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I. STATEMENT OF FACTS

The State accepts the statement of the facts as set forth by the defendant.

II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

The first assignment of error raised by the defendant is a claim that the State failed to prove that the defendant knowingly and voluntarily waived his right to provide statements to law enforcement and therefore his statements should have been suppressed. The trial court held a 3.5 hearing on November 12, 2008. At the conclusion of the hearing, the court entered its Findings of Fact and Conclusions of Law Re: CrR3.5 (CP 229). A copy of the Findings of Fact are attached hereto and by this reference incorporated herein.

As the court's Findings of Fact indicate, when the defendant was first contacted by Deputy Sample he indicated that he did not understand his rights. Because of that, the trial court suppressed those statements.

However, the Findings then discuss an interview with Deputy Earhart, which occurred several hours later at Southwest Washington Medical Center. Deputy Earhart indicated that he was assigned to go to the hospital to photograph any injuries suffered by the defendant during the time of his arrest. (Apparently he had been bitten by the police dog). (RP

48). Deputy Earhart indicated that while there he went over Miranda Rights with the defendant through the use of a standard issue card. (RP

48). The discussion with the defendant, preliminarily, was as follows:

QUESTION (Deputy Prosecutor): And when you had contact with him, did you cover his Miranda rights or constitutional rights with him?

ANSWER (Deputy Earhart): Yes.

QUESTION: How did you do so?

ANSWER: I have an issued card. I just read from the card to him.

QUESTION: All right. Would you please –

THE COURT: Do you know if this is after the interview that Detective Sample had done?

THE WITNESS: When I got there, I asked him if detectives had already talked to him. He said yes.

THE COURT: Defendant told you that?

THE WITNESS: Yes, sir.

THE COURT: Was he in a hospital room or an emergency room or what?

THE WITNESS: He was in a hospital room. He was in an emergency room at the hospital.

THE COURT: Go ahead.

QUESTION (by Deputy Prosecutor): And when you read him his rights, you said you read them from your card. Could you just read those into the record, please?

ANSWER: Yes. You have the right to remain silent. Anything you say can be used against you in a court of law. You have the right at this time to talk to a lawyer and have him present with you while you're being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish. And you can decide at any time to exercise these rights and not answer any questions or make any statements.

And then under the waiver portion it asks, do you understand each of these rights I've explained to you? And he answered, yes. And having these rights in mind, do you wish to talk to me now? And he answered yes.

QUESTION: Okay. And any indications to you that he didn't understand his rights?

ANSWER: No.

QUESTION: And he actually indicated that he did understand his rights; is that what you're saying?

THE COURT: That's a leading question. You ask him what he said.

QUESTION (by Deputy Prosecutor): What did he say to you when you read the rights to him?

ANSWER: He said he understood his rights.

QUESTION: All right. And when you asked him if he would waive his rights, what did he say?

ANSWER: He waived them.

THE COURT: What did he say?

THE WITNESS: On the second question, he said yes.

THE COURT: So you asked him both questions?

THE WITNESS: Yes, sir.

THE COURT: Okay. Thank you. Go ahead.

QUESTION (by Deputy Prosecutor): Did you proceed to ask him any questions?

ANSWER: Yes.

QUESTION: Did you ask him about his injury?

ANSWER: Yes.

QUESTION: What did you ask him?

ANSWER: I asked him if – just in general if he could tell me about his interactions with police dogs that day.

QUESTION: All right. And did he give you any response to that?

ANSWER: Yes.

QUESTION: Okay.

MR. JACKSON (Deputy Prosecutor): Okay. Your Honor, I don't know if we need to go into this. It's that statement that the State's going to move to admit.

THE COURT: Roughly, how long did you interview him, then?

THE WITNESS: I was in the room with him probably 15 or 20 minutes.

THE COURT: And you were questioning him about what had happened that day?

THE WITNESS: Yes, sir.

THE COURT: Okay. You can – I don't need to get the content, that's not necessary. But you can ask the rest of the foundational questions.

MR. JACKSON: Okay. Thank you.

QUESTION (by Deputy Prosecutor): Anything said to the defendant in terms of a threat?

ANSWER: No.

QUESTION: Anything that you saw any other individual make to him during the time you were there that would be perceived as a threat?

ANSWER: No.

QUESTION: Any promises made to him?

ANSWER: No.

QUESTION: How about any indications that he understood your questions?

ANSWER: Yes, he understood. We were actually – it was a very lighthearted conversation. When I was talking to him, it was pleasant – he was pleasant to me and I was pleasant with him.

QUESTION: Okay. Any indication that he wasn't tracking with you, any questions?

ANSWER: No, he followed along. Gave appropriate answers to any question or part of the conversation.

QUESTION: Did you make any kind of misrepresentations to him?

ANSWER: No.

-(RP 48, L13 – 52, L18)

On cross examination of the officer, the testimony was that he was unaware that the defendant had previously been interviewed, or attempted to be interviewed by Officer Sample. (RP 54-55).

Also present during the interview by Deputy Earhart was Deputy Schmidt from the Clark County Sheriff's Office Major Crimes Unit. (RP 57). He testified that he was present when the Miranda Rights were read to the defendant and his reactions to those rights, plus the fact that there were no promises or threats made to the defendant and it appeared that he understood what was being said to him. (RP 58).

At the close of this testimony, and after hearing argument from counsel, the court made the following ruling:

THE COURT: I'm ready to rule. There's a marked contrast here between this interview and the interview with Detective Sample. For one thing, now we do have a very clear record during the interview with Deputy Earhart that he had previously been advised of rights, and just a few hours before. So we know the defendant from this record has been advised of his rights in the past, shortly in the past. And when readvised, on this occasion, stated that he did understand his rights.

He appeared coherent, he was cooperative, he – to use Deputy Tandler's phrase, he no longer had a dog attached. And certainly that would explain the dramatic change in his demeanor, from when he's first contacted to his last contact with Deputy Schmidt and Deputy Earhart.

Not only that, we see the cooling off process occurring with Deputy Sample. He wasn't agitated like he had been before. So I can't simply attribute his change in demeanor to some unknown administration of drugs. The only record I have here is that the defendant had been sutured. When asked – well, and it's anecdotal. But when this witness testified, he said that he'd had sutures before, and a local numbing agent applied. That wouldn't affect a person's ability to understand his Miranda warnings.

I have no record that he was under the influence of any drug at the time. And from all outward and objective appearances, he said he understood his rights, he agreed expressly to speak with the officers and carried on a cogent conversation. All those statements are admissible.

-(RP 61, L12 – 62, L16)

The voluntariness of a confession is determined by examining the totality of the circumstances in which the confession was made." State v. Cushing, 68 Wn. App. 388, 392, 842 P.2d 1035 (1993). The totality-of-the-circumstances test specifically applies to determine whether a confession was coerced by any express or implied promise or by the exertion of any improper influence. State v. Broadaway, 133 Wn.2d 118, 132, 942 P.2d 363 (1997); Arizona v. Fulminante, 499 U.S. 279, 285, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) (abrogating test stated in Bram v. United States, 168 U.S. 532, 18 S. Ct. 183, 42 L. Ed. 568 (1897)). The fact that the person in custody has recently used drugs or alcohol, or is in withdrawal from such use, or sleep deprivation, does not automatically

invalidate a waiver, but is a factor for the court to consider. State v. Aten, 130 Wn.2d 640, 664, 927 P.2d 210 (1996); State v. Ortiz, 104 Wn.2d 479, 484, 706 P.2d 1069 (1985); State v. Lawley, 32 Wn. App. 337, 345, 647 P.2d 530 (1982); State v. Turner, 31 Wn. App. 843, 845-46, 644 P.2d 1224 (1982); State v. Hutchinson, 135 Wn.2d 863, 885-86, 959 P.2d 1061 (1998), cert. denied, 525 U.S. 1157, 143 L. Ed. 2d 69, 119 S. Ct. 1065 (1999). The critical factual issue is whether, under the circumstances, the defendant was able to knowingly, intelligently, and voluntarily waive his rights. Hutchinson, 135 Wn.2d at 885-86.

A trial court's determination of voluntariness should be reversed on appeal only where it is not supported by substantial evidence in the record. Cushing, 68 Wn. App. at 393. In reviewing the question of voluntariness, the appellate court reviews the challenged findings of fact. State v. Broadaway, 133 Wn.2d 118, 132, 942 P.2d 363 (1997).

The State submits that the Findings of Fact and Conclusions of Law entered by the trial court concerning the 3.5 hearing are supported by substantial evidence in the record and point to a voluntary statement being made by the defendant after advice of his Miranda Rights. It is uncontested that the defendant stated that he understood his rights and from the testimony it appeared that he was coherent and fully cooperative with the officers at the hospital. Further, there was no record before the

trial court that the defendant was under the influence of any drugs at the time of the statement. With these factors in mind, the trial court found that the statements given at the hospital were voluntary and could be used in the State's case in chief.

III. RESPONSE TO ASSIGNMENTS OF ERROR NO. 2 AND NO. 3

The second and third assignments of error raised by the defendant are claims that imposition of the Persistent Offender Sentencing Accountability Act (POAA) violated some of the defendant's constitutional rights, and in particular, he should have had a right to a jury trial to make the determination of whether or not he was a persistent offender. For example, the defendant makes claim that a jury was necessary to find beyond a reasonable doubt facts that increase the defendant's maximum possible sentence. Also, the defendant claims that prior case law has not considered the issue of prior convictions under Appendi. Finally, he claims that the court erred in classifying him as a persistent offender because this became a "sentencing factor" rather than an "element" and thus violated the defendant's right to equal protection.

The State submits that all of these arguments have recently been explored by the Appellate system and have upheld the rulings by our trial court down the line.

In State v. Rudolph, 141 Wn. App. 59, 168 P.3d 430 (2007), Division II discussed a conviction for First Degree Robbery, where the trial court had sentenced him to life without parole under the Persistent Offender Accountability Act (POAA). The defendant argued that the POAA sentencing procedures were unconstitutional because they allowed the trial court to make factual findings about prior convictions rather than requiring a jury to make those findings. Division II first discusses this in terms of the constitutionality of the POAA and how it relates to Apprendi and Blakely.

“Citing Blakely, 542 U.S. 296, Rudolph argues that Washington's POAA sentencing procedures are unconstitutional because they allow the trial court to make factual findings about prior convictions, which increase punishment, rather than requiring a jury to make these findings. The State responds that we have already resolved this issue contrary to Rudolph's position in State v. Ball, 127 Wn. App. 956, 113 P.3d 520 (2005), review denied, 156 Wn.2d 1018 (2006), in which we held that the POAA is a recidivism statute not subject to Blakely analysis.⁷ We decline to reverse Ball and, instead, adhere to our previous holding that POAA sentencing procedures are not subject to Blakely”

-(State v. Rudolph, 141 Wn. App. at 63-64)

Division II continues in its discussion that:

“The United States Supreme Court’s subsequent decision in Blakely excludes the fact of prior convictions from its constitutionally based jury trial requirement in Apprendi for facts that increase the penalty beyond what the court

could impose without additional factual findings. Blakely, 542 U.S. at 313. Therefore, Blakely does not affect Wheeler's [State v. Wheeler, 145 Wn.2d 116, 34 P.3d 799 (2001)] holding that imposing a life sentence without parole under the POAA is constitutional.

-(State v. Rudolph, 141 Wn. App. at 65)

Our Supreme Court has “repeatedly rejected similar arguments and held that Apprendi and its progeny do not require the State to submit a defendant's prior convictions to a jury and prove them beyond a reasonable doubt.” State v. Thiefault, 160 Wn.2d 409, 418, 158 P.3d 580 (2007) (citing In re Personal Restraint of Lavery, 154 Wn.2d 249, 256-57, 111 P.3d 837 (2005)); State v. Wheeler, 145 Wn.2d 116, 34 P.3d 799 (2001), cert. denied, 535 U.S. 996 (2002); State v. Ortega, 120 Wn. App. 165, 84 P.3d 935 (2004), accord Almendarez-Torres, 523 U.S. 224, 247).

Division II has also addressed some of the defendant's contentions in State v. Ball, 127 Wn. App. 956, 113 P.3d 520 (2005). In the Ball case, the defendant sought review of a decision convicting him of four counts of Child Molestation and sentencing him under the Persistent Offender Act. The Court of Appeals affirmed the trial court's decision which held that the POAA was neither an exceptional sentence statute subject to a Blakely analysis, nor was it an enhanced sentence statute. The POAA was an act

pertaining to recidivism and was constitutional. As indicated by the Judges

in Division II:

“Michael Wayne Ball was convicted of four counts of child molestation. Ball had two previous convictions for first degree statutory rape. The State requested that the trial court sentence Ball under the Persistent Offender Accountability Act (POAA). The court reviewed Ball's previous convictions and found them to be "strikes" under the POAA. Ball appeals his sentence of life without the possibility of release. We hold that the POAA is neither an exceptional sentencing statute subject to a Blakely analysis nor is it an enhanced sentence statute. Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). The POAA is an act pertaining to recidivism. The POAA under chapter 9.94A RCW is constitutional. It permits a sentencing court to employ a preponderance standard, and the court is not required to submit the matter to a jury. We affirm.”

-(State v. Ball, 127 Wn. App. at 957)

“II. Application of Blakely to Persistent Offender Statute

Ball argues that under Blakely, 542 U.S. 296, the trial court had to submit the question of whether he was a persistent offender to the jury to be found beyond a reasonable doubt.

Blakely does not apply to sentencing under the POAA. Blakely specifically was directed at exceptional sentences under RCW 9.94A.535, "Departures from the guidelines." Blakely followed Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), where the Supreme Court held that:

[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed

statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.

Appendi, 530 U.S. at 490 (emphasis added).

Ours is not an exceptional sentencing situation. The "persistent offender" is not listed in RCW 9.94A.535, but in RCW 9.94A.030(32) and is found in RCW 9.94A.570. The POAA does not increase the penalty for the current offense.

Ball also asserts that this is a sentence enhancement statute. He is wrong. RCW 9.94A.533 addresses sentence enhancements which is entitled "Adjustments to standard sentences." These enhancements concern firearm enhancements, drug enhancements (e.g. school zones), etc. Only one "adjustment" refers to prior offenses, vehicular homicide may be enhanced for prior offenses. RCW 9.94A.533(7). The POAA is not listed or referred to in this section. We hold that it is not an enhancement of the sentence for the crime committed. Our Supreme Court has held that the POAA is a sentencing statute. State v. Thorne, 129 Wn.2d 736, 778, 921 P.2d 514 (1996). This sentencing statute is for recidivism, and the rationale is entirely different from that of either exceptional sentences or sentence enhancements. Our Supreme Court has declined to extend Appendi to recidivism statutes. State v. Wheeler, 145 Wn.2d 116, 124, 34 P.3d 799 (2001), cert. denied, 535 U.S. 996 cert. denied sub nom. Sanford v. Washington, 535 U.S. 1037, 152 L. Ed. 2d 654, 122 S. Ct. 1796 (2002).

Wheeler answers many of Ball's contentions. It reiterated that (1) the POAA statute was constitutional, (2) the convictions need not be charged in the information, (3) the sentence need not be submitted to a jury, and (4) it need not be proved beyond a reasonable doubt. Wheeler, 145 Wn.2d at 120. The court also specifically held that, "[a]ll that is required by the constitution and the statute is a sentencing hearing where the trial judge decides by a preponderance of the evidence whether the prior convictions exist." Wheeler, 145 Wn.2d at 121 (citing former RCW 9.94A.110 (2000) (now recodified as RCW 9.94A.500)). That procedure is precisely what occurred in Ball's case. Our Supreme Court

reaffirmed Wheeler in State v. Smith, 150 Wn.2d 135, 143, 75 P.3d 934 (2003), cert. denied, 541 U.S. 909 (2004)”

-(State v. Ball, 127 Wn. App. at 960)

This analysis has recently been approved in the Supreme Court in State v. Magers, 164 Wn.2d 174, 189 P.3d 126 (2008). Magers was making the same type of arguments that our defendant is making at this time. The Supreme Court was quite clear in its decision:

“Insofar as the latter argument is concerned, the Court of Appeals has held that Blakely does not apply to sentencing under the POAA, Blakely being specifically directed at exceptional sentences. State v. Ball, 127 Wn. App. 956, 957, 959-60, 113 P.3d 520 (2005). We agree with this conclusion and determine that Blakely has no application to the instant case.

It is well settled that Blakely does not apply to sentencing under the POAA. See State v. Ball, 127 Wn. App. 956, 959-60, 113 P.3d 520 (2005) (ruling that Blakely does not apply to the POAA). In reaching this conclusion, the Ball court noted that Blakely specifically addresses exceptional sentences, whereas the POAA is directed at recidivism. *Id.* Our Supreme Court is in accord. See State v. Wheeler, 145 Wn.2d 116, 34 P.3d 799 (2001) (holding Apprendi does not require that prior convictions used to establish persistent offender status be submitted to a jury and proved beyond a reasonable doubt); State v. Smith, 150 Wn.2d 135, 141, 75 P.3d 934 (2003) (“the United States Supreme Court has never held that recidivism must be pleaded and proved to a jury beyond a reasonable doubt”).”

-(State v. Magers, 164 Wn.2d at 194)

The State submits that the arguments being made by the defendant has previously been made and rejected by the Appellate courts. Blakely does not apply to a sentence under the POAA because the statute does not pertain to departures from the sentencing guidelines and does not increase the penalty for the current offense. Instead, the POAA is itself a sentencing statute, designed to address recidivism. State v. Ball, 127 Wn. App. at 960. As the Ball court further noted, the Washington Supreme Court has not extended the rule in Apprendi to recidivism statutes. Ball, 127 Wn.2d at 960 (citing State v. Wheeler, 145 Wn.2d 116, 124, 34 P.3d 799 (2001)). The Wheeler court held that the POAA is constitutional and that the convictions used to impose a POAA sentence need not be charged in the Information, submitted to a jury, or proved beyond a reasonable doubt. Wheeler, 145 Wn.2d at 120.

The jury in our case found that the defendant had committed the crime that he was charged with (Harming a Police Dog, RCW 9A.76.200) and that further the defendant was armed with a firearm during the commission of this crime (Special Verdict Form, CP 75). Based on the nature of the convictions and the defendant's prior history (the prior history was set forth in some detail with certified copies of convictions that were attached and incorporated into the Felony Judgment and Sentence (CP 84)), the trial court properly determined that he was a

candidate under the Three Strikes Law and subsequently sentenced him to life without possibility of parole.

IV. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 5 day of Jan, 2010.

Respectfully submitted:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

By: 
MICHAEL C. KINNE, WSBA#7869
Senior Deputy Prosecuting Attorney

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FILED
2009 NOV 19 PM 3:45
Sherry W. Parker, Clerk
Clark County

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,
Plaintiff,

v.

RONALD CHENETTE, JR.,
Defendant

No. 07-1-01875-1

FINDINGS OF FACT &
CONCLUSIONS OF LAW
RE: CrR 3.5

THIS MATTER having come before Judge Roger Bennett on November 12, 2008, the Court having heard the oral arguments of counsel, The State of Washington represented by Deputy Prosecuting Attorney Scott Jackson and the Defendant, represented by Defense Attorney Jeff Barrar, and having heard the testimony of Clark County Sheriff's Office (CCSO) Deputies David Tendler, Phillip Sample, Alan Earhart and CCSO Detectives Robert Mullikin and Kevin Schmidt, the Court enters the following:

FINDINGS OF FACT

1. Deputy Sample was the first officer to read Miranda rights to the defendant on the date of October 23, 2007, at which time the defendant was under arrest.
2. Deputy Sample asked if the defendant understood his rights and the defendant responded by saying "no".

FINDINGS OF FACT & CONCLUSIONS OF LAW -1

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3. Several hours later, while at Southwest Washington Medical Center, Deputy Earhart advised the defendant of his Miranda rights.
4. The defendant indicated this time that he understood his rights.
5. The defendant was also asked if he would waive those rights and he indicated that he would.
6. Deputy Earhart indicated that the defendant was tracking with questions and giving appropriate responses.
7. Detective Schmidt was present and overheard Deputy Earhart giving the Miranda warnings and the defendant's acknowledgement that he understood and waived those rights.
8. Detective Schmidt indicated, as did Deputy Earhart, that there were no misrepresentations, promises or threats made to the defendant.

CONCLUSIONS OF LAW

1. The defendant initially said he did not understand his rights.

Any statement made by defendant to Deputy Sample or others before his rights were read to him a second time by Deputy Earhart are suppressed. At that time, the defendant had specifically stated that he did not understand his rights.

2. Later, the defendant indicated he understood and waived his rights.

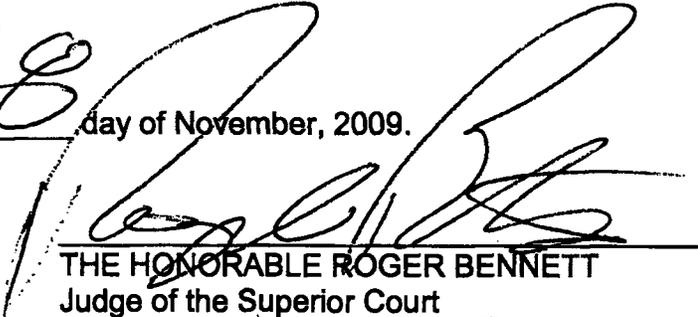
At the point when Deputy Earhart advised the defendant of his Miranda rights, it was clear from the record that the defendant had previously been advised, just hours before, of his rights. Upon being readvised, the defendant stated that he understood his rights. From the testimony he appeared coherent and he was cooperative. The court notes that a cooling off process had occurred since the moment of arrest a few

1 hours before. There was no record before the court that the defendant was under the
2 influence of any drug at the time.

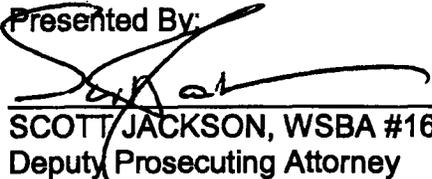
3 **3. The Statements are admissible.**

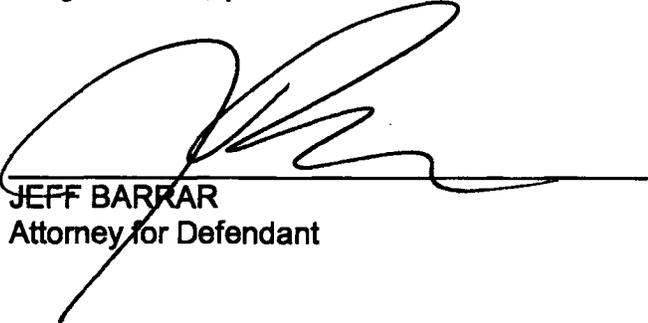
4 The defendant was advised of his Miranda rights twice on October 23, 2007.
5 There was no indication of undue threats or any promises made to encourage the
6 statements. Nor were there sufficient indications, if any, that the defendant was
7 incapable of understanding his rights, as he appeared from all outward and objective
8 appearances to understand his rights. Thus, the statements made by defendant
9 following the second reading of his rights, to Deputy Earhart and Detective Schmidt, are
10 admissible.

11
12 DONE in Open Court this 18 day of November, 2009.

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14 
15 THE HONORABLE ROGER BENNETT
16 Judge of the Superior Court

17 Presented By:

18 
19 SCOTT JACKSON, WSBA #16330
20 Deputy Prosecuting Attorney

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22 JEFF BARRAR
23 Attorney for Defendant

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RONALD CHENETTE, JR.
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