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

SUPPLEMENTAL BRIEF FOR APPELLANT CORNELIUS E. PEOPLES

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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. Peoples had repeatedly asked prison officials to move him out of his cell block because he was afraid of being attacked, but his requests were denied until after he was assaulted by ten inmates. The defendant 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. Defendants moved to dismiss the case, claiming that, even though *Bivens* actions can be brought against guards at government-owned prisons, guards at private prisons under government contracts are immune from *Bivens* suits for violations of prisoners' constitutional rights.[1]

The district court granted the motion to dismiss, *Peoples v. CCA Detention Center*, 2004 WL 74317 (D. Kan. Jan. 15, 2004), and a panel of this Court affirmed in a split decision. *Peoples v. CCA Detention Centers,* 422 F.3d 1090 (10th Cir. 2005). The panel-majority concluded that *Bivens* actions for constitutional violations are precluded whenever a state-law tort claim is available. *Id.* at 1103. The majority then determined that Peoples could bring a negligence claim against the defendant prison guards under Kansas tort law and, therefore, did not have a constitutional

[1] Peoples' opening brief provides a detailed description of the circumstances of the assault, the contents of Peoples' complaint, and defendants' motion to dismiss. *See* Opening Brief for Appellant Cornelius Peoples at 2-7.

claim under *Bivens*. *Id.* at 1103-05.[2]

In dissent, Judge Ebel argued that the panel's decision squarely conflicts with *Carlson v. Green*, 446 U.S. 14 (1980), which established that federal prisoners may bring *Bivens* actions against prison guards for constitutional violations, and that the panel-majority's reasoning was at odds with the Court's decisions in *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001), as well as *Bivens* itself. 442 F.3d at 1109-10. Judge Ebel declared: "The majority's conclusion that a *Bivens* action is unavailable in this case purports to rest upon a reading of the Supreme Court's precedent. My reading of that precedent, however, dictates a contrary result." *Id.* at 1108.

Peoples submitted a petition for rehearing en banc, which was granted on December 22, 2005.

SUMMARY OF THE ARGUMENT

In *Bivens*, the Supreme Court permitted a citizen to bring an action for damages against individual federal officers who deprived him of his Fourth and Fifth Amendment rights. Nine years later, in *Carlson v. Green*, 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,

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[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 employees of a private prison corporation incarcerating federal prisoners under contract with the United States government. Undersigned counsel represented Peoples only in the one case cited above, which was referred to by the panel as "*Peoples I.*"

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, Peoples would have a *Bivens* action 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*. Because private prison guards exercise the same federal power to incarcerate as those employed directly by the government, however, they are government actors. Holding them liable for violating prisoners' constitutional rights therefore does not "expand" the *Bivens* remedy, but rather is a straightforward application of *Carlson v. Green*.

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 same actions under *Bivens.* 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. As Judge Ebel noted in dissent, the panel-majority's conclusion that CCA's guards are immune from suit for constitutional violation when they work for the federal government – even though those same guards are liable when they work for the state – creates an asymmetry between the constitutional

obligations of federal and state actors that the Supreme Court has repeatedly and expressly rejected.

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 government to incarcerate federal prisoners are government actors. *See Lugar v. Edmondson Oil Co.,* 457 U.S. 922 (1982) (private individuals are state actors when exercising authority under state law); *Evans v. Newton*, 382 U.S. 296, 299 (1966) ("[W]hen private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations."); *West v. Atkins*, 487 U.S. 42, 55-57 (1988) (private doctor treating prisoners under contract with state prison authorities acted under color of state law, and thus could be liable under § 1983 for Eighth Amendment violations); *Street v. Corrs. Corp. 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 providing the 'traditional state function' of operating a prison"); *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 custody and supervision of prisoners, can be held liable for violations of the Eighth Amendment").

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. Joint Appendix ("J.A.") 49-50. 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. J.A. 50. At all times, Peoples' incarceration at CCA was at the behest of the federal government, and CCA's power to imprison Peoples derives solely from the federal government's delegation of that authority to CCA. *See* 18 U.S.C. § 4086.

Significantly, courts have always viewed CCA and its employees as government actors for the purposes of 42 U.S.C. § 1983 when CCA is under contract with state governments to incarcerate state prisoners. *See, e.g., Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 71 n.5 (2001) (state prisoners "already enjoy a right of action against private correctional providers under 42 U.S.C. § 1983"); *Jones v. Barry,* 33 Fed. Appx. 967, 971 n.5 (10th Cir. 2002) (CCA defendants are acting "under color of the law of the District of Columbia" for the purposes of § 1983) (unpublished opinion attached to opening brief); *Rosborough v. Mgmt. & Training Corp.*, 350 F.3d 459, 461 (5th Cir. 2003) (holding that employees of private prison-management companies may be sued under § 1983 because confinement of wrongdoers – though sometimes delegated to private entities – is a government function); *Street*, 102 F.3d 814; *Ancata v. Prison Health Svcs.,* 769 F.2d 700, 703 (11th Cir. 1985). CCA's officers have been sued many times for constitutional violations under § 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. Corrs. Corp. of America,* 331 F.3d 1164 (10th Cir. 2003); *Taylor v. Stewart*, 49 Fed. Appx. 262 (10th Cir. 2002) (unpublished opinion attached to opening brief). Indeed, in its Supreme Court brief in *Richardson v. McKnight*, 521 U.S. 399 (1997), CCA admitted that its prison officials were acting under color of state law for the purposes of § 1983. *See* Brief of Petitioners, 1997 WL 10351, at *19 ("[I]t is apparent that state action is present under a public function analysis and that petitioners [CCA officials] acted under color of law.").

The Supreme Court has repeatedly declared that § 1983's requirement that the defendant have acted "under color of" state law is identical to the "state action" that must be proven to find a constitutional violation. *See Rendell-Baker v. Kohn,* 457 U.S. 830, 838 n.5 (1982) ("'In cases under § 1983, 'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment.'") (quoting *United States v. Price*, 383 U.S. 787, 794 n.7 (1966)); *see also Lugar*, 457 U.S. at 930-32; *Brown v. Philip Morris, Inc.*, 250 F.3d 789, 801 (3d Cir. 2001) (explaining that a *Bivens* action is "the federal equivalent of a § 1983 cause of action," and holding in a *Bivens* case that "[i]n order to determine whether the conduct of a private party should be attributable to the federal government, courts apply the 'state action' analysis set forth by the Supreme Court" in § 1983 cases). Thus, the question whether CCA's employees are acting "under color of" state law for the purposes of § 1983 is the same as asking whether CCA employees are "government actors" for the purposes of a *Bivens* claim. Because this

Court has answered the first question in the affirmative – as has every other court to address the question – it must answer the second question in the affirmative as well.

A split panel of the Fourth Circuit recently reached the contrary conclusion in its decision in *Holly v. Scott*, __ F.3d __, 2006 WL 60276 (4th Cir. Jan. 12, 2006), holding that private prison guards are not government actors even though they are liable for constitutional violations under § 1983. The opinion suggested that the state action doctrine might be broader under § 1983 than under *Bivens*. *Id.* at *5. As explained above, there is no basis for such a distinction because the Supreme Court has firmly established that § 1983's "under color of law" standard is identical to the state action requirement for a constitutional violation. *See Holly*, 2006 WL 60276, at *13-14 (Motz, J., concurring). As the concurring judge on that panel noted, the majority "disregard[ed]" considerable authority and "creat[ed] a circuit split" on a question on which the federal circuits had previously been undivided. *Id.* at *13 (Motz, J., concurring).

Holly misread the Supreme Court's decision in *Richardson v. McKnight* as establishing that private prison guards are not state actors. *Id.* at *6. *Richardson* addressed only the question whether a private prison guard has qualified immunity when sued for constitutional violations – an issue that is entirely distinct from the question whether a private prison guard is a government actor who can be held liable for violating constitutional rights.

Richardson explained that there are "important differences" between privately run and publicly run prisons "that, *from an immunity perspective*, are critical." 521

U.S. at 409 (emphasis added). Qualified immunity is unnecessary in the context of private, for-profit prisons because "competitive market pressures" on privately operated prisons will prevent employees from reacting to potential liability with "unwarranted timidity," as the Court feared publicly-employed officials might. *Id.* at 409. Nor will "talented candidates" be "deterred by the threat of damages suits" from working for private prison corporations because the private firm, "unlike a government department," can "offset any increased employee liability risk with higher pay or benefits." *Id.* at 411. These distinctions all support the conclusion that qualified immunity should be available for government guards, and not for private guards, but they do not undermine the conclusion that private prisons are exercising governmental power when they incarcerate federal prisoners.

B. *Carlson v. Green* Establishes That a *Bivens* Action is Available Here.

Throughout this litigation, defendants have mistakenly claimed that Peoples is seeking to *extend Bivens* liability. *See, e.g.,* Defs' Br. at 11. If this Court concludes that private prison guards are government actors, however, this case presents nothing more than a straightforward application of *Bivens* and *Carlson*. Indeed, to find that CCA's guards are government actors but then to conclude that they are not liable for constitutional violations would, as Judge Ebel explained (422 F.3d at 1109), create a direct conflict with *Carlson*'s holding that federal prison guards are subject to *Bivens* actions for Eighth Amendment 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 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 adequate remedy. The Supreme Court disagreed, concluding that the prisoner's remedies were not limited to suit under the FTCA and holding 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. 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 FTCA remedies did not preclude a *Bivens* action in *Carlson*, the potential here for state-law tort remedies does not prevent Peoples from bringing a *Bivens* action for violation of his Eighth Amendment rights. Moreover, the plaintiff in *Carlson* also could have brought state-law tort claims directly against the federal prison guards, and yet that possibility did not preclude the Supreme Court from finding that a *Bivens* action was available.

The panel-majority stated that "at first blush *Carlson* may appear to control this case," 442 F.3d at 1101, but concluded it did not because subsequent Supreme Court decisions – in particular, *Malesko* – are in "tension" with *Carlson*. *Id.* at 1102. The panel majority commented that "the [Supreme] Court has explained its approach to *Bivens* claims in a variety of ways in the thirty-four years since *Bivens* itself was decided," and in light of these inconsistent statements, the majority concluded that it would "follow the Court's most recent pronouncement on the issue." *Id.*

Although the panel majority is correct that the Supreme Court has not spoken with perfect clarity on the circumstances under which *Bivens* liability may be "extended," no such extension is at issue here. Neither *Malesko* nor any other Supreme Court precedent has overruled *Carlson* or suggested that *Carlson* for some reason does not apply to private prison guards. To the contrary, as explained in Peoples' opening brief (at 26-28) and by Judge Ebel (422 F.3d at 1110), *Malesko* assumed that *Bivens* actions *are* available against private prison guards. *Malekso* held that a prisoner could not bring a *Bivens* action against a private prison *corporation* in part because a cause of 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 on the individual directly responsible for the alleged injury.*" *Malesko*, 534 U.S. at 71 (emphasis added). Furthermore, *Malesko* analogized the corporate prison defendant to a government agency, which is immune from *Bivens* actions even though employees working for

that agency are not. *Id.* at 69 (quoting *FDIC v. Meyer*, 510 U.S. 471 (1994)). Justice Stevens made the same point in dissent, noting that "the reasoning of the [majority] opinion relies, at least in part, on the availability of a remedy against employees of private prisons." *Id.* at 79 n.6 (Stevens, J, dissenting).

In short, although the Supreme Court has recently counseled courts to exercise "caution" when considering whether to extend *Bivens* into new territory, *Malesko*, 534 U.S. at 74, those statements do not reverse *Carlson*'s holding that prison guards are liable for Eighth Amendment violations even when other remedies – including state-law tort remedies – are available. And, as discussed above, *Malesko*'s reasoning only supports, rather than undermines, the conclusion that private prison guards can be held liable for constitutional violations. Thus, *Carlson* remains good law and should be applied here. Unless and until *Carlson* is overruled by the Supreme Court itself, all prison guards exercising federal governmental authority to incarcerate are subject to suit for their Eighth Amendment transgressions. *See Peoples*, 422 F.3d at 1110 (Ebel, J., dissenting) (criticizing majority for "abandon[ing]" the principles established in *Carlson* and *Bivens* "even though the Supreme Court has never overruled *Bivens* or any of its progeny").

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 Plaintiff's Constitutional Rights.

Defendants argue that prisoners cannot bring *Bivens* actions against private prison guards for violations of their constitutional rights if they have remedies under state law. As just explained, that conclusion direct conflicts with *Carlson*'s holding

that *Bivens* remedies *are* available against prison guards for Eighth Amendment violations even when other remedies are available. In addition, that conclusion ignores the serious flaws inherent in a system in which protection of constitutional rights turns on inconsistent and shifting state tort law – the very flaws that led to the Supreme Court's establishment of the *Bivens* remedy in the first place.

1. A State-Law Negligence Claim Cannot Substitute for a *Bivens* Action.

As Judge Ebel noted in his dissent from the panel opinion, state law is no substitute for a constitutional claim: The "alternate 'cause of action' sufficient to preclude a *Bivens* action must be a *constitutional* cause of action . . . . A state tort cause of action (not predicated on a constitutional violation) is not an adequate alternative remedy for a constitutional violation." 422 F.3d at 1109 (emphasis in original). 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 these federal rights. 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*.

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, if it were, then *Carlson* and even *Bivens* would not be good law, since state-law remedies were

available in both cases. At the time that *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, which provided yet another remedy to the plaintiff in *Carlson,* serves primarily to waive the United States government's immunity to *state-law* claims. *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 the plaintiff's constitutional claims. As Judge Ebel wrote, "[i]f the presence of a tort claim against individual officers was not sufficient to preclude a *Bivens* remedy against those officers in *Carlson*, so too should the availability of state-law tort claims against the instant defendants here be an insufficient substitute for the constitutional cause of action *Bivens* provides." 422 F.3d at 1109.[3]

In its recent decision addressing liability of private prison guards, the Fourth Circuit incorrectly concluded that the plaintiff in *Carlson* could not have brought a

[3] In 1988, eight years after *Carlson* was decided, Congress amended the Federal Tort Claims Act to bar state-law tort claims against individual federal officers. *See* Pub. L. No. 100-694, § 5 (codified at 28 U.S.C. § 2679(b)(1)). It expressly preserved *Bivens* claims, however. *Id.* § 2679(b)(2)(A).

state-law tort claim directly against the federal prison officials, which it thought distinguished *Carlson* from the case before it. *Holly*, 2006 WL 60276, at *8. The Fourth Circuit cited a provision of the FTCA that precludes a plaintiff who can sue the government under the FTCA for its tortious conduct from bringing any other cause of action against the federal employee responsible. *Id.* (citing 28 U.S.C. § 2679(b)(1)). However, that provision preempting state tort claims against federal officials was added to the FTCA in 1988, *see supra* note 3; as noted above, at the time *Carlson* was decided in 1980, individuals were free to sue federal employees under state law for negligence in carrying out their official duties. *See Westfall,* 484 U.S. 292. Thus, the Fourth Circuit's attempt to distinguish between the remedies available to prisoners in private prisons today and the prisoner in *Carlson* is based on an incorrect premise.

Furthermore, the two other circuits that have addressed the question have concluded that *Bivens* actions are available against private individuals who violate constitutional rights while exercising federal power, even when state law tort remedies are also available. *See Vector Research, Inc. v. Howard & Howard Attorneys*, 76 F.3d 692, 698-99 (6th Cir. 1996); *Showengerdt v. Gen. Dynamics Corp.*, 823 F.2d 1328, 1337-38 (9th Cir. 1987); *see also Sarro v. Cornell Corrs., Inc.*, 248 F. Supp. 2d 52, 58 (D.R.I. 2003) (stating that in *Gerena v. Puerto Rico Legal Services, Inc.*, 697 F.2d 447 (1st Cir. 1983), the First Circuit "implicitly recognized that a private party acting under color of federal law may be liable under *Bivens*") Indeed, in *Vector Research*, the Sixth Circuit permitted a *Bivens* action to go forward

against private attorneys who assisted in an allegedly unconstitutional search under the supervision of the U.S. Marshals Service even though the plaintiffs had also brought state-law tort claims against the attorneys in the very same litigation. 76 F.3d at 697.[4]

The panel-majority found the availability of a state-law tort remedy in *Carlson* to be irrelevant because the analysis in *Carlson* focused only on the effect of the FTCA remedy against the United States and not on the effect of the state-law claim. 442 F.3d at 1102. Yet the core holding in *Carlson* is that federal prisoners seeking to vindicate their constitutional rights should not have to rely on the FTCA because that statute incorporates the law of the state "where the act or omission occured," 28 U.S.C. § 1346(b)(1), and inconsistent and shifting state tort law cannot adequately protect federal constitutional rights. "[I]t is obvious," the Supreme Court held, "that the liability of federal officials for violations of citizens' constitutional rights should be governed by uniform rules" and thus should not dependent on "the vagaries of the laws of the several States." *Carlson*, 446 U.S. at 23. A conclusion that a *Bivens* remedy is unavailable here would thus be in direct conflict with *Carlson* because it would force federal prisoners to rely on the various tort regimes in each state in their attempt to vindicate constitutional rights – the very situation that *Carlson* concluded was untenable. *See* 422 F.3d at 1109 (Ebel, J., dissenting).

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[4] The Fourth Circuit's decision in *Holly* did not cite either of these decisions in its opinion. *Holly* did cite to the panel's decision in this case, 2006 WL 60276, at *9, apparently unaware that the decision had been vacated three weeks earlier.

2. Relying on State Tort Law to Protect Constitutional Rights is Both Burdensome and at Odds With the Supremacy of Federal Law.

The panel-majority concluded that Peoples' right to bring a *Bivens* action turned entirely on whether he has a cause of action under Kansas law, the state in which he was incarcerated at the time of the events giving rise to his suit. 422 F.3d at 1103. If the majority's approach were correct, then every time a prisoner seeks to sue a prison guard for violation of his constitutional rights in any state, the district court will first have to engage in an analysis of state law to determine whether the prisoner has alleged a viable cause of action – a conclusion that would be difficult to draw at early stages of litigation before a well-developed record reveals the precise contours of the claim, and which would be made harder by the fact that most prisoners are *pro se* and often fail to describe their legal claims accurately. Even CCA's employees might well prefer a uniform standard of liability to one in which they will have to start every case in federal court arguing about whether the relevant state law provides sufficient protection, and then either have to defend on the merits or begin the litigation all over again in state court.

Furthermore, following the majority's logic, prisoners in states that limit tort liability would be able to bring *Bivens* claims for constitutional violations, while those in states that had expansive laws would not. As a result, the United States would be a checkerboard in which prisoners in some states could vindicate their constitutional rights, while those in other states would be limited to state tort remedies only. For example, the panel-majority noted that Utah requires willful and malicious conduct before a prison official may be found liable to an inmate for

injuries caused by a third party, *id.* at 1104 n.8 (citing *Sheffield v. Turner*, 445 P.2d 367 (Utah 1968)), while the Eighth Amendment protects inmates against prison officials who are deliberately indifferent to an inmate's risk of serious harm, *see Farmer v. Brennan*, 511 U.S. 825, 842 (1994). Presumably, the panel-majority would conclude that inmates in private prisons in Utah can bring a *Bivens* action to vindicate their constitutional rights even though inmates in Kansas cannot. Bizarrely, this patchwork of liability would apply only to federal prisoners in private prisons; federal prisoners in government-run prisons could, under *Carlson*, always bring *Bivens* actions regardless of whether they also could bring tort claims under state law.

This kind of state-by-state analysis, in which constitutional rights are left to the protection of state tort law unless a federal court decides that a state's tort law is insufficient, is incompatible with the supremacy of federal law. If prisoners have a right to damages for violation of their constitutional right to be free from cruel and unusual punishment under the Eighth Amendment, then that right should exist nationwide and for all prisoners; it is not a right given piecemeal and only to those prisoners who can show that their state-law remedies are inadequate.

3. Peoples Is Not Guaranteed an Adequate Remedy Under Kansas Tort Law.

In any case, it is not at all clear that Peoples has an adequate remedy under Kansas law. As Peoples noted in his opening brief (at 21-22), 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 Boyle v. United Techs. Corp.*, 487

U.S. 500 (1988) (state law tort claims against government contractor are preempted if contractor was performing functions at government's direction); *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). Significantly, defendants never denied this possibility in the briefing before the panel, and certainly have never conceded that state law would apply to them.[5]

In fact, the record suggests that defendants might raise such a defense should they face liability under state tort law. In their motion to dismiss for failure to state a claim, defendants asserted that their hands were tied by their contract with the government: Defendants explained that they could not remove Peoples from the general prison population because the Leavenworth facility "is usually at or near housing capacity" due to the fact that the "contract between CCA and the U.S. Marshals Service requires CCA to accept all detainees." J.A. 73-74. In other words, the defendants assert that because CCA's contract with the government required that CCA accept all inmates sent to it by the U.S. Marshals Service, it had no space into which Peoples could have been moved for his own protection. *Id.* Although Peoples

[5] The panel-majority noted that neither Peoples nor defendants had directly addressed the viability of Peoples' claim under Kansas law. 422 F.3d at 1103. As explained above and in Judge Ebel's dissent, state law can never be an adequate remedy for a constitutional violation. But even if it were, it should be defendant's burden, not plaintiff's, to show that state law would provide such a remedy – particularly where, as here, the plaintiff has raised his concern that defendants would claim state law is preempted because defendants were acting pursuant to government direction. Because defendants have failed to make arguments about the viability of Peoples' state-law tort claims, or answer Peoples' concerns that they would claim state law does not apply, they have not met this burden.

does not, of course, agree with such a contention, CCA's assertion in this regard underscores the possibility that a "federal contractor" defense might negate any Kansas tort claim.

The Kansas statute limiting punitive damages further suggests that even if Peoples could successfully bring a tort claim against the CCA defendants, Kansas tort law would not adequately protect Peoples' constitutional rights or deter CCA guards from engaging in unconstitutional conduct. *See Carlson*, 446 U.S. at 22 (concluding that FTCA was not an adequate remedy for constitutional violations because it did not provide for punitive damages). The Kansas statute limits punitive damages to the "annual gross income earned by the defendant," so the amount will vary in every case depending on the identity of the defendant. Kan. Stat. Ann. § 60-3702(e)(1). Because compensatory damages for Peoples' injuries, like those of many inmates, will likely be small, punitive damages serve an important role in deterring future unconstitutional conduct – which is the primary goal of *Bivens* actions. *See Carlson*, 446 U.S. at 22 n.9. Yet, under Kansas law, punitive damages may be nearly nonexistent in any case in which the defendant has an intermittent employment history or earns a small salary.

Finally, litigation in state court under state law is not a realistic alternative for most federal prisoners. Peoples brought this case *pro se* after being transferred from CCA's prison in Leavenworth, Kansas to a prison in Osceola, 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. *See, e.g., Carlson*, 446 U.S. at 25 n.11 (noting that prison officials "have the power to transfer prisoners to facilities in any one of several States . . . thereby controlling to some extent the law that would apply to their own wrongdoing"). Thus, simply as a practical matter, it is very difficult for federal prisoners to protect their federal rights by way of state tort law.

D. Denying a *Bivens* Remedy Would Create an Asymmetry Between The Liability of Federal and State Prison Guards, and Between Publicly and Privately Employed Prison Guards.

It is undisputed that prisoners may bring suits for constitutional violations against prison guards employed directly by the U.S. government, and against all state prison guards, whether employed by state governments or a private prison corporation such as CCA. 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, as well as skew the government's incentives when determining whether to contract out the incarceration of federal prisoners. Such a result would fly in the face of the established principle that state and federal actors are subject to the same constitutional standards. *See Carlson*, 446 U.S. at 22 (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.") (quoting *Butz v. Economou*, 438 U.S. 478, 495-96 (1978)); *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954). Furthermore, *Malesko* was based in part on the Court's conclusion that it should not impose "asymmetrical liability costs" on either public or private prisons,

534 U.S. at 72, as would have occurred had it held that private prison corporations are liable even when the Bureau of Prisons is not.

The panel-majority stated that its decision did not "create" this asymmetry, which it viewed as existing prior to its holding, and it felt it was not its "prerogative" to eliminate the asymmetry already in place by creating a new implied cause of action. 422 F.3d at 1103. With all respect, that view incorrectly assumes that *Carlson*'s holding that prison guards are liable for constitutional violations excluded private prison guards employed by entities under contract with the Bureau of Prisons. Because *Carlson* squarely applies to *all* prison guards exercising the federal power to incarcerate, the panel-majority's decision does not conform to an existing asymmetry. Rather, it carves out a special category of prison guards who are now immune from the liability faced by all other prison guards. The panel-majority's decision thereby creates an asymmetry that contradicts established principles regarding the need for parity between state and federal actors, as well as between public and private individuals wielding government authority.

This Court is not being asked to create a new implied cause of action, as the majority assumed, but only to uphold a well-known and well-accepted standard of liability for federal prison guards. *Carlson* has been the law for the last 26 years and is now so well-established that we can assume that Congress is aware of the decision and has chosen not to override it. Congress has done nothing to suggest that it would like the courts to overrule *Bivens* or *Carlson*, or to create an exception for private prison guards. To the contrary, as noted earlier, the FTCA expressly leaves in place

the *Bivens* remedy. *See* 28 U.S.C. § 2679(b)(2)(A); *supra* note 3. And when Congress enacted legislation permitting the U.S. Marshals Service to contract with private prisons it nowhere stated that it wished to excuse those persons delegated governmental authority to incarcerate from being subject to the same standards of liability that otherwise apply. In sum, 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 and Congress intended. *See Carlson*, 446 U.S. 14.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Peoples' opening and reply briefs before the panel, the district court's order granting defendants' motion to dismiss should be reversed.

Dated: February 9, 2006 Respectfully submitted,

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RULE 32(a)(7) CERTIFICATION OF COMPLIANCE

I, Brian Wolfman, certify that the foregoing brief contains 6,004 words, and thus is within the 7000 word limit established by the Court's Order of December 22, 2005. This brief was prepared using Corel WordPerfect 12.

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Brian Wolfman

CERTIFICATE OF SERVICE

I certify that on February 9, 2006, I mailed, via first-class United States mail, two copies of Supplement Brief for Appellant Cornelius Peoples, to counsel for the appellees at the following address:

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