for a period
13 of not less than two years nor more than five years; or any combination of
14 these penalties.
- 15 iii. Unless a person's conduct is covered under some other provision of law
16 providing greater punishment, Caretaker Neglect of an Elder or Vulnerable
17 Adult shall be punishable by a fine of up to \$15,000.00, by imprisonment for
18 up to three years, by exclusion for a period of not less than two years nor
19 more than ten years; or any combination of these penalties.

20 (3) *Abuse of an elder or vulnerable adult.*

21 a. It shall be unlawful to:

- 22 i. intentionally inflict physical injury, or to allow physical injury to be
23 inflicted, or create or allow to be created a substantial risk of physical injury,
24 upon or to an elder or vulnerable adult; or
- 25 ii. commit any one of the following offenses, as defined by the Eastern Band of
26 Cherokee Indians Criminal Code, against an elder or vulnerable adult or the
27 property of an elder or vulnerable adult:
- 28 1. injuring real property (section 14-10.11);
 - 29 2. injuring telephone, wires or other telephone equipment (section 14-
30 10.14);
 - 31 3. criminal trespass (sections 14-10.15, 14-10.16, and/or 14-10.17);
 - 32 4. burglary (section 14-10.40);
 - 33 5. breaking and entering (section 14-10.41);
 - 34 6. criminal mischief (section 14-10.9);
 - 35 7. arson (sections 14-10.50, 14-10.51, and/or 14-10.52);
 - 36 8. assault (sections 14-40.49, 14-40.50, 14-40.54, 14-40.55, 14-40.56,
37 14-40.57, 14-40.59, 14-40.60, and/or 14-40.62);
 - 38 9. maiming (section 14-40.14);
 - 39 10. discharging a firearm into an occupied building (section 14-40-15);

- 1 11. harassment; telephone harassment (section 14-25.13 and/or 14-
- 2 5.3);
- 3 12. kidnapping (section 14-40.30);
- 4 13. false imprisonment (section 14-40.31);
- 5 14. custodial interference (section 14-40.32);
- 6 15. homicide (sections 14-40.40 and/or 14-40.41);
- 7 16. sex offenses, including aggravated sexual abuse, sexual abuse,
- 8 sexual abuse of a minor or ward, abusive sexual contact (sections
- 9 14-20.2, 14-20.3, 14-20.4, 14-20.8);
- 10 17. stalking (section 14-5.5);
- 11 18. communicating threats (section 14-5.2);
- 12 19. cruelty to animals (section 14-5.20);
- 13 20. robbery and robbery with a dangerous weapon (sections 14-10.30
- 14 and/or 14-10.31).

15 Any person in violation of this section shall be guilty of the offense of abuse of an
16 elder or vulnerable adult.

- 17 b. It shall be unlawful for a caretaker of an elder or vulnerable adult to commit an
18 offense in (c)(3)a(i) or (c)(3)a(ii) of this section. Any person in violation of this
19 section shall be guilty of the offense of caretaker abuse of elder or vulnerable
20 adult.

21 b(1). No person charged with a crime of Abuse of an elder or vulnerable adult shall be
22 released from detention until after the expiration of 72 hours from arrest,
23 notwithstanding the ability to post a cash or surety bond, unless released by a
24 Magistrate or Judge of the Cherokee Court after a formal release hearing, which
25 hearing shall be held immediately upon the defendant's first appearance before the
26 Magistrate or Judge of the Cherokee Court, unless for good cause shown, the
27 defendant or the Tribe seeks a continuance. During the 72 hours, it shall be a
28 rebuttable presumption that the defendant poses a risk of violence and/or
29 intimidation to the alleged victim and that no condition or combination of
30 conditions will reasonably assure the appearance of the defendant as required and
31 the safety of the alleged victim and the community. In no case shall any person
32 arrested for Abuse of an elder or vulnerable adult be released prior to the
33 expiration of 72 hours from arrest unless the Court has made all reasonable efforts
34 to inform the alleged victim that the defendant's release is imminent and has been
35 given the alleged victim an opportunity to be heard at the formal release hearing.
36 The Magistrate or Judge may hear from the alleged victim via telephone and may
37 consider any written statement submitted by the victim. At the release hearing, the
38 Magistrate or Judge must review the probable cause supporting the charge of
39 Abuse of an elder or vulnerable adult under this section and determine whether:

- 40 a. The person poses a credible threat of violence, repeated harassment or
41 bodily injury to the alleged victim or to the victim's family or household,

1 b. Is a threat to public safety; and

2 c. Is reasonably likely to appear in court.

3 At the hearing, the defendant has the right to be represented by counsel, and, if
4 financially unable to obtain adequate representation, to have counsel appointed.
5 The person shall be afforded an opportunity to testify, to present witnesses, to
6 cross-examine witnesses who appear at the hearing, and to present information by
7 proffer or otherwise. The rules concerning admissibility of evidence in criminal
8 trials do not apply to the presentation and consideration of information at the
9 hearing, and the Magistrate or Judge may consider any and all evidence available
10 at the time of the hearing. The facts the judicial officer uses to support a finding
11 that no condition or combination of conditions will reasonably assure appearance
12 of the defendant as required and the safety of the alleged victim or the community
13 shall be supported by clear and convincing evidence. If, after the hearing, the
14 Magistrate or Judge finds that no condition or combination of conditions will
15 reasonably assure the appearance of the defendant as required and the safety of
16 the alleged victim or the community, the Magistrate or Judge shall order the
17 detention of the defendant for the remainder of the 72 hours from arrest. Upon
18 such finding the Magistrate or Judge may also order the detention of the defendant
19 pending trial or may order the defendant be released, upon the expiration of 72
20 hours from arrest, on a condition or combination of release conditions. In making
21 the determination regarding detention required by subsection, the court will
22 consider whether the arrested person's pattern of violent or threatening behavior
23 towards a victim or victim's family or household member is chronic, and whether
24 the seriousness of the behavior has been escalating, indicating a heightened
25 danger of severe or lethal injury to the alleged victim.

26 c. Penalties.

- 27 i. Unless a person's conduct is covered under some other provision of law
28 providing greater punishment, abuse of an elder or vulnerable adult shall be
29 punishable by a fine of up to \$5,000.00, by imprisonment for up to 12
30 months, by exclusion for a period of not less than two years nor more than
31 five years; or any combination of these penalties.
- 32 ii. Unless a person's conduct is covered under some other provision of law
33 providing greater punishment, caretaker abuse of an elder or vulnerable adult
34 shall be punishable by a fine of up to \$15,000.00, by imprisonment for up to
35 three years, by exclusion for a period of not less than two years nor more
36 than ten years; or any combination of these penalties.

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38 **BE IT FINALLY ORDAINED** that all ordinances which are inconsistent with this ordinance
39 are rescinded, and that this ordinance shall become effective after ratification by the
40 Principal Chief.

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42 *Submitted by the Cherokee Police Commission.*