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252

IN THE MAGISTRATE'S COURT FOR THE DISTRICT OF THE CAPE
HELD AT CAPE TOWN

CASE NO 1/4/9 – 1/2018

In the matter of:

The request for the extradition of AUGUSTINUS PETRUS MARIA KOUWENHOVEN from the Republic of South Africa to the Netherlands

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JUDGMENT

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1. This is an extradition enquiry in terms of section 9, read with section 10, of the Extradition Act 67 of 1962 to determine if the respondent, Augustinus Petrus Maria Kouwenhoven, is liable to be extradited to The Netherlands, having been convicted there of certain crimes relating to the supply of weapons to one Charles Taylor in Liberia and sentenced to 19 years imprisonment.

2. After a point *in limine* in regard to the admissibility of documentation was raised and adjudicated upon in this matter, the State closed its case with just a duly authenticated copy of the judgment from the Netherlands court before the court. The respondent's legal team closed its case without leading any evidence and proceeded to argue this matter. I understand the three points raised by them to be the following:

   2.1 The State has failed to prove that the Netherlands is a party to an extradition treaty with South Africa;

   2.2 The State has not complied with Article 2(1) read with Article 12 of the European Convention on Extradition in that the documentation required therein is not before the court; and

   2.3 Section 3(1) of the Extradition Act has not been complied with as the crimes of which the respondent has been convicted were not committed within the jurisdiction of the Netherlands but in Liberia.

<u>The State has failed to prove the Netherlands is a party to an extradition treaty with South Africa</u>

3. Advocate Burke for the State argued that the question as to whether a requesting state is a party to an extradition agreement with South Africa is dealt with during the administrative phase. The Extradition Act provides for a three phase process for dealing with an extradition request from a foreign state. Simply put, the first is the administrative phase where, generally, the foreign state submits an extradition request to the South African Minister of Justice. The Minister must consider the request, and if

he/she is satisfied that an extradition order can lawfully be made, he/she can authorise a magistrate to conduct an extradition enquiry. The magistrate then issues a warrant for the arrest of the requested person in terms of section 5(1)(a) so that they may be brought to court for an extradition enquiry.

4. There is an alternative process set out in section 5(1)(b) of the Act, where a magistrate can be approached for a warrant of arrest for a person sought by a foreign state. The magistrate who issues such a warrant must notify the Minister forthwith of the fact of such issue and the Minister can direct the magistrate to cancel the warrant, or, if the warrant has already been executed, direct the person so arrested to be discharged immediately.

5. What is clear is that the Minister has the major role to play in this phase and it is during this phase, argues Mr Burke, that a determination will be made as to whether the requesting state has an extradition treaty with South Africa. If not, section 3(2) of the Extradition Act would be applicable and the President would have to consent in writing to the surrender of a person requested by a foreign state. The court is entitled to take judicial notice of the fact that the Netherlands is party to a treaty with South Africa, either having received a notification from the Minister prior to the issuing of the warrant or having received no direction from the Minister after the issue of a warrant.

6. Furthermore, argued Mr Burke, the court in Abel v Minister of Justice[1]makes it clear that the duty to ascertain whether there is a treaty or not lies with the Minister; and it is for the magistrate to consider the contents thereof and not the existence thereof. In considering the role of the Minister in extraditions, Traverso J (as she was then) quotes from Harksen v President of the Republic of South Africa and Others[2]:

> [15] The effect of section 3(2) is no less domestic in its reach than the other provisions of the Act. It neither initiates nor concludes extradition. Where there is an extradition treaty between South Africa and a requesting State, the Minister is authorised by the provisions of section 5(1) to set in motion the provisions of the Act by notifying the magistrate of the request. Where there is no extradition treaty between the requesting State and South Africa, it is the Minister who forwards the request for extradition to the President. Then under section 3(2) the President's consent is necessary to enable the Minister to give the notification to the magistrate. Section 3(2) and the Act as a whole regulate the domestic procedures which then govern the extradition proceedings and which protect the rights of persons present in South Africa whose surrender is sought by a foreign State.

7. The second part of Mr Burke's argument is that the court is entitled to take judicial notice of the fact that the Netherlands is a party to an extradition treaty with South Africa. He referred the court to Schmidt's Law of Evidence where the learned authors say "... there are also cases where a fact is so notorious or could be so readily and accurately determined that it would be absurd to require on of

[1] Abel v Minister of Justice and Others 2000 2 SACR 333 C; 2001 (1) SA 1230 (C)
[2] Harksen v President of the Republic of South Africa and Others 2000 (5) BCLR 478 (CC)

the parties to produce evidence about it."[3] A quick internet search, says Mr Burke, and it is clear that the Netherlands has signed the European Convention on Extradition.

8. Furthermore, a court is entitled to take judicial notice of foreign law. The Law of Evidence Amendment Act 45 of 1988 provides that a court may take notice of foreign law if it can be ascertained easily and with sufficient certainty. In today's internet linked world, one can easily and with certainty, ascertain the position in regard to the Netherlands position with regard to the treaty.

9. The last leg of Mr Burke's argument under this head is that a court can also take judicial notice of other legal proceedings and in the matter of Kouwenhoven v The Minister of Police and Others[4], it was common cause that the Netherlands and South Africa are parties to an extradition agreement[5]. To ignore the fact that the respondent before court admitted in other proceedings in regard to his extradition that there is a treaty between South African and the Netherlands would be absurd, he argued.

10. Advocate Katz for the Respondent argued that the court ought to determine this point (as well as the others made by him) in terms of section 3 of the Extradition Act and says that Mr Burke is conflating the administrative and judicial phases of the extradition process.

11. Section 3(1) reads as follows:

> (1) Any person accused or convicted of an offence included in an extradition agreement and committed within the jurisdiction of a foreign State a party to such agreement, shall, subject to the provisions of this Act, be liable to be surrendered to such State in accordance with the terms of such agreement, whether or not the offence was committed before or after the commencement of this Act or before or after the date upon which the agreement comes into operation and whether or not a court in the Republic has jurisdiction to try such person for such offence.

12. The State must therefore prove in the judicial phase that:

    11.1 The person is accused or has been convicted of an offence;

    11.2 Included in an extradition agreement to which South Africa and the requesting state are parties; and

    11.3 Such offence was committed within the jurisdiction of the requesting state.

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[3] CWH Schmidt, The Law of Evidence Lexis Nexis, Durban (Issue 13) at page 6-3.
[4] Unreported judgment of the Western cape High Court by Cloete and Fortuin JJ under case number 1477/2019, judgment given 19 September 2019.
[5] See footnote 41.

13. The judgment in the Abel matter[6] is no support for Mr Burke's argument that it is only the minister who needs consider the existence of a valid treaty. In that case, the treaty at issue was a bi-lateral treaty between the United States of America and South Africa and so the parties to the treaty were clear and easily ascertainable. This is not the case in a multi-lateral treaty like the European Convention of Extradition and the same considerations do not apply.

14. The reliance on the agreement as to the existence of the treaty in the Kouwenhoven review matter[7] is also misplaced, argues Advocate Katz. The existence of the treaty was accepted for the purposes of that case only, which relied on a particular cause of action, and is irrelevant for this court's decision.

15. The only valid argument advanced by Mr Burke, according to Mr Katz, is the argument based on judicial notice, but it too is misplaced. The European Convention itself allows for parties to make a reservation in respect of any provision or provisions in the Convention[8] and requires signature and ratification[9]. Parties can also denounce the Convention[10]. Due to these and other provisions, it must be proved in court that the requesting state is, in fact, a party to the Convention as it is not a simple matter to determine precisely what, if any, provisions of the Convention the requesting party has acceded to.

16. The reliance on the Law of Evidence Amendment Act is also misplaced, argues Advocate Katz. The question as to whether the Netherlands is a party to the Convention or not is a matter of fact and not of law and so the act is not applicable. In support of this contention he referred me to the case of Koch[11] at paragraphs 114 to 120 where the court held that the question as to whether Germany was a party to the same Convention we are dealing with was a matter of fact.

17. I am constrained to agree with Mr Katz that section 3(1) of the Extradition Act requires the State to prove that the Netherlands is a party to an extradition agreement with South Africa as part of the judicial phase. I am also of the opinion that this is a matter of fact and not law and so the Law of Evidence Amendment Act does not avail the State. While I am mindful that the Koch case is a Namibian case and that our law differs from that of Namibia, the difference between law and fact is, at least in this context, appears to be the same in both legal systems.

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[6] Abel v Minister of Justice and Others 2000 2 SACR 333 C; 2001 (1) SA 1230 (C)
[7] Unreported judgment of the Western cape High Court by Cloete and Fortuin JJ under case number 1477/2019, judgment given 19 September 2019.
[8] Article 26
[9] Article 29.
[10] Article 31.
[11] S v Koch (SA 13/05) [2006] NASC 6 (29 November 2006)

18. However, I am unable to agree with Mr Katz that just because the Convention allows for parties to renounce it, or to make certain reservations, that one is unable to ascertain with reasonable ease and certainty who the parties to the Convention are. I am satisfied that a quick search of the Council of Europe website is sufficient to prove that the Netherlands is a party to the European Convention on Extradition and that this satisfies the requirements for me to take judicial notice of this fact. Furthermore, it is common knowledge that the Netherlands is a country in Europe and part of the European Union. To ignore this fact would only bring the law into disrepute.

19. I am also unable to agree with Mr Katz that he can, without more, argue that the fact that the respondent agreed that the Netherlands was a party to an extradition agreement with South Africa in one case to do with his extradition cannot be used against him in another case. There was no reservation of rights to raise this point in further proceedings and to ignore the acceptance of the de facto position (that the Netherlands is a party to an extradition treaty with South Africa) is, again, to bring the law in to disrepute. I can take judicial notice of the findings of another court and in the review case, these findings were based on the European Convention on Extradition. Article 16 of the Convention was discussed by the court in its judgment, and article 12 gets a mention.

20. I am therefore satisfied that I can take judicial notice of the fact that the Netherlands is party to an extradition treaty with South Africa, namely the European Convention of Extradition.

The Necessary Documentation is not before Court

21. Having decided that the Netherlands is a party to an extradition agreement with South Africa, I must move on to decide whether the State has complied with the requirements of that agreement, namely article 2(1) read with article 12.

22. As mentioned above, I delivered judgment on a point *in limine* in regard to the admissibility of documents in this matter on 14 January 2020. In that judgment, I found the following documents to be inadmissible unless properly proved:

    a. Letter from the Dutch Minister of Justice and Security;
    b. Letter from the Dutch Public Prosecution Service;
    c. The Order of Imprisonment;
    d. The Summary of Charges;
    e. The Statutory Provisions; and
    f. The Supreme Court Judgment

23. The State has taken no further steps to prove these documents and so they are not before me despite the fact that they are contained in the bundle of documents received from the Dutch government. The only reason they are still contained in the bundle is that, if

necessary, they need to be transmitted to the Minister in the form in which they were received.

24. Article 2(1) of the Convention reads as follows:

> Extradition shall be granted in respect of offences punishable under the laws of the requesting Party and of the requested Party by deprivation of liberty or under a detention order for a maximum period of at least one year or by a more severe penalty. Where a conviction and prison sentence have occurred or a detention order has been made in the territory of the requesting Party, the punishment awarded must have been for a period of at least four months.

25. Article 12 reads as follows:

> 1. The request shall be in writing and shall be communicated through the diplomatic channel. Other means of communication may be arranged by direct agreement between two or more parties.
>
> 2. The request shall be supported by:
>
> a. the original or an authenticated copy of the conviction and sentence or detention order immediately enforceable or of the warrant of arrest or other order having the same effect and issued in accordance with the procedure laid down in the law of the requesting party;
>
> b. a statement of the offences for which extradition is requested. The time and place of their commission, their legal descriptions and a reference to the relevant legal provisions shall be set out as accurately as possible; and
>
> c. a copy of the relevant enactments or, where this is not possible, a statement of the relevant law and as accurate a description as possible of the person claimed, together with any other information which will help to establish his identity and nationality.

26. Mr Katz's argument is that these documents as laid down in article 12 are necessary to prove the existence of "double criminality", i.e. that the offences for which the respondent has been convicted in the Netherlands are also offences in South Africa <u>and</u> are punishable by imprisonment of at least one year. It is not sufficient, he argues, to say that the respondent received a sentence of 19 years imprisonment in the Netherlands. Without these documents, the State has not complied with section 3(1) of the Extradition Act and the respondent must be discharged.

27. Mr Burke's retort to this argument is that all the necessary information is contained in the judgment, which is before the court, and that this court should follow the approach adopted

by the learned court in the Roche-Kelly Judgment[12] and not require too formalistic an approach to the documentation required.

28. I am in agreement that providing the necessary information is properly before this court, there is no need to follow "an overly technical" approach "that undermines the apparent purpose of the statutory regime"[13]. The Netherlands is a civilized country with a legal system that is subject to the necessary checks and balances and I can think of no better proof of the required facts than a judgment from one of its courts.

29. I find, therefore, that the State has complied with the requirements of articles 2(1) and 12 of the Convention in spirit if not in form.

<u>Crimes not Committed within the Jurisdiction of the Requesting State</u>

30. The final argument to be considered is whether the crimes that the respondent has been convicted of were committed within the jurisdiction of the Netherlands as required by section 3(1) of the Extradition Act.

31. It is common cause that the crimes which the respondent has been convicted off were committed in Liberia, and not in the Netherlands. In convicting him, the Netherlands was exercising extra-territorial jurisdiction based on what is known as "active personality" jurisdiction. This allows nations to prosecute their own citizens for crimes committed outside of their borders.

32. South Africa also has legislation allowing it to prosecute persons for crimes committed beyond its borders. Of particular relevance is section 9 of the Regulation of Foreign Military Assistance Act 15 of 1998 which criminalises private citizens who provide assistance to foreign militaries.

33. The exercise of extra-territorial jurisdiction is accepted in many jurisdictions and it is easy to understand why. As Lord Slyn said in the matter of Re Al-Fawwaz[14]:

> 37. When the 1870 Act was passed crimes were no doubt largely committed in the territory of the state trying the alleged criminal, but that fact does not, and should not, mean that the reference to jurisdiction is to be so limited. It does not as a matter of the ordinary meaning of the words used. It should not because in present conditions it would make it impossible to extradite for some of the most serious crimes now committed globally or at any rate across frontiers. Drug smuggling, money laundering, the abduction of children, acts of terrorism, would to a considerable extent be excluded

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[12] Roche-Kelly v S, WCHC, case no A330/2018, Ndita J et Mangcu-Lockwood AJ, Judgment delivered 28 November 2019

[13] Roche-Kelly, paragraph 16.

[14] [2002] 1 All ER 545 (HL)

from the extradition process. It is essential that that process should be available to them. To ignore modern methods of communication and travel as aids to criminal activities is unreal. It is no less unreal to ignore the fact that there are now many crimes where states assert extra-territorial jurisdiction, often as a result of international conventions.

34. The question to be asked, since the exercise of extra-territorial jurisdiction is quite legal and acceptable in both South Africa and the Netherlands, is whether our Extradition Act allows extradition in regard to offences that are alleged to have been committed within the territorial jurisdiction of the requesting state only, or whether it is sufficient that the requesting state has jurisdiction in the sense that the offence is triable in the requesting state.

35. Mr Bishop, who argued this point, maintains that every time the word "jurisdiction" is used in the Extradition Act, it refers to territorial jurisdiction only. His argument, based upon general principles of statutory interpretation and a close reading of the Act, is compelling.

36. The first reference to jurisdiction in the Extradition Act is in section 2(1) which reads:

> The President may, on such conditions as he or she may deem fit, but subject to the provisions of this Act ... enter into an agreement with any foreign State, other than a designated State, providing for the surrender on a reciprocal basis of persons accused or convicted of the commission within the jurisdiction of the Republic or such State <u>or any territory under the sovereignty or protection of such State</u> of an extraditable offence or offences specified in such agreement and may likewise agree to any amendment or revocation of such agreement.

37. That the section references "any territory" under the sovereignty or protection of the requesting State makes it clear that jurisdiction is intended to mean territorial jurisdiction. The section begins by referring to the Republic's jurisdiction and then to the requesting state's jurisdiction. If jurisdiction was intended in any other sense than territorial, there would be no need to mention that crimes committed within the jurisdiction of a territory that is outside of the requesting state's territory, but under its sovereignty, could also be included in an extradition agreement.

38. Another example of the use of the term jurisdiction is in the last few words of section 3(1). It says that a person is extraditable "whether or not a court in the Republic has jurisdiction to try such person for such offence." Considering that a South African court <u>must</u> have substantive jurisdiction in regard to the offence in line with the principle of double criminality, the jurisdiction referred to here must be territorial jurisdiction otherwise the words would be meaningless.

39. Mr Bishop went on to argue that all eight references to jurisdiction in the Extradition Act, when carefully construed, are references to geographical jurisdiction.

40. Given that one of the principles of statutory interpretation is that the same words and phrases within a statute are presumed to have the same meaning, I am satisfied that the reference to jurisdiction in the earlier part of section 3(1) is a reference to territorial jurisdiction.

41. Mr Bishop also referred me to the matter of Carolissen v Director of Public Prosecutions[15] where the Western Cape High Court had to consider whether the offence with which Carolissen was to be charged was committed within the jurisdiction of the United States of America as required by section 3(1). The facts showed that Carolissen had manufactured (or sourced) child pornography in South Africa and disseminated it via the internet to Government agents in the USA. American law criminalised both components of this act – the manufacture (or sourcing) of the pornography and the transportation of it to America via the internet - and it therefore claimed jurisdiction on the grounds that the images were received in America. The court accepted that the United States therefore had territorial jurisdiction and had made out a case for extradition, even if they were to charge Carolissen for manufacturing (or sourcing) child pornography on the basis of extra-territorial jurisdiction.

42. The learned judges in the matter went further and noted that the correct forum in which to challenge the jurisdiction of the United States was in the United States itself, but added this caveat: an applicant for extradition must make out a *prima facie* case for its territorial jurisdiction, regardless as to whether the offence relates to cybercrime or otherwise[16].

43. In the matter before me, there is nothing to link the offences of which the respondent has been convicted with the geographical territory of the Netherlands and on this basis it must be distinguished from the Carolissen matter.

44. In countering this argument, Mr Burke argued that the word "jurisdiction" in the Extradition Act should be given a wide meaning and not confined to territorial jurisdiction. This interpretation, he argued, would be in keeping with our international obligations and assists the world in dealing with crimes that transcend borders.

45. It is trite that in interpreting statutes one should have reference to the purpose for which the statute was enacted and complying with our international obligations and doing our part in dealing with cross-border crimes is no doubt part of the purpose of the Extradition Act. However, when the Act itself so clearly

[15] [2016] 3 All SA 56 (WCC)
[16] At par 50

refers to territorial jurisdiction as the basis for declaring a person extraditable, there can be no room for interference by a magistrate's court.

46. Given that in order to find the respondent liable to be extradited I must find that the offences of which he has been convicted were committed within the territorial jurisdiction of the Netherlands itself, and that the offences were committed in Liberia, I cannot find that the respondent is liable to be extradited.

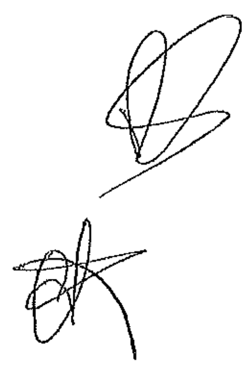
47. Under the circumstances, and with great regret, I am obliged to discharge the respondent in terms of section 10(3) of the Extradition Act.

DATED AT CAPE TOWN ON THIS THE 21ST DAY OF FEBRUARY 2020.

I T Arntsen

Additional Magistrate

Cape Town



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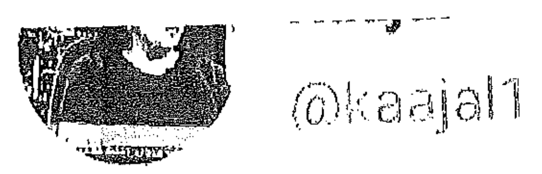
262



@kaajal1

Devastating outcome of extradition process #Kouwenhoven

Thijs Bouwknegt @thijsbouwkne... · 21 Feb

#SouthAfrica may not extradite businessman Guus #Kouwenhoven to #Netherlands to serve prison sentence for complicity in #warcrimes in #Liberia & #Guinea (2000-02) & selling arms to #CharlesTaylor regime – "crimes outside ...

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263

DR DESMOND WOOLF

BA (Hons) MBChB (UCT) FCP (SA)

Physician

7 February 2020

To Whom It May Concern:

RE: MR A. KOUWENHOVEN

D.O.B: 15/9/1942

This is to state that the above gentleman has been a patient of mine for just over 4 years, and I last examined him 6/2/2020.

He has a number of serious medical problems;

1). Longstanding HIV infection.

He has been on antiretroviral medication now for about 7 years.

2). Usual Interstitial Pneumonitis was diagnosed in January 2017 by a pulmonologist (Dr Pete Chapman).

This is a condition which causes progressive scarring in the lungs, causing cough and breathlessness, and generally progressing to end stage scarring with respiratory failure. Mr Kouwenhoven is also on medication for this.

3). Longstanding severe backache with radiculopathy, and damage to L5/S1 root on the left, which has left him with a weak left leg, severe backache, and foot drop and great difficulty walking. He can only walk very short distances with a brace and cane.

4). Significant cognitive impairment.

This was fist noted in 2016, and results in impaired executive function, with loss of short term memory and poor attention span. A number of factors may be operative here, including HIV medication, small vessel vasculopathy and opiate medication which is taken for his chronic backache.

In addition Mr Kouwenhoven suffers from a number of other problems including hypertension, prior esophageal stenosis, benign prostate hypertrophy, and depression.

It is my opinion that imprisonment would expose him to severe risk of infection, given his impaired immunity from HIV, and pulmonary infection could be fatal for him. In view of his multiple medical problems he requires easy access to the numerous specialists that he sees for the various issues.

Further queries may be addressed to me at the above.

Yours sincerely,

Dr Desmond Woolf

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"APMK14"
264

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Our Ref: 18155

14th February 2020

MEDICAL REPORT

RE: SUITABILITY OF PRISON FACILITIES IN SOUTH AFRICA TO ACCOMMODATE MR AUGUSTINUS KOUWENHOVEN

Mr Kouwenhoven has cryptogenic fibrosing alveolitis (usual interstitial pneumonia). This is a progressive fibrotic process involving the air sac walls of the lung leading to reduced oxygen absorption and reduced lung capacity. This leads to significant reduction of exercise capacity. This is a progressive condition with a variable prognosis with the median survival of 3½ to 4 years from diagnosis. He also has residual leg weakness following spinal surgery and some cognitive limitation.

A high resolution CT scan of his chest done on 13.02.2020 shows extensive fibrotic scarring particularly in the basal portions of the peripheral areas of his lung. This condition renders him vulnerable to respiratory infections.

The overcrowding in the current detention facilities in this country put him at very high risk for pulmonary infections. Of particular concern is the high incidences of tuberculosis (including MDR and XDR versions of tuberculosis) in the patients in these facilities. The severe overcrowding renders the risk of transmission of this infection very high, particularly those with pre-existing lung vulnerability such as Mr Kouwenhoven.

Detaining him in such a facility will undoubtedly put him at a significant increased risk of acquiring respiratory infections. His reduced respiratory reserve (caused by the attrition of his lung function due to damage already done by the disease process) not only renders him more vulnerable to these infections but also puts him at great risk for significant complications should such infections develop as he is already so very limited that any superimposed infection would further compromise his reserve and may cause very serious complications such as pneumonia (which in his situation could prove fatal) or tuberculosis (because of the presence of highly resistant strains in some cases are not treatable and his treatment in any event may be compromised by the medication used to treat the cryptogenic fibrosing alveolitis which in some cases suppresses the body's innate immunity and makes him more vulnerable to infection).

265

Augustinus Kouwenhoven (Continued)

For all these reasons, I strongly recommend that he not be exposed to the high risk environment of a detention facility.

Yours sincerely

DR. PETER J. CHAPMAN