NO. 04-___

IN THE
Supreme Court of the United States

CORNELIUS PEOPLES,
Petitioner,

v.

CCA DETENTION CENTER, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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September 29, 2006

QUESTION PRESENTED

Is a federal prisoner precluded from suing a prison guard for violating his Eighth Amendment rights, as ordinarily authorized under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971), solely because the United States Marshals Service directed that he be incarcerated in a private prison?

LIST OF PARTIES

Petitioner:

Cornelius Peoples

Respondents:

James Perry

Fred Lawrence

Roger Moore

Jay Foskett

CCA Detention Center was a party below and is therefore listed in the caption. CCA was dismissed from the lawsuit below, and petitioner no longer seeks relief from CCA.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Cornelius Peoples respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the *en banc* United States Court of Appeals for the Tenth Circuit (Pet. App. 1a) is published at 449 F.3d 1097. The panel opinion for the United States Court of Appeals for the Tenth Circuit (Pet. App. 4a) is published at 422 F.3d 1090. The district court's memorandum opinion granting respondents' motion to dismiss (Pet. App. 42a) is unpublished.

JURISDICTION

The judgment of the en banc court of appeals was entered on May 17, 2006. Pet. App. 1a. Mr. Peoples moved for an extension of time to file his petition for writ of certiorari to September 29, 2006, and that extension was granted by Justice Breyer on August 7, 2006. This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., Amend. XIII, provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

STATEMENT

Petitioner Cornelius Peoples, a federal prisoner, filed suit under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971), alleging that prison officials violated his constitutional right to be free from cruel and unusual punishment by failing to protect him from attacks by other prisoners. Peoples had repeatedly asked prison officials to

move him out of his cell block because he was afraid of attacks by other prisoners, but his requests were denied until after he was physically assaulted by ten prisoners. The defendant prison officials are employees of Corrections Corporation of America ("CCA"), a private, for-profit corporation that incarcerates federal prisoners under contract with the United States Marshals Service. Defendants moved to dismiss the case, claiming that even though *Bivens* actions can be brought against guards at government-owned prisons, *see Carlson v. Green*, 446 U.S. 14 (1980), guards at private prisons under government contracts are immune from *Bivens* suits for violations of prisoners' constitutional rights. Peoples contends that because CCA guards have been delegated the federal power to incarcerate, they are liable for violating his constitutional rights just as government guards would be.

A. Factual Background

1. The Federal Government's Broad Delegation of Correctional Services to Private Corporations.

In recent years, the federal government has broadly delegated to private corporations the governmental power to operate federal prisons. Starting in the early 1980s, both the Immigration and Naturalization Service and the United States Marshals Service contracted with for-profit corporations to run detention facilities. *See* Brief for the United States as Amicus Curiae, 1997 WL 63323 at *4, *Richardson v. McKnight*, 521 U.S. 399 (1997). By 2001, 12.3 percent of all federal prisoners were housed in private prisons, and that number is rising. *See* Paige M. Harrison & Allen J. Beck, Bureau of Justice Statistics, U.S. Department of Justice Bulletin NCJ195189, Prisoners in 2001, at 1 (July 2002).

The private prison industry is also growing to keep up with the demand. By the end of 2000, private prisons housed 87,369 state and federal prisoners – 22% more than in 1999. Developments in the Law III: "A Tale of Two Systems: Cost, Quality and Accountability in Private Prisons," 115 HARV. L. REV. 1868, 1868-69 (2002). As of 2000, fourteen corporations operated over 150 correctional facilities in the United States, with revenues of over one billion dollars. CCA is the largest for-profit prison corporation in the United States. Its website boasts that it is the "fifth largest corrections system in the nation." <www.correctionscorp.com/aboutcca.html>.

2. Defendants' Violation of Peoples' Eighth Amendment Rights During His Incarceration at CCA's Leavenworth Facility.

CCA has contracted with the United States Marshals Service to incarcerate federal pretrial detainees and prisoners at Leavenworth, Kansas. *See* Defs' Mem. in Support of Mot. to Dismiss at 1, 4 (D.E. # 16). Defendants James Perry, Fred Lawrence, Roger Moore, and Jay Foskett were employees of CCA's Leavenworth facility at the time the events described below took place.

In July 2001, the Marshals Service directed that Peoples be transferred from the federal penitentiary at Lompoc, California to CCA's Leavenworth facility. *See* Complaint at 4-5 (D.E. # 1). Peoples was initially placed in segregation until James Perry, Chief of Security, received approval from the Marshals Service to release him into the general population. Peoples was then moved to H-Pod, a medium security unit, where he was placed in an eight-man cell. *Id.* Within hours of the transfer, Peoples complained to the H-Pod officer that "he was going to have problems with" several Mexican gang members housed in H-Pod with him. *Id*. The officer

responded, "if you have a problem let someone know, but the captain is not going to move you right now." *Id.*

That night, Peoples filed a grievance in accordance with CCA's "Grievance Procedures." In his grievance, Peoples stated that members of the "Mexican Mafia" were likely to attack him because he was a member of the "Moorish Science Temple" — a religious group that had "clash[ed]" with the Mexican Mafia in the past. *See* Complaint at 5. He placed the grievance in an envelope marked "emergency grievance" and put it in the grievance box, as required by CCA's procedures. *Id*. Although CCA's grievance procedures state that CCA responds to "emergency grievances" within 72 hours, Peoples never received any response. *Id*.

Over the next few days, Peoples spoke with several CCA personnel, explaining that he feared he would be attacked by the Mexican Mafia, but was told by CCA officers that Chief of Security Perry refused to move him. *Id*. Peoples also wrote to the warden, Fred Lawrence, describing his situation, and placed that letter in the grievance box, but again he received no answer. *Id.*

On August 1, 2001, at 6 a.m., seven Mexican Mafia members attacked Peoples. *Id*. Security Captain Jay Foskett called for an emergency lockdown of the unit. Captain Foskett interviewed Peoples to determine what had happened, and Peoples told Foskett about the grievances he had filed and his requests to be moved to another location. *Id.* at 7. Captain Foskett told Peoples that he would "talk to Perry and let him know what the deal is." *Id.* Captain Foskett later told Peoples that Perry was aware of the grievances that Peoples had filed, and that Perry had stated that "he would move you to a two man cell, but he was not moving you out of the Pod." *Id.* Captain Foskett explained to Peoples, "I can only do what Perry says." *Id.* Peoples was moved to another cell in H-Pod, and H-Pod was taken off lockdown status. *Id.*

At approximately 11 a.m. that day, Peoples was attacked again, this time by 10 members of the Mexican Mafia using pad locks tied to socks and full cans of soda as weapons. *Id*. Peoples received numerous cuts and bruises on his head, back, and ribs, in addition to a serious cut to his wrist. *Id.*

After that attack, Peoples was placed in segregation for seven days. *Id.* at 8. During that time, he filed another grievance complaining about CCA's failure to move him out of H-Pod earlier. *Id.* He was then moved to A-Pod for approximately two weeks, until he was transferred to another facility. *Id.*

B. Procedural Background

1. The District Court Opinion

Acting pro se, Peoples filed suit against CCA and CCA employees Foskett, Perry, Lawrence, and Moore under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), alleging that these defendants violated his constitutional right to be free from cruel and unusual punishment by failing to protect him from assaults by other prisoners. Peoples asserted that the district court had jurisdiction over these claims case pursuant to 28 U.S.C. 1331.

Defendants moved to dismiss, arguing that *Bivens* established a private right of action only against federal officials who abused their constitutional authority, and not against private companies or the individual officers employed by those companies. Defendants also contended that CCA officials were not "acting under color of state or federal law" when incarcerating Peoples. *See* Defs' Mem. in Support of Mot. to Dismiss at 4 (D.E. # 16). Defendants contended that these flaws in Peoples' complaint deprived the district court of subject matter jurisdiction over his claim.

The district court first considered whether Peoples' damages claims against CCA could go forward. *See* Pet. App. 44a-45a. The court explained that in *Correctional Services Corp. v. Malesko,* 534 U.S. 61 (2001), the Supreme Court held that *Bivens* did not extend to suits against private corporations such as CCA, and thus the district court granted defendants' motion to dismiss as to CCA. *See id.* at 48a.[1]

The district court next addressed the question whether CCA's employees could be sued in their individual capacities. *Malesko* had not resolved that issue. The court noted that, if read in a "vacuum," *Malesko*'s "reasoning would appear to support a finding that the Supreme Court would recognize a *Bivens* action against CCA employees." *Id* at 51a. However, the district court believed that Peoples could bring a negligence claim against the prison officials under state law, and, according to the district court, the availability of this alternative remedy meant that Peoples could not also bring a *Bivens* action for the violation of his constitutional rights. *Id.* at 52a-54a.

As a result of its conclusion that Peoples had no cause of action under *Bivens* against the private prison guards, the district dismissed the case on the ground that it lacked "subject matter jurisdiction" over Peoples' *Bivens* claim. *Id.* at 54a.

2. The Tenth Circuit Panel Opinion

Peoples appealed, and a panel of the Tenth Circuit issued a split decision affirming the district court.[2] All three members of the panel agreed that the district court had subject matter

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[1] Peoples does not challenge the district court's conclusion that he cannot bring a *Bivens* action against CCA.

[2] The panel decision addressed appeals from two district court cases brought by Peoples because they concerned the identical question of whether a *Bivens* action can be brought against an employee of a private prison corporation incarcerating federal prisoners under contract with the United States government. Pet. App. 5a. Undersigned counsel represents Peoples only in the one

jurisdiction over Peoples' claim, noting that the district court's conclusion that it lacked jurisdiction was "based on the faulty premise that jurisdiction only exists if the plaintiff can state a cause of action pursuant to *Bivens.*" Pet. App. 18a n.5. But the panel was divided on the question whether Peoples could bring a *Bivens* claim against private prison guards.

The panel-majority held that *Bivens* actions for constitutional violations are precluded whenever a state-law tort claim is available. It based this conclusion on language in this Court's recent *Malesko* decision, which the panel read to suggest that *Bivens* actions are only available in the absence of other remedies. Pet. App. 19a-20a. The panel-majority recognized, however, that this reading of *Malesko* was in "tension" with this Court's decision in *Carlson v. Green*, 446 U.S. 14 (1980), which held that a prisoner could bring an Eighth Amendment claim against federal prison guards despite the existence of alternative remedies under both the Federal Tort Claims Act and state tort law. *Id* at 21a. Nonetheless, the majority concluded that Peoples' ability to bring a *Bivens* claim turned on whether he could bring a tort claim under state law.

As a result, the panel-majority then had to determine whether Peoples could, in fact, bring a state-law tort claim against the prison officials who failed to protect him from attack. Pet. App. 23a-27a. To answer this question, the majority surveyed Kansas tort law. Although generally "one does not owe another a duty to protect against injuries caused by third parties" under Kansas law, the majority determined that the "special relationship" between prisoners and prison

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case discussed above, which the panel referred to as "*Peoples I.*" Mr. Peoples, acting pro se, filed a petition for writ of certiorari in *Peoples II* on August 15, 2006. *See Peoples v. CCA Detention Centers, et al.*, *petition for cert. filed* (U.S. Aug. 15, 2006) (No. 06-6052). Public Citizen Litigation Group, a non-profit public interest law firm, will submit an *amicus curiae* brief in support of that petition. Public Citizen's institutional interest in the litigation will be set forth in that amicus brief, and we also note that Public Citizen is co-counsel in this case.

guards required the guards to "prevent reasonably foreseeable injuries caused by fellow inmates." *Id.* at 23a-24a. Accordingly, the majority concluded that Peoples would have a remedy under Kansas tort law. Although Kansas law provides for a cap on punitive damages, the court did not think this limit justified making a *Bivens* claim available. *Id.* at 26a.

In dissent, Judge Ebel maintained that the panel-majority's decision was in direct conflict with *Carlson* and *Bivens*, and that its reasoning was at odds with *Malesko*. In Judge Ebel's view, *Bivens* and *Carlson* established that tort law cannot be an adequate remedy for deprivation of a federal constitutional right because liability for constitutional violations must be uniform across the nation and should not be "'left to the vagaries of the laws of the several states.'" Pet. App. 39a (quoting *Carlson*, 446 U.S. at 23). Judge Ebel drew further support for this position from the Court's decision in *Malesko,* which had "assum[ed]" that a *Bivens* action would be available against employees of a private prison. Pet. App. 35a.

Judge Ebel also noted that the majority opinion created a troubling asymmetry between the liability of public and private prison guards. As a result of the majority's decision, prison guards employed directly by the federal government are liable under *Bivens*, but those employed by private corporations under contract with the federal government to incarcerate federal prisoners are not. Judge Ebel concluded that this asymmetry is at odds with the Supreme Court's professed desire in *Malesko* to avoid differential liability for public and private prisons, and thus is further evidence that all prison guards exercising the federal power to incarcerate should be liable for constitutional violations. Pet. App. 36a-39a (citing *Malekso*, 534 U.S. at 72).[3]

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[3] In addition, because state prisoners, both public and private, are liable for constitutional violations pursuant to 42 U.S.C. 1983, the majority opinion created the oddity that *only* guards working for private prison corporations under contract with the federal government are immune from

Judge Ebel's dissent commented that this is a "close case," and he declared that "this question, which will undoubtedly arise again given the increasing privatization of prison facilities, ultimately ought to be decided by the Supreme Court." Pet. App. 32a n.2.

3. The En Banc Court's Opinion

Peoples' petition for rehearing en banc was granted on December 22, 2005. On May 9, 2006, the Tenth Circuit heard argument in the case, and on May 17, 2006, the court issued a *per curiam* opinion. On the question whether a *Bivens* action is available against employees of a privately-operated prison, the Court declared that it was "evenly divided . . . for substantially the same reasons as are set forth in the panel's majority and dissenting opinions." Pet. App. 2a-3a. The district court's ruling on this issue was thus affirmed by an equally divided court.

However, the *en banc* court determined unanimously that the district court had subject matter jurisdiction over Peoples' *Bivens* claim, reversing the district court on that point and remanding the case back to the district court. Pet. App. 3a.

The reversal and remand does not deprive this Court of jurisdiction to hear this petition. Section 1254(1) of Title 28 provides:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> > (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

"The literal language of the § 1254(1) reference to 'any party' is broad enough to encompass the successful or prevailing party before the court of appeals." Stern & Gressman, SUPREME COURT PRACTICE 45 (7th ed. 1993). Furthermore, the fact that the *en banc* court of appeals reversed and

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suit for constitutional violations. *See* Pet. App. 37a-38a (Ebel, J., dissenting).

remanded, rather than affirmed the district court's dismissal of People's lawsuit, is no reason for this Court not to grant this petition. The district court's opinion turned entirely on the question whether a *Bivens* action would be available against private prison guards. That court concluded that *Bivens* should not be "extended" to apply to private prison guards, and thus ordered the case dismissed for reasons very similar to those expressed by the Tenth Circuit panel-majority opinion. Accordingly, the district court's conclusion that it must dismiss for "lack of jurisdiction," rather than for "failure to state a claim," is nothing more than a technical error, and the district court will undoubtedly dismiss the case for failure to state a claim on remand. Rather than waste further time on the empty formality of pursuing a remand, Mr. Peoples has chosen instead to bring this issue to this Court for review.

Moreover, Mr. Peoples has also filed a petition for writ of certiorari in *Peoples II*, a case raising the identical question of whether a private prison guard can be liable under *Bivens* for violating a prisoner's constitutional rights. *See Peoples v. CCA Detention Centers, et al.*, *petition for cert. filed* (U.S. Aug. 15, 2006) (No. 06-6052). The district court in *Peoples II* dismissed the case for failure to state a claim, rather than for lack of jurisdiction, and that decision was affirmed by an equally divided Tenth Circuit. *See* Pet. App. 3a. As noted earlier, *see supra* note 2, *Peoples II* was consolidated with *Peoples I*, and the Tenth Circuit's panel and en banc decisions addressed both cases together in one opinion. Because these two cases raise the same issue, both should be reviewed by the Court at this time.

REASONS FOR GRANTING THE PETITION

I. THE CIRCUITS ARE SPLIT ON THE QUESTION WHETHER *BIVENS* CLAIMS CAN BE BROUGHT AGAINST PRIVATE INDIVIDUALS WIELDING FEDERAL GOVERNMENTAL POWER.

The circuit courts are divided on the question whether *Bivens* claims are available against private parties exercising federal governmental authority. The Sixth and Ninth Circuits have both held that private parties are subject to suit under *Bivens*, while the Fourth Circuit recently reached the opposite conclusion. *Compare Vector Research, Inc. v. Howard & Howard Attorneys*, 76 F.3d 692, 698-99 (6th Cir. 1996) ("[D]efendants who are not government employees may, as we have held, be properly sued under the *Bivens* doctrine."); *Showengerdt v. General Dynamics Corp.*, 823 F.2d 1328, 1337-38 (9th Cir. 1987) (holding that *Bivens* action may be brought against a private individual acting under color of federal law), *with Holly v. Scott,* 434 F.3d 287 (4th Cir. 2006) (holding private prison officials are immune from suit for constitutional violations). And, as demonstrated by the result in this case, the Tenth Circuit is evenly split so that it is unable to establish law on that question.[4] *See also* Erwin Chemerinsky, FEDERAL JURISDICTION 610 (4th ed. 2003) (stating that "there is a split of authority among the

[4] The district courts are also divided on the question presented. *Compare Jama v. United States Immigration and Nationalization Service,* 343 F. Supp. 2d 338, 363 (D. N.J. 2004) (holding that a *Bivens* action is available against employees of private organization); *Sarro v. Cornell Corr., Inc.*, 248 F. Supp. 2d 52, 56-64 (D. R.I. 2003) (same); *Purkey v. CCA Detention Center*, 339 F. Supp. 2d 1145, 1148-51 (D. Kan. 2004) (same); *Heinrich ex rel. Heinrich v. Sweet*, 62 F. Supp. 2d 282, 307 (D. Mass. 1999) (same), *with Akinsuroju v. CCA*, 2006 WL 2548075, *2-*3 (S.D. Ga. Sep. 1, 2006) (holding that a *Bivens* action is not available if prisoner can bring an alternative state law tort claim against CCA employees); *Alba v. Montford*, 2006 WL 2085432, *2 (S.D. Ga. Jul. 24, 2006) (same); *Schwartz v. Hawkins & Powers Aviation*, 2006 WL 1028392, *9 (D. Wyo. Mar. 31, 2006) (same).

circuits on the question," but noting that the "weight of authority seems to favor *Bivens* suits against private individuals who act under color of federal law").

In *Vector Research*, the Sixth Circuit expressly permitted a *Bivens* suit to go forward against the employees of a private corporation. First Technology Safety Systems had obtained an *ex parte* order authorizing the seizure of material from Vector Research, Inc., relating to First Technology's copyright infringement claim against Vector. *See* 76 F.3d at 695. The order authorized United States Marshals and persons acting under the Marshals' supervision, including private attorneys representing First Technology, to search Vector's offices and to seize material relevant to the copyright action, which they did. *Id.* at 696. Vector and three of its employees then brought *Bivens* claims alleging violation of their Fourth Amendment rights, as well as state-law tort claims, against the private attorneys who had participated in the search. *Id.* at 697. The district court dismissed the complaint for failure to state a claim, but the Sixth Circuit reversed. The Sixth Circuit expressly addressed the question whether private parties can be liable under *Bivens* for constitutional violations and concluded that "defendants who are not government employees may, as we have held, be properly sued under the *Bivens* doctrine." *Id.* at 698-699.

Likewise, the Ninth Circuit's decision in *Showengerdt* also establishes that *Bivens* actions may be brought against private individuals in that circuit. Showengerdt was a Navy engineer whose office was searched by C.W. Kessel, an employee of a private security firm under contract with the Navy to provide security at Showengerdt's workplace. Showengerdt brought a *Bivens* action against Kessel, among others, for violating his Fourth and Fifth Amendments rights. Kessel argued that "a *Bivens* remedy is not available against" him because he is not a "government employee[]." *Id.* at 1337. The Ninth Circuit rejected that argument, holding that

"the private status of the defendant will not serve to defeat a *Bivens* claim, provided that the defendant engaged in federal action." *Id.* at 1337-1338.

The Ninth Circuit's recent decision in *Agyeman v. Corrections Corporation of America*, 390 F.3d 1101 (9th Cir. 2004), demonstrates that its position on this issue has not changed. In the course of holding that the district court erred in refusing to appoint counsel to a *pro se* prisoner, that court stated "[t]o the extent that Agyeman sought recovery from individual employees of the Corrections Corporation, the case had to be brought as a *Bivens* action." 390 F.3d at 1104.

In contrast with the Sixth and Ninth Circuits, the Fourth Circuit has recently held in *Holly v. Scott* that private prison guards are immune from suit for their constitutional transgressions, for two independent reasons. First, two of the three panel members concluded that the "action of the private prison employees are not fairly attributable to the federal government." *Holly*, 434 F.3d. at 288. Second, all three panel members held that *Bivens* actions are not available "because the inmate has adequate remedies under state law for his alleged injuries." *Id*. In reaching that conclusion, the Fourth Circuit cited the Tenth Circuit's panel opinion in Peoples' case, and expressed its agreement with that now-vacated holding. *Id.* at 296.

The Fourth Circuit's decision is at odds with the holding in the Sixth and Ninth Circuits. In the latter two circuits, prisoners will be able to bring *Bivens* actions against private prison guards for violation of their constitutional rights, while prisoners in private prisons in the Fourth Circuit will be denied this remedy.

Within the rest of the circuits, the law is in disarray. Because the *en banc* Tenth Circuit divided evenly on this question, there is no precedent in that circuit to guide the district courts, which have issued conflicting decisions. *Compare Purkey v. CCA Detention Center,* 339 F.

Supp. 2d 1145, 1148-51 (D. Kan. 2004), *with Schwartz v. Hawkins & Powers Aviation*, 2006 WL 1028392, *9 (D. Wyo. Mar. 31, 2006). Likewise, district courts in other circuits have issued numerous decisions going either direction on this issue in the last few years alone. *See supra* note 4. Accordingly, plaintiffs in these circuits will be permitted or denied the opportunity to bring suit for violation of their constitutional rights by private actors depending on which district court judge is assigned the case.

II. DENYING A *BIVENS* REMEDY TO PRISONERS INCARCERATED IN PRIVATE PRISONS IS AT ODDS WITH THIS COURT'S PRECEDENTS.

The *en banc* Tenth Circuit split 6-to-6 on the question whether private individuals could be liable for constitutional violations "for substantially the same reasons as set forth in the panel's majority and dissenting opinions." Pet. App. 2a-3a. The panel majority had agreed with the district court that when a state-law tort remedy is available, a *Bivens* remedy is not – a position that was also adopted by the Fourth Circuit in *Holly v. Scott*. This Court should grant this petition because the panel-majority's position, like that of the district court and the Fourth Circuit, conflicts with this Court's precedents.

In *Bivens*, the Court recognized that the Constitution itself limits the exercise of federal power and that damages are an appropriate remedy for those injured by individuals acting under color of federal law. Thus, in *Bivens* this Court permitted a citizen to bring an action for damages against individual federal officers who deprived him of his Fourth and Fifth Amendment rights. Following logically from *Bivens, Carlson v. Green* held that a prisoner could bring a claim for damages on the ground that his Eighth Amendment rights were violated by prison guards employed by the Bureau of Prisoners. Accordingly, if Peoples had been attacked

in a federal prison administered by the Bureau of Prisons, rather than in a federal prison run by CCA under a contract with the federal government, a *Bivens* action would lie against the prison guards who had failed to protect him.

Indeed, the Tenth Circuit panel-majority conceded that as a result of its decision *only* prison guards at private prison corporations such as CCA will be immune from suits for constitutional violations, Pet. App. 22a, creating an asymmetry in the liability of prison guards at government-run prisons and private prisons that might skew the government's incentive to contract out the sensitive task of incarcerating prisoners. As Judge Ebel explained in his dissent, this anomalous result directly conflicts with *Carlson* and *Bivens*, and is in great tension with this Court's recent decision in *Malesko*, which, in holding that a *Bivens* action did not lie against a private prison *corporation* presupposed that such an action did lie against the private guards employed by the corporation. Pet. App. 32a-36a (Ebel, J., dissenting).

A. *Carlson v. Green* Established that Prison Guards are Liable for Constitutional Violations.

Carlson v. Green established that prison guards exercising the federal governmental power to incarcerate are subject to *Bivens* liability for constitutional violations. As here, *Carlson* concerned the abuse of the federal power to incarcerate. Green, who represented the estate of a deceased prisoner, argued that the prison's failure to treat the prisoner's asthmatic condition violated the prisoner's Eighth Amendment right to be free from cruel and unusual punishment. 446 U.S. at 16 n.1. In response, prison officials argued that they should not be liable under *Bivens* because the prisoner's estate could also bring suit under the Federal Tort Claims Act ("FTCA"), which they argued provided an adequate alternative remedy. This Court disagreed,

concluding that the FTCA did not provide a sufficient alternative remedy and thus permitting the prisoner's estate to sue under *Bivens* for the violation of his Eighth Amendment rights.

The now-vacated Tenth Circuit panel-majority opinion commented that "at first blush *Carlson* may appear to control this case." Pet. App. 20a. But the majority then distinguished *Carlson* on the ground that the FTCA remedy was not analogous to a state-law tort claim available to prisoners such as Peoples because an FTCA claim could be brought only against the United States, while state-law tort claims subject the individual wrongdoer to liability. *Id.* at 20a-21a. As long as prisoners have a state-law tort remedy, the panel-majority concluded, there is no *Bivens* remedy for violations of constitutional rights by prison guards. *Id.* at 21a.

As Judge Ebel noted in his dissent, however, state law is no substitute for a constitutional claim. Pet. App. 33a-36a. State tort law is concerned with relations between individuals, not abuse of government power, and thus even a successful lawsuit for negligence will not vindicate a prisoner's federal constitutional rights because that state lawsuit will, by definition, make no mention of those rights. Indeed, as Judge Ebel explained, the inadequacy of state tort law was the very reason for implying a cause of action directly under the Constitution in *Bivens*: "[I]t was the lack of a constitutional cause of action (and the concomitant reliance on state tort law as a mechanism for enforcing federal constitutional rights) that gave rise to *Bivens* in the first place." *Id* at 34a.

For that reason, the availability of a state-law remedy has never been dispositive of the question whether a *Bivens* action can be brought; indeed, that notion is at odds with *Carlson* and *Bivens* itself because state law remedies were available in both cases. When *Bivens* and *Carlson* were decided, state-law tort remedies were available to all individuals claiming violation

of their constitutional rights – whether they claimed those rights were violated by federal officials or by private individuals cloaked with federal power. *See Westfall v. Erwin*, 484 U.S. 292 (1988) (holding that federal government officials could be held liable under state law, despite statutory remedy against federal agency employing them). So, for example, the plaintiff in *Carlson* could have brought a state-law claim for negligence against the federal prison guards who failed to treat the prisoner's asthma. Furthermore the FTCA provided yet another remedy to the plaintiff in *Carlson*, because it subjects the United States to lawsuits for violation of state tort law. *See* 28 U.S.C. 1346(b)(1). Yet neither the availability of state tort claims against the individual guards nor an FTCA claim against the United States served as a bar to plaintiff's constitutional claims in *Carlson*.

Indeed, the core holding in *Carlson* is that federal prisoners seeking to vindicate their constitutional rights should not have to rely on the FTCA *because the FTCA incorporates inconsistent and shifting state tort law.* "[I]t is obvious," this Court stated, "that the liability of federal officials for violations of citizens' constitutional rights should be governed by uniform rules" and thus should not be dependent on "the vagaries of the laws of the several States." 446 U.S. at 23. Thus, the Tenth Circuit panel-majority's view that constitutional claims can be replaced by state-law tort claims – a view shared by the district court in this case as well as by the Fourth Circuit – is in direct conflict with *Carlson*: The majority decision forces federal prisoners to rely on the various tort regimes in each state to attempt to vindicate constitutional rights, which puts federal prisoners incarcerated in private prisons in the very situation that *Carlson* concluded was untenable. *See* Pet. App. 33a (Ebel, J., dissenting) (noting that the panel-

majority's decision conflicts with *Carlson*'s holding that constitutional claims cannot be protected by inconsistent state tort law).

Moreover, *Carlson* also reasoned that prisoners whose constitutional rights are violated should have the benefit of punitive damages, which are available under *Bivens* but not under the FTCA. 446 U.S. at 22. Yet the Fourth Circuit's decision in *Holly*, as well as the district court's decision here, forces prisoners such as Peoples to rely on state tort law even though many states preclude or limit punitive damage awards. *See, e.g.,* Kan. Stat. Ann. 60-3702(e)(1). In short, these courts leave Peoples, and prisoners like him, at the mercy of state tort law – exactly the result that *Carlson* rejected.

B. This Court's Decision in *Correctional Services Corporation v. Malesko* Was Premised on the Availability of *Bivens* Claims Against Private Prison Guards.

A basic supposition of this Court's 2001 decision in *Malesko* was that a *Bivens* claim could be brought against the prison guards employed by private prisons. In *Malesko*, a prisoner sued the private prison corporation**,** not the private prison guards themselves. The Court held that the prisoner could not bring a *Bivens* action against the private prison corporation in part because an action against the corporation might dissuade prisoners from suing prison guards, for whom liability would be a more powerful deterrent. The Court explained: "[I]f a corporate defendant is available for suit, claimants will focus their collection efforts on it, *and not the individual directly responsible for the alleged injury*." 534 U.S. at 71 (emphasis added). For this rationale to make any sense at all, the "individual directly responsible" for the injury — the officers employed by a private prison corporation — must be liable under *Bivens.* As Justice Stevens

noted in dissent, "the reasoning of the [majority] opinion relies, at least in part, on the availability of a remedy against employees of private prisons." 534 U.S. at 79 n.6.[5]

Furthermore, *Malesko* analogized the corporate prison defendant to government agencies, which the Court held in *FDIC v. Meyer* are immune from *Bivens* actions even though employees working for those agencies are not. *Id.* at 69 (quoting *FDIC v. Meyer*, 510 U.S. 471 (1994)). In *Meyer*, the Court "emphasized that the purpose of *Bivens* is to deter *the officer*,' not the agency," and thus it refused to find that an agency could be held liable under *Bivens* so as to encourage the litigant to bring the action against the more easily deterred party – the individual agency employees. *Malesko*, 534 U.S. at 69 (citing *Meyer*, 510 U.S. at 485) (emphasis in original). Likewise, in *Malesko*, this Court reasoned that *Bivens* should not be extended to private corporations because corporate liability would not operate to "'deter the officer'" of that corporation from flouting the Constitution. *Id.* *Malesko*'s analogy to *Meyer* confirms that this Court understood that private prison guards, like agency employees, can be held individually responsible for constitutional violations through *Bivens*.

Moreover, *Malesko* expressly stated that its *Bivens* rulings strive to maintain symmetry between the liability of public and private prison guards, as well as the liability of prison guards

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[5] Commentators also read *Malesko* to permit *Bivens* actions against private prison guards. *See* Developments in the Law III: "A Tale of Two Systems: Cost, Quality and Accountability in Private Prisons," 115 HARV. L. REV. 1868, 1881 n.90 (2002) ("In *Correctional Services Corp. v. Malesko*, 122 S. Ct. 515, 517 (2001), the Court held that private companies operating federal halfway houses, like their public counterparts, were not subject to civil rights suits under *Bivens . . . [v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388, 395-97 (1971)], *though the offending officials could personally be sued under Bivens*, which allows awards of monetary damages against federal agents for a violation of federal constitutional rights. *Malesko*, 122 S. Ct. at 517." (emphasis added)); Jody Freeman, "Extending Public Norms Through Privatization," 116 Harv. L. Rev. 1285, 1319 n.138 (2003).

working for state and federal governments. *Malesko*, 534 U.S. at 72 (refusing "to impose asymmetrical liability costs on private prison facilities alone"). Yet as the panel-majority itself acknowledged, its decision shatters that symmetry: "There is no doubt that our holding renders federally employed guards subject to a *Bivens* claim while privately employed guards might not." Pet. App. 22a. By its own concession, the panel-majority's decision disrupts both federal-state and public-private symmetry to create a special class of prison guard entirely insulated from suits for constitutional violations.

As the chart included in Judge Ebel's dissenting opinion demonstrates, Pet. App. 37a, courts that reject *Bivens* claims for private prison guards immunize a growing sub-class of prison guards – those who work for private prison corporations under contract with the federal government – from liability for constitutional violations that all other prison guards in the nation must face. Prison guards who work for a state government, or for a private corporation under contract with a state government, or for the federal government, all can be sued for constitutional violations – the former two groups under 42 U.S.C. 1983 and the latter under *Bivens*; only employees of private corporations under contract with the federal government are immune. The majority opinion, like that of the district court and Fourth Circuit, "undercuts the important policy objectives of public-private symmetry" and "federal-state symmetry" extolled in *Malesko*. Pet. App. 36a (citing *Malesko,* 534 U.S. at 72.).

In keeping with this Court's decision in *Malesko*, any decision regarding *Bivens* liability should be informed by the liability of state prison guards and guards who work directly for the federal government. Differing liability standards for state and federal prison guards is unfair to victims of constitutional wrongdoing and is at odds with the basic principles of federalism. *Cf.*

Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (holding that the federal government must adhere to the same constitutional standards imposed on the states). Even more serious, those courts that have chosen to immunize private prison employees from liability for their constitutional transgressions have created a rule that is certain to skew the government's choice whether to contract out incarceration now that the government (and CCA) knows that prisoners incarcerated by CCA do not have equivalent remedies to those incarcerated by the federal government.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 29, 2006