No. 04-3071

UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT

CORNELIUS E. PEOPLES
Plaintiff-Appellant,

v.

CCA DETENTION CENTER, et al.
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS, JUDGE KATHRYN H. VRATIL

REPLY BRIEF FOR APPELLANT CORNELIUS E. PEOPLES

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FEDERAL PRISONERS MAY BRING *BIVENS* ACTIONS AGAINST EMPLOYEES OF PRIVATE PRISONS WHO VIOLATE THEIR EIGHTH AMENDMENT RIGHTS

A. CCA's Employees Are Government Actors.

Defendants claim that CCA's employees are not government agents acting under color of federal law. Defs' Br. at 5-11. However, the United States Supreme Court, this Court, and every court of appeals to have addressed this question have all concluded that private prison guards are government agents acting under color of the law of the governmental entity with which their employer has contracted.

As noted in Peoples' opening brief (at 11-15), the Supreme Court has several times declared that private individuals exercising the government's unique power to incarcerate are government actors for the purposes of 42 U.S.C. § 1983. In *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922 (1982), the Court held generally that private individuals are state actors when exercising authority under state law. A few years later, in *West v. Atkins*, 487 U.S. 42, 55-57 (1988), the Court held that a private doctor treating prisoners under a contract with state prison authorities acted under color of state law, and thus could be held liable under section 1983 for Eighth Amendment violations. Most recently, in *Malesko v. Correctional Services*

Corp., 534 U.S. 61 (2001), the Supreme Court noted that state prisoners "already enjoy a right of action against private correctional providers under 42 U.S.C. § 1983." *Id.* at 71 n.5.

The courts of appeals have, as they must, unanimously followed the Supreme Court's lead, including cases in this circuit involving CCA employees. *See, e.g., Jones v. Barry*, 33 Fed. Appx. 967 (10th Cir. 2002) (unpublished opinion attached to Peoples' opening brief). Quoting *Jones* out of context, defendants claim *Jones* held that "'the CCA defendants are not state actors.'" Defs' Br. at 6 (quoting *Jones*, 33 Fed. Appx. at 971 n.5). But *Jones* was only making the point that the CCA employees in that case were not *state* actors because CCA was under contract with the District of Columbia (which is not a state). *Jones* went on to conclude that "the CCA defendants are District of Columbia actors." *Jones*, 33 Fed. Appx. at 971 n.5. Thus, *Jones* squarely supports the proposition that CCA employees are government agents considered to be acting "under color of" the law of whatever governmental entity CCA contracts with – whether that entity is a state, the District of Columbia, or the federal government. *See also Street v. CCA,* 102 F.3d 810, 814 (6th Cir. 1996); *Rosborough v. Management & Training Corp.*, 350 F.3d 459, 461 (5th Cir. 2003); *Taylor v. Stewart*, 49 Fed.

Appx. 262 (10th Cir. 2002)[1]; *cf. Smith v. Cochran*, 339 F.3d 1205, 1215-16 (10th Cir. 2003) (stating that "persons to whom the state delegates its penological functions, which include the custody and supervision of prisoners, can be held liable for violations of the Eighth Amendment").

B. Private Prison Guards Exercising Federal Authority Are Liable For Violating Prisoners' Constitutional Rights.

As explained above, the Supreme Court and every circuit court to address the question has concluded that private prison guards are government actors just like prison guards employed directly by a state or by the federal government. In *Carlson v. Green*, 446 U.S. 14 (1980), the Supreme Court established definitively that prison guards could be held liable under *Bivens* for violations of federal prisoners' Eighth Amendment rights. Therefore, holding private prison guards liable for Eighth Amendment violations is not, as defendants contend, an "expansion" of *Bivens*, but rather is a straightforward application of the holding in *Carlson*.

[1] Oddly, defendants claim that *Taylor* "clearly does not address any claims made by the plaintiff against private employees of a private prison." Defs' Br. at 7. Defendants are mistaken. Taylor named as defendants CCA and seven individuals employed at CCA's Torrance County Detention Facility. Thus, every individual defendant was a CCA employee, not a state employee.

1. *Bivens* Actions Are Available Against Private Individuals Who Commit Constitutional Torts While Exercising Federal Government Power.

The two circuit courts to have decided the question agree that *Bivens* actions are available against private individuals who violate constitutional rights while exercising federal power. *See 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). *See also Sarro v. Cornell Corrections, Inc.*, 248 F. Supp.2d 52 (D. R.I. 2003); *Heinrich ex rel. Heinrich v. Sweet*, 62 F. Supp.2d 282, 307 (D. Mass. 1999).[2]

Defendants assert that the First Circuit "refused to allow *Bivens* actions against private parties," citing a footnote in *Fletcher v. Rhode Island Hosp. Trust Nat'l Bank*, 496 F.2d 927, 932 n.8 (1st Cir. 1974). Defs' Br. at 11. But, as the district court recognized in *Sarro,* 248 F. Supp.2d at 58, that footnote is dictum because it was irrelevant to the Court's holding that the defendant was not a *state* actor. That *Fletcher*'s footnote was non-binding

[2] In *DeVargas v. Mason & Hanger-Silas Mason Co., Inc.*, 844 F.2d 714, 720 n.5 (10th Cir. 1988), this Court noted that it was an open question in this circuit whether *Bivens* actions are available against private party defendants.

dicta was driven home by the First Circuit's more recent decision in *Gerena v. Puerto Rico Legal Services, Inc.*, 697 F.2d 447 (1st Cir. 1983), which "implicitly recognized that a private party acting under color of federal law may be liable under *Bivens*." *Sarro*, 248 F. Supp.2d at 58; *see also Heinrich*, 62 F. Supp. 2d at 306 (noting that in *Gerena* assumed that a *Bivens* action could be brought against a private party acting under color of federal law). In *Gerena*, a lawyer sued the Puerto Rico Legal Services, Inc. ("PRLS"), a private corporation, for firing him without due process, in violation of his constitutional rights. Although the First Circuit ultimately upheld dismissal of the case, it first engaged in an exhaustive analysis of whether PRLS was acting under color of federal law – an analysis that would have been unnecessary had the Court taken the position that a *Bivens* action cannot lie against a private party acting under color of federal law. Accordingly, neither the First Circuit, nor any other Court of Appeals, has disagreed with the Sixth and Ninth Circuits that *Bivens* actions may be brought against private parties exercising federal power.[3]

[3] In *Gerena*, the plaintiff sued a legal services corporation, and not individual employees of that corporation. *Malesko* would now preclude such actions against private corporate entities. However, *Gerena* nonetheless demonstrates that the First Circuit does not follow the suggestion in *Fletcher*'s footnote that *Bivens* actions can never lie against private parties.

2. *Malesko* Supports The Conclusion That A *Bivens* Remedy Is Available Against Private Prison Guards.

a. Defendants correctly note that in *Malesko*, the Supreme Court refused to extend *Bivens* to permit a suit against a private prison corporation. Illogically, defendants then insist that "[i]f the Supreme Court refuses to imply a cause of action under *Bivens* against [a private prison corporation], a private cause of action cannot lie against these private individuals who are merely employees of this private corporation." Defs' Br. at 12.

Defendants have it backward. *Malesko* concluded that a private prison corporation could not be held liable under *Bivens* in part to avoid discouraging such suits against the individual employees of the corporation who committed the constitutional tort. The Court explained that the "purpose of *Bivens* is to deter individual[s]" from "committing constitutional violations." 534 U.S. at 70. The Court was concerned that "if 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. 71 (emphasis added). For that rationale to make sense, the "individual responsible for the injury" – that is, the private prison guards – must be liable under *Bivens*. *See also* 534 U.S. at 79 n.6 (Stevens, J., dissenting)

("[T]he reasoning of the [majority] opinion relies, at least in part, on the availability of a remedy against employees of a private prison.")[4]

b. In *Malesko*, the Supreme Court reasoned that because prisoners in government-operated prisons can sue individual officers but not those officers' employer (the Bureau of Prisons), prisoners in private prisons likewise cannot sue the officer's corporate employers. *Malesko*, 534 U.S. at 71-72. The Court expressed the need for parity in the remedies available to prisoners in government- and privately-operated prisons to avoid imposing "asymmetric liability costs on private prison facilities alone." *Id.* at 72. The negative pregnant of the Supreme Court's reasoning is that the remedies available to prisoners in government-operated prisons must also be available to prisoners in privately-operated prisons, meaning that all federal prisoners have a *Bivens* remedy against prison guards who violate their constitutional rights.

Defendants note that in *Richardson v. McKnight*, 521 U.S. 399 (1997), the Supreme Court held that prison guards at private prisons are not

[4] The same logic underlies the holding in *FDIC v. Meyer*, 510 U.S. 471, 484-86 (1971), in which the Court concluded that a *Bivens* action was not available against government agencies because such suits should only be brought directly against agency employees. Following that reasoning, just as agency employees are liable under *Bivens* even though agencies are not, corporate employees are liable under *Bivens* even though the corporate entities are not. *See Malesko*, 534 U.S. at 69 (citing and discussing *Meyer*).

entitled to qualified immunity available to government-employed prison guards. Defs' Br. at 14. Defendants then argue that under *Malesko*'s parity principle, *Bivens* suits should not be available against private prison guards because that would give prisoners at private facilities broader remedies than prisoners at government-run facilities. *Id*. However, defendants' "solution" to this asymmetry – to deny prisoners at private prisons the *Bivens* remedy that is available to their publicly-incarcerated counterparts – conflicts with the very parity principle they claim to uphold.

Defendants are correct that prisoners bringing *Bivens* actions against private prison guards will not see their lawsuits hindered by qualified immunity claims, creating some difference in the liability of government and private prison guards. But, as the Supreme Court explained in *Richardson*, that distinction is justified by the "important differences" between privately-run and publicly-run facilities "that, *from an immunity perspective*, are critical." 521 U.S. at 409 (emphasis added).

Qualified immunity is unnecessary in the context of a private, for-profit prison for two reasons. First, "competitive market pressures" on privately-operated prisons will prevent the employee from reacting to potential liability with "unwarranted timidity," as the Court feared publicly-employed officials might. *Id.* at 409. "Competitive pressures mean not only

that a firm whose guards are too aggressive will face damages that raise costs, thereby threatening its replacement, but also that a firm whose guards are too timid will face threats of replacement by other firms with records that demonstrate their ability to do both a safer and a more effective job." *Id.* at 409. Second, "talented candidates" will not be "deterred by the threat of damages suits" from working for private prison corporations because they can be indemnified by their employer and because the private firm, "unlike a government department," can "offset any increased employee liability risk with higher pay or benefits." *Id.* at 411.

These differences provide the rationale for the Court's conclusion in *Richardson* that qualified immunity protection is unnecessary in the context of private prisons. *Cf. Wyatt v. Cole*, 504 U.S. 158, 167 (1992) (holding in the section 1983 context that "the rationales mandating qualified immunity for public officials are not applicable to private parties"). But they certainly do not justify holding only government-employed guards liable for constitutional torts. To the contrary, the *Richardson* Court's reasons for denying private prison guards qualified immunity all strongly support the conclusion that these guards must be liable for tortious activity to ensure that

"market pressures" do not lead private prison employees to be "too aggressive." *Richardson*, 521 U.S. at 409.[5]

3. Peoples Has No Guaranteed State-Law Remedy For Violation of His Constitutional Rights.

Although defendants continue to insist that Peoples has a remedy under state law for violation of his Eighth Amendement rights (Defs' Br. at 15-16), they did not address any of the substantive and procedural hurdles to such a state law tort claim described in Peoples' opening brief. *See* Peoples' Br. at 20-22. For example, defendants did not deny that any state tort claim that Peoples might have tried to bring under Kansas law would depend entirely on 1) Kansas standards of negligence and causation; 2) procedural rules governing the filings of such claims; and 3) whether immunities or other defenses might be available to the guards. Nor did defendants deny that they could argue that they are immunized from state law tort claims because federal law and federal officials set the terms of Peoples' incarceration. *See Brown v. Nationsbank*, 188 F.3d 579, 588-89 (5th Cir.

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[5] Defendants quote the same passage from *Richardson* to support their argument that *Bivens* liability is unnecessary because "market forces" will sufficiently deter private prison guards from violating prisoners' constitutional rights. Defs' Br. at 20. However, as the very passage defendants quote makes clear, the Court concluded that "'competitive pressures'" would prevent guards *only* from being "'too timid'"; it was "'damages that raise costs'" that the Court stated would prevent guards from being "'too aggressive.'" *Id.* (quoting *Richardson*, 521 U.S. at 409).

1991) (Supremacy Clause shields private defendants acting under FBI direction from state law claims). In short, Peoples has no certain remedy under state tort law and, in any case, should not have to "depend[] on a decision by the State in which he resides to accord him a remedy" for violation of his federal constitutional rights. *Bivens v. Six Unknown Named Agents of the Fed. Bur. of Narcotics*, 403 U.S. 388, 400 (1971) (Harlan, J., concurring).

4. A *Bivens* Remedy Is Available To Peoples Because Congress Has Not Established An Alternative Remedial Scheme And No "Special Factors" Exist That Would "Counsel Hesitation."

In *Bivens*, the Court observed that Congress had provided no damages remedy for the violation of Bivens' Fourth Amendment rights, nor taken any other action that would suggest it wished to foreclose the creation of an implied cause of action. *Bivens*, 403 U.S. at 396. Here, Congress has likewise provided no alternative remedy for violation of Peoples' constitutional rights, or otherwise expressed disapproval of the creation of a *Bivens* remedy. Indeed, the absence of Congressional action is far more meaningful here than in *Bivens* or in *Carlson,* because Congress has been aware of the Supreme Court's decision in *Carlson* for the last 24 years and yet it has not acted to foreclose the implied cause of action against prison guards who violate federal prisoners' Eighth Amendment rights.

In addition, here, as in *Bivens,* there are no "special factors counselling hesitation in the absence of affirmative action by Congress." 403 U.S. at 396. Defendants contend that the "private status of defendants has itself been considered a special factor counseling hesitation," and then cite to this Court's decision in *Beattie v. Boeing Co.*, 43 F.3d 559 (10th Cir. 1994). Defs' Br. at 14. *Beattie* does not support defendants' point. In *Beattie*, this Court held only that "the predominant issue of national security clearances amounts to such a special factor counseling against recognition of a *Bivens* claim in this case." 43 F.3d at 563. Defendant Boeing's status as a private company played no part in the Court's conclusion that a *Bivens* action was unavailable. *See also Showengerdt*, 823 F.2d at 1337 (holding that the private status of a federal actor is not a "special factor" precluding a *Bivens* action).

Nor can private party status be equated with the "special factors" that have prevented the Supreme Court from creating a *Bivens* remedy in the past, such as a conflict with federal fiscal policy, *see FDIC v. Meyer*, 510 U.S. 471, 485 (1971), the existence of a comprehensive remedial scheme created by Congress, *see Schweiker v. Chilicky*, 487 U.S. 412, 421-23 (1988), or the disruption of an institution with the unique structure and nature of the military, *see Chappell v. Wallace*, 462 U.S. 296, 304 (1983).

Holding private individuals who exercise federal power liable to the same degree as their publicly-employed counterparts simply ensures that all federal prisoners will have a remedy for violation of their constitutional rights, just as the Supreme Court intended. *See Carlson*, 446 U.S. 14.

CONCLUSION

For the foregoing reasons, the district court's order granting defendants-appellees' motion to dismiss should be reversed.

Dated: August 5, 2004 Respectfully submitted,

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RULE 32(a)(7) CERTIFICATION OF COMPLIANCE

I, Brian Wolfman, certify that the foregoing brief contains 3,086 words, and thus is within the word limit established by Federal Rule of Appellate Procedure 32(a)(7). This brief was prepared using Microsoft Word 2002.

_____
Brian Wolfman

CERTIFICATE OF SERVICE

I certify that on this 5th day of August, 2004, I mailed, via United States mail, first class postage prepaid, two copies of the Reply Brief of Appellant Cornelius Peoples to the attorney for appellees, at the following address:

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