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.

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

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**BRIEF FOR APPELLANT CORNELIUS E. PEOPLES**

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ORAL ARGUMENT REQUESTED

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## STATEMENT OF RELATED CASES

There are no prior or related appeals.

## STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case arose from a complaint filed by plaintiff Cornelius Peoples alleging that defendants Corrections Corporation of American ("CCA") and individual employees of CCA subjected him to cruel and unusual punishment, in violation of the Eighth Amendment, by failing to protect him from attacks by other prisoners while he was incarcerated at CCA's facility in Leavenworth, Kansas. The district court had jurisdiction over this case under 28 U.S.C. § 1331. *See* Joint Appendix ("JA") 7 (Complaint at 2 (Docket Entry ("D.E.") # 1).

On January 15, 2004, the district court issued a final decision granting defendants' motion to dismiss. *See* JA 99-110 (*Peoples v. CCA Detention Center, et al.*, 2004 WL 74317 (D. Kan. Jan. 15, 2004) (D.E. # 29)). A final judgment was entered by the district court that same day. (D.E. # 30). Peoples' notice of appeal, filed on February 12, 2004, is timely. *See* JA 111 (Notice of Appeal (D.E. # 32)).

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

## STATEMENT OF THE ISSUE

May a federal prisoner bring a damages action against individual prison officers responsible for violating his constitutional rights, as ordinarily authorized under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971), or is he precluded from doing so solely because the United States Marshals Service directed that he be incarcerated at a facility run by a private corporation under contract with the Marshals Service?[1]

## STATEMENT OF THE CASE

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. The prison officials are employees of Corrections Corporation of America ("CCA"), a private corporation that incarcerates federal prisoners under contract with the United States Marshals Service. Since the United States Supreme Court's decision in *Carlson v. Green,* 446 U.S. 14 (1980), it is settled law that federal prisoners may bring *Bivens* actions against prison guards for violations of the prisoners' constitutional rights.

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[1] This issue was raised in Defendants' Motion to Dismiss (JA 49-65), and ruled on in the district court's memorandum decision granting that motion (JA 99-110).

Nonetheless, defendants moved to dismiss the case, asserting that a *Bivens* action cannot be brought against prison officials employed by a private corporation because they are not acting "under color of federal law" and, even if they are, because *Bivens* does not permit damages actions against private prison guards. The district court granted the motion to dismiss, ruling that *Bivens* does not extend to damages suits against individuals employed by a private corporation, even when the corporation is operating under a contract with the federal government to incarcerate federal prisoners. Peoples appeals that decision because the exception created to *Bivens* by the district court is unwarranted; *Bivens* actions were established to deter constitutional violations by individuals exercising federal power, and damages actions against private prison guards incarcerating federal prisoners serve the same deterrent function as identical actions against government prison guards incarcerating federal prisoners.

## STATEMENT OF THE FACTS

### 1. The Federal Government's Broad Delegation 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 of the United States as Amicus Curiae, 1997 WL 63323 at *4, *Richardson v. McKnight*, 521 U.S. 399 (1997). In 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); Developments in the Law III: "A Tale of Two Systems: Cost, Quality and Accountability in Private Prisons," 115 Harv. L. Rev. 1868, 1868 (2002).

The private prison industry is also growing to keep up with the demand. In 2000, fourteen corporations were operating over 150 correctional facilities in the United States, with revenues of over one billion dollars. *See* "A Tale of Two Systems," 115 Harv. L. Rev. at 1868. CCA is the largest for-profit prison corporation in the United States, and CCA's website boasts that it is the "sixth largest corrections system in the nation, behind only the federal government and four states." <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. JA 49, 52 (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. JA 49, 53.

In July 2001, the Marshals Service directed that Peoples be transferred from the federal penitentiary at Lompoc, California to CCA's Leavenworth facility. JA 9-10 (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. JA 10. Peoples was then moved to H-Pod, a medium security unit, where he was placed in an 8-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 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." *See* JA 17-22 (Exhibit 1, attached to Complaint (D.E. #1)). In his grievance, Peoples stated that members of the "Mexican Mafia" were likely to attack him because Peoples was a member of the "Moorish Science Temple" — a religious group that had "clash[ed]" with the Mexican Mafia in the past. JA 10 (Complaint at 5 (D.E. #1)). He placed the grievance in an envelope marked "emergency grievance" and put it in the grievance box, as required by CCA's procedures. JA 10-11. Although CCA's grievance procedures state that CCA responds to "emergency

grievances" within 72 hours, Peoples never received any response to his grievance. JA 11, 19.

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. JA 11. Peoples also wrote to the warden, Fred Lawrence, describing his situation, and placed that letter in the grievance box, but again he received no response. *Id.*

On August 1, 2001, at approximately 6 a.m., seven Mexican Mafia members attacked Peoples. JA 11. 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. JA 12. 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. JA 12. 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. JA 13. 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.*

**3. Proceedings in the District Court.**

Peoples brought this pro se action against CCA and CCA employees Foskett, Perry, Lawrence, and Moore under *Bivens v. Six Unknown Named Agents*, 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. Defendants moved to dismiss, arguing that the district court lacked jurisdiction over both CCA and the individually-named defendants because *Bivens* established a private right of action against federal officials who abused their constitutional authority, and not against private companies or the individual officers employed by those companies. Defendants also argued that CCA officials were not "acting under color of state or federal law" when incarcerating Peoples. *See* JA 52 (Defs' Mem. in Support of Mot. to Dismiss at 4 (D.E. # 16)).

The district court first considered whether it had jurisdiction over Peoples' damages claims against CCA. 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. JA 105.[2]

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." JA 106-07. 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. JA 107.

The district court noted that its conclusion conflicted with the only other decision addressing the question, *Sarro v. Cornell Corr., Inc.*, 248 F. Supp.2d 52 (D.R.I. 2003), which held that *Bivens* actions are available against officials at private prisons. Although the district court found that "*Sarro*'s reasoning has some appeal,"

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

JA 109, it nonetheless stood by its conclusion that the availability of a state negligence action was "dispositive" of the question. JA 107.

Peoples filed this appeal challenging the district court's decision holding that he could not bring a *Bivens* action against the individual officers employed by CCA.

## STANDARD OF REVIEW

This Court reviews the grant of a motion to dismiss *de novo*. *Woodmen of World Life Ins. Soc'y v. Manganaro*, 342 F.3d 1213, 1216 (10th Cir. 2003). Because this is an appeal from a motion to dismiss, this Court must take the allegations in the complaint as true. *Ruiz v. McDonnell*, 299 F.3d 1173, 1180 (10th Cir. 2002).

## SUMMARY OF THE ARGUMENT

In *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), the Supreme Court recognized that the Constitution itself limits the exercise of federal power and that damages are an appropriate remedy for those who have suffered constitutional violations under color of federal law. Thus, *Bivens* permitted a citizen to bring an action for damages against individual federal officers who deprived him of his Fourth and Fifth Amendment rights. In *Carlson v. Green*, 446 U.S. 14 (1980), the Court held that a prisoner's claim that his Eighth Amendment rights were violated by prison guards employed by the Bureau of Prisons could also be brought under *Bivens*.

Accordingly, there is no dispute that if Cornelius 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. CCA nonetheless contends that its guards cannot be held liable for identical violations of Peoples' Eighth Amendment rights, claiming that its employees are not government actors and that to permit an action against them would constitute an unwarranted expansion of *Bivens.* JA 52, 55-56. Both of CCA's arguments are in conflict with the considerable precedent permitting prisoners to bring suit against public and private prison guards who deprive them of their constitutional rights.

Private prison guards exercise the same federal power to incarcerate as those employed directly by the government, and thus are government actors acting "under color of federal law" and are subject to the same penalties to deter them from abusing that power. Moreover, Peoples is not seeking an "expansion" of *Bivens* to cover prison guards in federal prisons — that rule was established in *Carlson* more than two decades ago. Indeed, *all* prison guards are liable for violating constitutional norms: state prison guards, both publicly and privately employed, are subject to actions under 42 U.S.C. § 1983, and federal prison guards are subject to the actions under *Bivens.* Actions against CCA's prison guards incarcerating federal prisoners serve the same

deterrent function as § 1983 actions against CCA's guards incarcerating state prisoners or *Bivens* suits against government-employed guards, and are just as essential to protect prisoners from abuse of the extraordinary and unique governmental power to incarcerate its citizens.

In short, in seeking to evade liability under *Bivens*, CCA is asking this Court to insulate its guards at federal prisons from having to obey the constitutional norms that bind every government-employed guard and even those CCA guards employed at facilities housing state prisoners. Denying Peoples his *Bivens* remedy on the ground that this subset of guards, alone, is immune from suit would constitute an unjustified reversal of the longstanding right of federal prisoners to seek damages from prison guards who abuse the federal power to incarcerate. *See Carlson*, 446 U.S. 14.

## ARGUMENT

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

### A. Prison Guards Employed at Private Prisons Housing Federal Prisoners Are Government Actors.

Guards employed by a private prison corporation under contract with the federal government to incarcerate federal prisoners are government actors. *See Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922 (1982) (private individuals are state actors

when exercising authority under state law); *Street v. Corrections Corporation of America*, 102 F.3d 810, 814 (6th Cir. 1996) (CCA and its employees "were acting 'under color of state law' in that they were performing the 'traditional state function' of operating a prison."); *United States v. Thomas*, 240 F.3d 445, 448-49 (5th Cir. 2001) (guard at a privately-operated detention center under contract with INS was a "public official" for purposes of federal bribery statute). Like guards at public prisons, these privately-employed guards exercise the unique governmental power of depriving citizens of their liberty. "Only the government has the authority to imprison a person and the exclusive governmental nature of that function is not altered by the fact that, occasionally, the government may contract to have criminal defendants incarcerated at privately-operated institutions." *Sarro v. Cornell Corrections, Inc.*, 248 F. Supp.2d 52, 61 (D.R.I. 2003).

In operating the Leavenworth prison, CCA has stepped into the shoes of the federal government. CCA runs Leavenworth under contract with the United States Marshals Service. JA 49-50 (Defs' Mem. in Support of Mot. to Dismiss at 1-2 (D.E. # 16)). Peoples was housed at CCA Leavenworth at the direction of the Marshals Service, which assigned him to that facility while he awaited a trial in federal court for charges of violating federal law. JA 9-10; 49-50. In short, at all times, Peoples' incarceration at CCA was at the behest of the federal government, and CCA's power

to imprison Peoples derived solely from the federal government's delegation of that authority to CCA. *Cf.* 18 U.S.C. § 4086. As CCA itself candidly informed the district court, Peoples "is a federal prisoner in the custody of the U.S. Marshals Service while being detained at CCA." JA 49-50. Under these circumstances, the private prison guards overseeing Peoples' detention are government actors operating under color of federal law.[3]

Significantly, courts have always viewed CCA and its employees as government actors when CCA is under contract with state governments or the District of Columbia to incarcerate state or D.C. prisoners. *See, e.g., Street*, 102 F.3d at 814; *Jones v. Barry,* 33 Fed. Appx. 967, 971 n.5 (10th Cir. 2002) (unpublished opinion is appended to this brief). CCA's officers have been sued many times for constitutional violations under 42 U.S.C. § 1983, and, in defending those cases, CCA has not argued that its officers cannot be liable because they are not government actors. *See, e.g., Beaudry v. Corrections Corp. of America*, 331 F.3d 1164 (10th Cir. 2003); *Jones*, 33 Fed. Appx. 968; *Taylor v. Stewart*, 49 Fed. Appx. 262 (10th Cir. 2002) (unpublished opinion is appended to this brief). Indeed, in its Supreme Court brief in *Richardson*

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[3] In fact, the United States Marshals Service contracts out the incarceration of 75 percent of the prisoners in its custody to state, local, and private facilities; the remaining 25 percent are housed in Federal Bureau of Prison facilities. *See* www.usdoj.gov/marshals/factsheets/psd02.htm.

*v. McKnight*, 521 U.S. 399 (1997), CCA admitted that its prison officials were acting under color of state law for the purposes of 42 U.S.C. § 1983. *See* Brief of Petitioners, 1997 WL 10351, at *19. In light of CCA's acknowledgment in these § 1983 cases that its employees responsible for incarcerating state prisoners are government actors, it is hard to understand how CCA can argue in this case that its employees responsible for incarcerating federal prisoners are not.

Indeed, as discussed in more detail below, *see infra* at 28-30, it is well-established that state prisoners in private facilities under contract with state governments can bring damages actions for violations of federal rights under 42 U.S.C. § 1983. *See Malesko*, 534 U.S. at 71 n.5 (state prisoners "already enjoy a right of action against private correctional providers under 42 U.S.C. § 1983"); *Jones*, 33 Fed. Appx. at 971 n.5. Thus, if this Court were to hold that CCA employees are not government actors when incarcerating federal prisoner and thus not subject to *Bivens* actions, it would create an "untenable" situation in which CCA's employees are liable for constitutional violations when contracting with state governments but immune from such suits when contracting with the government of the United States. *See Harlow v. Fitzgerald*, 457 U.S. 800, 809 (1982); *Butz v. Economou*, 438 U.S. 478, 500 (1978) ("[T]here is no basis for according to federal officials a higher degree of immunity from liability when sued for a constitutional infringement as authorized by

*Bivens* than is accorded state officials when sued for the identical violation under § 1983.")

In sum, officials at private prisons housing federal prisoners are government actors subject to the same limitations as any other individual exercising government power. Accordingly, as explained further below, like any federal prisoner, Peoples can find recourse through a *Bivens* action for the abuse of that power. *See Carlson*, 446 U.S. 14.

### B. The Deterrence Rationale Underlying the Damages Remedy Created by *Bivens* Applies Just as Strongly to Private Prison Guards as to Federal Officials.

*Bivens* actions serve to deter constitutional transgressions by individuals cloaked with federal power, without regard to whether those individuals wield federal power pursuant to a government contract rather than as federal employees. All that matters for the purpose of *Bivens* liability is whether the individual committed a constitutional tort while exercising federal authority, not how that individual came to be in a position to exercise such power. Accordingly, *Bivens* applies to officials at private prisons, just as it does to officials at government-owned prisons.

As the Supreme Court declared in *Malesko*, "*Bivens* from its inception has been based . . . on the deterrence of individual officers who commit unconstitutional acts."

*Malesko*, 534 U.S. at 71; *see also Carlson*, 446 U.S. at 21; Brief of the United States as Amicus Curiae, 2001 WL 558228 *19 n.9, *Malesko*, 534 U.S. 61 (The "goal of deterrence has been, from the outset, one of the principal rationales underlying *Bivens* and its progeny."). By creating a cause of action against the very individuals who commit constitutional violations, *Bivens* is a "more effective deterrent" against constitutional wrongdoing than a cause of action against the government itself. *Carlson*, 446 U.S. at 21. "It is almost axiomatic that the threat of damages has a deterrent effect, surely particularly so when the individual official faces personal financial liability." *Id.* (internal citation and footnote omitted). Because the deterrence rationale underlying *Bivens* applies just as powerfully when federal authority is wielded and abused by employees of a private corporation delegated that authority by the federal government, the *Bivens* remedy is available to federal prisoners deprived of their constitutional rights while in private prisons.

The outcome of this case is dictated by the Supreme Court's decision in *Carlson v. Green*. 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 adequately 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 alternate and adequate remedy. The Supreme Court disagreed, concluding that the prisoner's remedies were not limited to suit under the FTCA and finding that a *Bivens* action is available against prison guards who deprive prisoners of their constitutional rights while exercising the federal power to incarcerate.

Peoples is in the same position as the prisoner in *Carlson*. The prison officials at CCA Leavenworth violated Peoples' Eighth Amendment right to be free from cruel and unusual punishment by ignoring his repeated requests for transfer to another cell block, leading to his assault by other prisoners. Despite following CCA's established grievance procedures, Peoples' requests for a protective transfer were never granted (or even answered). Subsequently, Peoples was twice attacked by the very inmates he feared, causing him serious injury. Only after the second vicious attack was Peoples transferred to safety. As in *Carlson*, the prison officials here argue that they cannot be held liable under *Bivens* because of the possibility that Peoples has an alternate remedy under state tort law. However, just as the FTCA remedies did not replace a *Bivens* action in *Carlson*, the potential for state tort law remedies does not displace Peoples' right to bring a *Bivens* action for violation of his Eighth Amendment rights.

There is no reason to grant federal prisoners in government facilities remedies for constitutional transgressions while denying those same remedies to federal prisoners incarcerated in private, for-profit institutions. Deterring prison officials from violating the constitutional rights of prisoners is just as compelling a goal in the context of private prisons acting under contract with the federal government. If anything, competitive pressures on private prisons may make the deterrence provided by the threat of damages actions even more vital to maintaining inmate safety.

According to the Department of Justice, private prisons on average have a staff-to-prisoner ratio 15 percent below public prisons, and, perhaps as a result, private prisons also have a higher rate of major incidents than public prisons. *See* James Austin & Garry Coventry, Bureau of Justice Assistance, U.S. Dep't of Justice, Bulletin NCJ 181249, Emerging Issues on Privatized Prisons, at 52 (2001). As one commentator wrote, "[p]rivate prisons can be so concerned about maximizing occupancy that they have accepted inmates more violent" than their facilities could handle. Daniel Low, "Nonprofit Private Prisons: The Next Generation of Prison Management," 29 New England Journal on Criminal and Civil Confinement 1, 33 n.201 (Winter 2003). For example, the CCA prison in Youngtown, Ohio, accepted maximum-security inmates into a medium-security facility, which led to a number of violent incidents, including the murder of one medium-security inmate by a

maximum-security inmate. *Id.* Damages actions are necessary to provide a financial incentive to prevent private prisons from cutting corners that result in the violation of constitutional standards.[4]

For these reasons, deterrence is just as compelling a justification for providing *Bivens* actions against private prison guards as against prison guards at government-run prisons. Prisoners and others in federal custody, like Peoples, are uniquely vulnerable to the abuse of federal power, and *Bivens* provides their sole remedy against deliberate deprivations of their constitutional rights. If private prison guards were immune from *Bivens* actions, the federal government would have an economic incentive to contract out incarceration to private corporations that could perform those tasks for less because their officials could oversee federal prisoners without regard for constitutional strictures and without fear of liability under *Bivens*. *Bivens* must be available in private as well as government prisons to ensure that *all* officials wielding the unique federal power to incarcerate are deterred from violating the constitutional

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[4] The evidence shows that litigation holding prison guards liable for their misconduct does protect prisoners. A journalist who spent a year undercover as a line officer at Sing Sing prison in New York concluded that it was fear of liability that led the state to protect inmates from harm. For example, he attributed a decline in inmate rape at Sing Sing to the fact that "[i]nmates who ask for protection and fail to get it can make expensive claims." Ted Conover, Newjack: Guarding Sing Sing 263 (2000). *See also* Margo Schlanger, "Inmate Litigation," 116 Harv. L. Rev. 1555, 1680-90 (2003) (concluding that "both jail and prison systems do indeed respond to the salient threat of serious liability").

rights of the prisoners under their control.

### C. The Possibility of a State Law Remedy Does Not Automatically Preclude a *Bivens* Action, Particularly When There is No Evidence That State Law Would Remedy the Violation of Peoples' Constitutional Rights.

The district court decided that Peoples could bring a negligence claim against CCA officials under state law, and then concluded that, under the Supreme Court's recent decision in *Malesko*, the availability of another remedy is "dispositive" of the *Bivens* question. JA 107. That is, the district court read *Malesko* as holding that if a state-law tort remedy is available, then a *Bivens* action is not. The district court's conclusion that state-law tort remedies automatically provide a substitute for a *Bivens* action is incorrect and constitutes a serious misreading of the Supreme Court's decision in *Malesko*.

#### 1. A State Law Negligence Claim is Not Automatically a Substitute for a *Bivens* Action.

As a threshold matter, a negligence claim is simply not equivalent to an action alleging the violation of a federal constitutional right. State tort law is concerned with relations between individuals, not abuse of government power. Even a successful lawsuit for negligence will not vindicate a prisoner's federal rights because that state lawsuit will, by definition, make no mention of these federal rights. Thus, without a *Bivens* action, Peoples would have no remedy for a violation of his Eighth

Amendment right to be free from cruel and unusual punishment.

In any event, it is not at all clear that Peoples would be able to bring a successful state-law negligence claim. If Peoples' remedies are limited to state tort law, his claims against these defendants will stand or fall on the standard for negligence and causation in Kansas, the Kansas statute of limitations, procedural rules concerning the filing of such a claim, or on whether immunity or other defenses available under Kansas law would protect the prison guards from suit. Furthermore, CCA's employees might argue that federal law and federal officials set the terms of Peoples' incarceration, which would immunize them against state tort claims (but of course would not be a defense to a *Bivens* action). *See Brown v. Nationsbank*, 188 F.3d 579, 588-89 (5th Cir. 1991) (Supremacy Clause shields private defendants acting under FBI direction from state law claims). Accordingly, there is no basis for the district court's conclusion that Peoples would have had a viable negligence claim against CCA employees.[5]

Even if Peoples' lawsuit can go forward in Kansas, another prisoner in another

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[5] Peoples brought this case pro se after being transferred from CCA's prison in Leavenworth, Kansas to a prison in Osceolo, Missouri; it would have been extremely difficult for him to have filed a negligence case in a state court in Kansas. Peoples' situation is not unique. Most federal prisoners do not have access to lawyers to protect their constitutional rights and are frequently transferred from one state to another. Thus, simply as a practical matter it is very difficult for federal prisoners to protect their federal rights by way of state tort law.

state might be thwarted from bringing the same type of action, preventing the uniform enforcement of federal constitutional rights. Each State has its own laws and procedural rules, making it uncertain whether a cause of action will be recognized in all fifty states. For example, negligent conduct may give rise to an assault claim in Connecticut, *Alteiri v. Colasso*, 362 A.2d 798 (Conn. 1975), but not in Rhode Island, *Baran v. Silverman*, 83 A. 263 (R.I. 1912), or Mississippi, *Webb v. Jackson*, 583 So.2d 946 (Miss. 1991). Inconsistent and potentially hostile state law standards and rules could easily prevent a federal prisoner from protecting himself from constitutional violations by private prison guards. Constitutional rights cannot be adequately safeguarded by a patchwork of state tort law, which is why the *Bivens* remedy must be available to all who are subject to constitutional violations by federal actors. *See Carlson,* 446 U.S. at 24; *Bivens*, 403 U.S. at 409 (Harlan, J., concurring).

**2. State Law Does Not Assure Enforcement of the Federal Constitution.**

In any case, the district court was wrong to find the potential for state-law remedies foreclosed Peoples from bringing a *Bivens* action. The availability of alternative remedies has never been the primary factor in determining whether a *Bivens* action is available. Although the existence of other remedies is a factor in determining whether a plaintiff has a *Bivens* action, the district court erred in

concluding that the Supreme Court's decision in *Malesko* held that the availability of state law remedies is "dispositive" of that question. JA 107. Indeed, if the district court's reading of *Malesko* were correct, it would eviscerate the holding in *Bivens* and its progeny. In *Bivens* itself the Court stated that a federal cause of action was available "regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act," 403 U.S. at 391**,** and in *Carslon*, the Court permitted a *Bivens* action to go forward despite the fact that a cause of action could also be brought under the FTCA. 446 U.S. at 19-20. Indeed, in his dissent in *Carlson*, Chief Justice Burger criticized the majority for finding that the plaintiff had a *Bivens* action "even though a victim of unlawful official action may be fully recompensed under an existing statutory scheme." *Carlson*, 446 U.S. at 31 (Burger, C.J., dissenting). Nonetheless, in both cases, the Court concluded that the plaintiff had a cause of action for violation of rights protected by the U.S. Constitution.

Just like the district court here, the federal defendants in *Bivens* reasoned that the availability of state-law tort claims counseled against providing a federal damages action. Indeed, the federal officers specifically noted that Bivens could bring state-law tort claims to compensate him for his injuries. As the Court described it:

> [The defendants] do not argue that petitioner should be entirely without remedy for an unconstitutional invasion of his rights by federal agents. In [defendants'] view, however, the rights that petitioner asserts — primarily rights of privacy — are creations of state and not of federal

> law. Accordingly, they argue, petitioner may obtain money damages to redress invasion of these rights only by an action in tort, under state law, in the state courts.

The Supreme Court rejected the argument that state law remedies were sufficient to compensate Bivens for violation of his constitutional rights. The Court first noted that state tort law might not provide an adequate remedy. *Bivens,* 403 U.S. at 394-95. Even if it did, Justice Harlan declared that Bivens should not have to "depend[] on a decision by the State in which he resides to accord him a remedy" because "[s]uch a position would be incompatible with the presumed availability of federal equitable relief." *Id.* at 400 (Harlan, J., concurring). State law is not an adequate substitute because it will vary from state to state and even over time, providing an inconsistent and uncertain remedy for constitutional violations. *Id.* at 409 (Harlan, J., concurring).

In *Carlson*, the Court reiterated the point, stating that the "liability of federal agents for violation of constitutional rights should not depend upon where the violation occurred." *Carlson*, 446 U.S. at 24 (internal quotation marks and citation omitted). Rather, "it is obvious," the Court held, "that the liability of federal officials for violations of citizens' constitutional rights should be governed by uniform rules" and thus should not be dependant on the "vagaries" of state law. *Id.* at 23.

Accordingly, Peoples' right to be free from violations of his constitutional

rights should not turn on the state law of Kansas. Even if Peoples had an adequate state law remedy for his injuries — which is not at all clear, *see supra* 20-22 — he should not have to depend on state tort law to provide a remedy for the abuse of *federal* power. A federal remedy must be provided here, just as in *Bivens*, because the Constitution "operates as a limitation upon the exercise of federal power regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen." *Bivens*, 403 U.S. at 392.[6]

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[6] The most salient question in *Bivens* and its progeny was not whether a state-law remedy was available to the plaintiff, but rather whether Congress had acted either to provide a legislative remedy for the constitutional violation or otherwise to indicate that it wished to foreclose an implied cause of action for a constitutional violation under color of federal law. *Schweiker v. Chilicki*, 487 U.S. 412, 425 (1988); *Bush v. Lucas*, 462 U.S. 367, 378 (1983). Thus, in *Bush v. Lucas*, the Court declined to create a *Bivens* remedy against individual governmental officials for a First Amendment violation because Congress had crafted an administrative review mechanism that provided "meaningful redress" and therefore "foreclosed the need to fashion a new, judicially crafted cause of action." *Malesko*, 534 U.S. at 67 n.3 (citing *Bush*, 462 U.S. at 378 n.14). Congress has provided no such alternative form of relief for Peoples' injury.

### D. The Supreme Court's Decision in *Malesko* Supports the Conclusion that *Bivens* is Available to Remedy Constitutional Violations by Private Prison Guards.

According to the district court, the rationale of the *Malesko* decision suggested that a *Bivens* action is unavailable against private prison guards. JA 104-09. The district court's view is a serious misreading of *Malesko*. In fact, both parties in *Malesko* explicitly stated that they assumed *Bivens* actions were available against guards employed by a private prison corporation, and that assumption formed the foundation for the Court's conclusion that a *Bivens* remedy was *not* available against the corporate entity itself. *See* Brief of Petitioner, 2001 WL 53566, at *13; Brief of Respondent, 2001 WL 993679, at *8, *12.

*Malesko* held that the prisoner could not bring a *Bivens* action against the private prison corporation itself 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." *Malesko*, 534 U.S. at 79 n.6.[7]

Further evidence that the *Malesko* Court presumed *Bivens* actions were available against the individual officers of a private prison is found in the Court's analogy of the corporate defendant to a federal agency. The Court declared that a *Bivens* action against a private corporation would be equivalent to permitting such an action against federal government agency — a proposition that the Court had previously rejected in *FDIC v. Meyer*, 510 U.S. 471, 484-86 (1971). 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 the 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 responsible for the constitutional violations. *Malesko*,

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[7] Commenters 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. at 1881 n.90 ("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).

534 U.S. at 69 (citing *Meyer*, 510 U.S. at 485) (emphasis in original). Likewise, in *Malesko*, the 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*. The Court's analogy to *Meyer* confirms that the Court presumed that private prison guards, like agency employees, can be held individually responsible for constitutional violations through *Bivens*.

### E. Denying a *Bivens* Remedy Would Produce Anomalous Results.

*Bivens* actions are indisputably available against prison guards employed directly by the U.S. government. Likewise, 42 U.S.C. § 1983 indisputably permits prisoners in private prisons under contract with a state government to sue prison guards for violations of their constitutional rights. Thus, denying the *Bivens* remedy to federal prisoners in private prisons would create an asymmetry in the enforcement of constitutional violations by state and federal actors and would skew the government's incentives when determining whether to contract out the incarceration of federal prisoners. To prevent such an anomalous result, *Bivens* actions must be available to federal prisoners in private prisons.

### 1. Because Private Prison Guards Are Liable for their Constitutional Torts Under 42 U.S.C. § 1983, They Must Also Be Liable Under *Bivens*.

Under 42 U.S.C. § 1983, state prisoners in private facilities under contract with state governments can bring damages actions for violations of federal rights. *See, e.g., Malesko*, 534 U.S. at 71 n.5 (state prisoners "already enjoy a right of action against private correctional providers under 42 U.S.C. § 1983"); *Jones*, 33 Fed. Appx. at 971 n.5 (noting that CCA defendants "can be held personally liable" under § 1983); *Street*, 102 F.3d at 814 ("The defendants were acting 'under color of state law' in that they were providing the 'traditional state function' of operating a prison."). Accordingly, if *Bivens* is not available as a remedy to federal prisoners housed in private prisons, then state actors will be subject to greater liability for constitutional violations than federal actors — a result both unfair to victims of unconstitutional wrongdoing and at odds with the basic principles of federalism. *Cf. Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) ("In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the federal government.").

Liability for constitutional violations should not vary depending on whether the violation occurred under the color of state rather than federal law. For that reason, the federal courts have always assumed that the liability of federal officials under *Bivens*

parallels the liability of state officials under 42 U.S.C. § 1983. "The 'constitutional design' would be stood on its head if federal officials did not face at least the same liability as state officials guilty of the same constitutional transgression." *Carlson*, 446 U.S. at 22; *see also Butz*, 438 U.S. at 495-96, 501 ("Surely, federal officials should enjoy no greater zone of protection when they violate federal constitutional rules than do state officers."). Thus, yet another reason for concluding that *Bivens* actions are available to federal prisoners in private prisons is that it would be at odds with the constitutional structure to deprive federal prisoners of a cause of action for constitutional violations that is available to all state prisoners in private prisons.

Such an inconsistency between the standards of liability for state and federal actors is particularly troubling striking when applied to CCA, which contracts its services to state governments as well as the federal government. Already, CCA's employees can be sued under section 1983 for cruel and unusual punishment inflicted upon state prisoners. To hold those very same employees immune from suit when CCA's contract is with the federal government rather than a state government would be bizarre, and would serve to undermine the principle, at *Bivens* core, that the constitutional limits on government action applies equally to federal and state actors.

### 2. Because Prison Guards in Government Prisons Are Liable Under *Bivens*, Prison Guards in Private Prisons Under Contract With the Government Must Also Be Liable Under *Bivens.*

Just as liability for constitutional violations should not turn on whether the transgressor is a state or federal actor, nor should liability depend on whether a prisoner is incarcerated in a public or a private facility. As already noted, the need for parity between remedies available to prisoners housed in public and those housed in private facilities was cited as a basis for the Court's decision in *Malesko.* The Court stated that *Bivens* actions should not be available against a private prison corporation because federal prisoners in public prisons could not sue the corporate entity's equivalent, the Bureau of Prisons ("BOP"). *Malesko*, 534 U.S. at 71-72. The Court explained that to permit the corporation to be held liable where the Bureau of Prisons is not would improperly impose "asymmetrical liability costs on private prison facilities." *Id.* at 72. Applying the parity principle here mandates the availability of *Bivens* actions against private prison guards because federal prisoners in private prisons should be able to sue the guards for constitutional transgressions just as all other prisoners can.

Denying prisoners remedies against private prison guards that are available against government-employed guards would skew the government's choice whether to contract out incarceration. In *Malesko*, the United States argued that "because the

government cannot be held directly liable under *Bivens* when it provides correctional services itself, imposing liability on private providers of correctional services that step into BOP's shoes under the contract could distort the choice between contracting out and providing services in house." U.S. Amicus Br., 2001 WL 558228, at *10. That same principle cuts strongly in *favor* of permitting *Bivens* actions against private prison guards so that they are liable to the same extent as the publicly-employed counterparts. Indeed, if *Bivens* actions are not available against private prison guards, inevitably the government will choose to increase the rate of contracting-out incarceration to private corporations for reasons wholly unrelated to any proper penalogical or fiscal purpose, but solely because the privately-employed guards are immune from lawsuits for constitutional violations while the government's guards are not.

## CONCLUSION

For the foregoing reasons, the district court's order granting defendant-appellee CCA's motion to dismiss should be reversed.

Dated: June 21, 2004 Respectfully submitted,

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## REASONS WHY ORAL ARGUMENT IS REQUESTED

In this case, plaintiff-appellant Cornelius Peoples filed a *Bivens* action against prison guards employed by Corrections Corporation of America ("CCA"), a for-profit corporation which operates federal prisons under contract with the United States Marshals Service. The district court granted defendants' motion to dismiss because it read the Supreme Court's recent decision in *Malesko* to suggest that *Bivens* actions were not available against individual officers of private corporations. However, the court also noted that its holding directly conflicted with *Sarro v. Cornell Corr., Inc.*, 248 F. Supp.2d 52 (D.R.I. 2003), and commented that "*Sarro's* reasoning has some appeal." JA 109.

Peoples believes that oral argument will assist the Court because this case raises issues of first impression in this Circuit and will likely serve as a guide to lower courts. The fact that this question has divided two district courts and is likely to recur in the future also counsels in favor of oral argument.

## RULE 32(a)(7) CERTIFICATION OF COMPLIANCE

I, Amanda Frost, certify that the foregoing brief contains 7,598 words, and thus is within the word limit established by Federal Rule of Appellate Procedure 32(a)(7). This brief was prepared using Corel Word Perfect, version 7.0.

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Amanda Frost

## ADDENDUM

1. *Peoples v. CCA Detention Center*, 2004 WL 74317 (D. Kan. Jan. 15, 2004)

2. *Jones v. Barry,* 33 Fed. Appx. 967 (10th Cir. 2002)

3. *Taylor v. Stewart*, 49 Fed. Appx. 262 (10th Cir. 2002)