NINETEENTH ANNUAL CIVIL RIGHTS AND CIVIL LIBERTIES COMPETITION

2025

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Civil Rights and Liberties Competition

COMPETITION PROBLEM

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Professor Gerald Weber

EMORY UNIVERSITY SCHOOL OF LAW

INSTRUCTIONS

1. Do not cite to any case that was decided after July 31, 2025.

2. Assume that all motions, defenses, and appeals were timely filed in accordance with the Federal Rules of Civil Procedure.

3. When citing to the Record, use the page numbers located on the footer of each page of the Record.

4. Competitors should not argue the constitutionality of a fabrication of evidence claim.

5. Arguments should remain limited to the stipulated facts and exhibits.

6. Assume all evidence was properly admitted under the Federal Rules of Evidence.

7. A team may make a request for clarification or interpretation of the Problem. Any such request must be emailed by a team member or student coach to emorymootcourt@gmail.com with the subject line "Problem Clarification" before Sunday, September 14th, 2025, at 11:59 p.m. EST. All clarifications and interpretations will be posted on the CRAL website: www.law.emory.edu/cral.

No. 11-54384

IN THE

Supreme Court of the United States

OCTOBER TERM, 2025

ASSISTANT DISTRICT ATTORNEY DALE ROSEN IN HIS INDIVIDUAL CAPACITY, PETITIONER,

v.

ALINA GRANT, RESPONDENT.

THE PETITION FOR A WRIT OF CERTIORARI IS GRANTED, LIMITED TO THE FOLLOWING QUESTIONS:

I. Whether, as at least five circuits hold in conflict with five other circuits, *Heck v. Humphrey* bars § 1983 claims brought by plaintiffs who are not in custody, and who as a result, are unable to pursue federal habeas relief under § 2254.

II. Whether a prosecutor is absolutely immune from a § 1983 suit for damages where that prosecutor fabricates video footage then presents the fabricated video footage at trial.

IN THE UNITED STATES COURT OF APPEALS
FOR THE 14TH CIRCUIT

No. 22-118877

District Court No. 2024-CV-071820

ASSISTANT DISTRICT ATTORNEY DALE ROSEN IN HIS INDIVIDUAL CAPACITY,

Appellant

V.

ALINA GRANT,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF EMORY
Decided: May 9, 2025
Before: KEATING, POPE, PEARSON, Circuit Judges.

OPINION

KEATING, ***Circuit Judge*****:**

Alina Grant (hereinafter "Grant"), a former inmate at Emory State Prison, filed this action pursuant to 42 U.S.C. § 1983 (hereinafter "§ 1983"). In her complaint, Grant alleged that Assistant District Attorney Dale Rosen (hereinafter "Rosen")—the prosecutor in Grant's original criminal trial—violated her federal rights after fabricating and presenting evidence at her criminal trial.

Shortly thereafter, Rosen moved to dismiss, arguing, *inter alia*, that Grant's suit was barred under *Heck v. Humphrey*, 512 U.S. 477 (1994), and that he was entitled to absolute immunity. The district court denied Rosen's motion to dismiss, holding that Grant's suit did not fall within *Heck*'s ambit, as Grant was no longer in custody and therefore unable to pursue federal habeas relief. The district court further held that Rosen was not acting within his role as an advocate when the alleged constitutional violations occurred and was, therefore, not entitled to absolute immunity. We agree with the lower court. Accordingly, we **AFFIRM**.

The instant matter presents this Court with two questions—each the source of frequent disagreement among the circuits. We will address each in turn. When an individual is convicted and placed in custody following a state criminal proceeding, they may challenge the lawfulness of their conviction (and custody) by seeking a writ of habeas corpus. *See* 28 U.S.C. § 2254 (hereinafter "§ 2254"). Section 2254 is the federal habeas statute applicable to those incarcerated under state law. *Id*. But in order to obtain federal habeas relief, a state prisoner must first meet the stringent requirements imposed by § 2254, including the exhaustion of state remedies. *See* 28 U.S.C. § 2254(b)(1). If successful in a challenge, the state prisoner will secure early or immediate release from custody—a core aim of any habeas action. *See Heck*, 512 U.S. at 481; *see also* 39 Am. Jur. 2d *Habeas Corpus* § 1 (2025) ("The writ of habeas corpus traditionally has been accepted as the specific instrument to obtain release from unlawful confinement.").

On the other hand, § 1983 provides a broad cause of action against "every person" acting under color of state law who violates or causes the violation of another's federal rights. 42 U.S.C. § 1983; *see Kalina v. Fletcher*, 522 U.S. 118, 123 (1997). In this way, both § 1983 and § 2254 afford litigants a federal forum to seek redress for "unconstitutional treatment at the hands of state officials" but differ in "scope and operation." *Heck*, 512 U.S. at 480. Given the similarities, it is no surprise that there exists some overlap between § 1983 and § 2254. To keep these statutory regimes separate, the Supreme Court announced that the more specific remedial scheme of § 2254 displaces the more general vehicle of § 1983 when there is overlap, even though a claim "may come within the literal terms of § 1983." *Id.* at 481.

Against this backdrop, the Court in *Heck* held that a claimant's § 1983 suit is not cognizable when success in that suit necessarily implies the invalidity of an underlying criminal conviction—by challenging either the fact or duration of one's confinement—absent a favorable termination in those criminal proceedings. *Id*. at 487. However, the precise reach of *Heck's* central holding has served as the impetus for a "deep and enduring circuit split" in the years following the decision. *See Wilson v. Midland Cnty. (Wilson)*, 116 F.4th 384, 406 (5th Cir. 2024) (en banc) (Willet, J., dissenting).

And while the legal framework is rather complex, the effects of *Heck* on a litigant's § 1983 claim are markedly less so. Put simply, the *Heck* bar is a rule of accrual. *Heck*, 512 U.S. at 489-90. While a statute of limitations decides when the proverbial clock runs out of time, a rule of accrual governs when that same clock starts ticking. *See McDonough v. Smith*, 588 U.S. 109, 115 (2019) (discussing accrual and the statute of limitations under § 1983). In other words, when a plaintiff's § 1983 suit implicates *Heck*, the clock for their claim does not start ticking, because that plaintiff will not have a complete and present cause of action unless and until the favorable termination requirement is met. *Heck*, 512 U.S. at 489-90 ("[A] § 1983 cause of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated.").

Notably, though, Roy Heck was still a state prisoner at the time he brought his § 1983 claim, *id*. at 478-79, and therefore "in custody" for purposes of accessing the federal habeas statute, 28 U.S.C. § 2254(a) ("[A federal court] shall entertain an application for a writ of habeas corpus in behalf of a person *in custody* . . . .") (emphasis added). Thus, the first question we grapple with turns on whether *Heck* applies *at all* in cases where, unlike Roy Heck, the § 1983 claimant is no longer in custody and therefore does not have access to federal habeas relief under § 2254.

This brings us to our second issue on appeal. Even if Grant's § 1983 claim is not barred by *Heck*, her suit cannot proceed on the merits if Rosen is entitled to absolute immunity. When an officer is sued for money damages in their official capacity, such a suit is treated as if it were against the state itself and thus barred by the Eleventh Amendment. *Hafer v. Melo*, 502 U.S. 358, 361-62 (1991). Conversely, where, as here, an officer is sued for money damages in their individual capacity, that suit is levied against the person herself rather than the office they occupy, thereby avoiding the reach of the Eleventh Amendment. *Id*. at 362. The legal puzzle of immunity, however, does not end here.

The Court has recognized a host of immunities that absolutely bar individual capacity suits against certain categories of officers. *Kalina*, 522 U.S. at 123; *see, e.g., Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) (legislative immunity); *Stump v. Sparkman*, 435 U.S. 349, 355-56 (1978) (judicial immunity); *Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976) (prosecutorial immunity). These immunities—including prosecutorial immunity—are creatures of common law. *Kalina*, 522 U.S. at 123.

Looking to the common law, the Court in *Imbler* expressed that prosecutors are absolutely immune for "activities intimately associated with the judicial phase of the criminal process." 424 U.S. at 430-31 (holding that initiating a prosecution and presenting the State's case falls within the scope of absolute immunity). As the Court has since explained, though, the test for whether a prosecutor is entitled to absolute immunity turns not on the title of the state actor but on the nature of the function they are performing. *Kalina*, 522 U.S. at 127 (citation omitted).

Moreover, this line of cases makes clear that a prosecutor's absolute immunity is not "grounded in any special esteem" for such officers, but rather, policy considerations in favor of shielding prosecutors from harassing litigation and granting them the latitude necessary to exercise independent judgment in the course of bringing and trying cases. *Kalina*, 522 U.S. at 127 (internal quotation and citation omitted). Or as the Court has put it:

> The cluster of immunities protecting the various participants in judge-supervised trials stems from the characteristics of the judicial process rather than its location. . . . [C]ontroversies sufficiently intense to erupt in litigation are not easily capped by a judicial decree. The loser in one forum will frequently seek another . . . . Absolute immunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation.

Butz v. Economou, 438 U.S. 478, 512 (1978) (citations omitted). In line with this policy, immunity is best understood not as a defense to liability but as a bar against the suit altogether. Thus, the second issue requires us to determine whether the prosecutor in the instant case, Rosen, is entitled to absolute immunity before Grant can proceed on the merits of her claim if she is otherwise permitted to do so under *Heck*. With that being said, we now turn to the facts underlying this tangled legal framework.

FACTUAL BACKGROUND[1]

Alina Grant, a twenty-four-year-old firefighter at the time of the arson, has lived in Clifton County[2] for her entire life. Grant's passion for her work as a firefighter reflects the

[1] The parties have stipulated to the facts contained herein.
[2] Clifton County is located in the State of Emory which, along with the States of Dooley and Lullwater, is encompassed by the Fourteenth Circuit.

hardships she has endured. Namely, when she was just twelve years old, Grant tragically lost her parents in a housefire that rocked the local community. While reports later ruled that fire an unforeseeable accident, Grant felt duty-bound to ensure that no other children in her hometown would have to suffer the same loss she did growing up. To that end, Grant attended the Emory State Fire Academy ("the Academy"), where she completed the state-mandated training, later earning a degree in fire science with top marks at just twenty-two years old. Following her graduation from the Academy, Grant began her career as a firefighter with the Clifton County Fire Department.

Two years later on March 11, 2018, at around three in the morning, a fire engulfed and destroyed Liberty Lock and Storage ("Liberty Lock") in Clifton County, causing over $750,000 in damages and a loss of twenty-five storage units at the facility. Clifton County Fire Marshals quickly determined the fire was a result of arson. A partially melted red gas can was found at the scene and submitted for fingerprint analysis. A surveillance camera from a gas station across the street captured grainy footage of someone walking towards the facility moments before the fire began. This footage was obtained by investigators Rowan and Lewis. An employee at the gas station who called in the arson reported seeing a figure dressed in all black walking near the storage unit carrying what appeared to be a gas can.

Later that morning, investigators Rowan and Lewis canvassed the area and interviewed witnesses. Assistant District Attorney Dale Rosen played an active role in the factual investigation along with the detectives. A dozen individuals were considered suspects in the early stages of the investigation. Several renters reported that Walt Dorsey, the owner of Liberty Lock, had a habit of entering units without notice and some renters reported that they had heard that Dorsey was facing money problems due to gambling debts. Some described missing items, such as kitchenware and small electronics, and filed complaints with Liberty Lock, but they did not seem to go anywhere.

Walt Dorsey told investigators that he had a “bad feeling” about one of the former renters, Alina Grant, who had been renting a unit at Liberty Lock until just days before the fire. Dorsey reported that Grant visited the facility on March 8th and confronted him after discovering a family heirloom, her grandfather’s gold chain, had gone missing. Dorsey further alleged that during his routine rounds of the facility that week, he had seen two red gasoline containers in Grant’s unit. Investigators spoke to several other witnesses, many of whom recalled Grant being visibly agitated in the storage facility’s office and yelling at Dorsey about the missing chain. When questioned, Grant and Dorsey each stated they were at home alone the night of the fire. Neither had alibi witnesses.

Later in the investigation, a partial print on the gas container found at the scene of the fire came back and could not conclusively exclude Grant as a match. She was subsequently arrested and charged with first-degree arson under Emory state law. At trial, Rosen presented the fingerprint, Grant’s knowledge as a firefighter, witness testimony, and the surveillance footage in his case in chief. Rather than work with a technician to transfer the surveillance footage to a DVD format for courtroom use (the usual practice in the office), Assistant District Attorney Rosen did the transfer himself. Grant was ultimately convicted and served a five-year sentence in Emory State Prison before her release on August 10, 2023. Because of her conviction, Grant was permanently barred from employment as a firefighter and has struggled to find employment elsewhere since her 2023 release.

In February 2024, only six months after Grant was released, local investigative reporter Gianna Wallace of *Gambrell Times* published a bombshell piece uncovering that Assistant District Attorney Rosen routinely used fabricated evidence at trial until his retirement in 2020. The article made national news, detailing a multitude of fabricated evidence across dozens of cases that had been covered-up by Rosen. Remembering that Rosen had been the prosecutor in her own criminal trial, Grant pursued an investigation into her case which revealed shocking new information.

Unbeknownst to anyone, after Grant's arrest, ADA Rosen used artificial intelligence to alter the surveillance footage, making the figure more closely resemble Grant. While transferring the video for courtroom use, Rosen used this altered footage during trial instead of the original footage. When questioned about the video footage in Grant's case, ADA Rosen asserted that he had merely enhanced the existing surveillance footage in preparation for trial. He maintained that, even with the altered footage, there was still probable cause for her arrest and sufficient unaltered evidence to convict her of first-degree arson.

PROCEDURAL HISTORY

In May 2024, Grant filed suit against Assistant District Attorney Rosen under 42 U.S.C. § 1983, seeking declaratory relief and damages from the Assistant District Attorney in his individual capacity based on his alleged violation of her constitutional right not to be deprived of liberty as a result of the fabrication of evidence by a government officer.

ADA Rosen moved to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). Rosen argued that Grant's claim had not yet accrued pursuant to *Heck* and that even if her claim had accrued, he was nonetheless entitled to absolute immunity under *Imbler*. The district court disagreed with Rosen on both grounds, denying his motion to dismiss. Thereafter, Rosen filed a timely notice of appeal with the district court.

JURISDICTION AND STANDARD OF REVIEW

The district court had jurisdiction pursuant to 28 U.S.C. § 1331. We have jurisdiction pursuant to 28 U.S.C. § 1291. Ordinarily, interlocutory appeals are not appropriate under the final judgment rule contained in 28 U.S.C. § 1291. However, a district court's denial of absolute immunity is properly within the bounds of the collateral order doctrine and therefore immediately appealable. *Will v. Hallock*, 546 U.S. 345, 350 (2006).

Moreover, appellate review of the pendent legal issue—here, whether there exists a complete and present cause of action under § 1983—is proper, because it is "inextricably intertwined" with the otherwise immediately appealable denial of absolute immunity. *See Ashcroft v. Iqbal*, 556 U.S. 662, 673 (2009) (internal quotation and citation omitted); *cf. Wilkie v. Robbins,* 551 U.S. 537, 549, n.4 (2007) ("Because the same reasoning applies to the recognition of the entire cause of action, the Court of Appeals had jurisdiction over this issue, as do we.").

The parties do not dispute the facts herein but instead, present two questions of law on appeal. Accordingly, we review the decisions of the district court *de novo*. *See Highmark Inc. v. Allcare Health Management System, Inc.*, 572 U.S. 559, 563 (2014). As always in such cases, we accept the allegations in the complaint as true and assume they "allege constitutional violations for which § 1983 provides a remedy." *Buckley v. Fitzsimmons*, 509 U.S. 259, 261 (1993); *see also*

McDonough v. Smith, 588 U.S. 109, 116 (2019) (citation omitted) (assuming without deciding the soundness of the right at issue as articulated by the lower court).

DISCUSSION

I.

On appeal, Grant argues that *Heck* is inapplicable to her suit given that she is no longer in custody. And like several of our sister circuits, we are ultimately persuaded by the wisdom of Justice Souter that requiring individuals no longer in custody to show the favorable termination of their underlying criminal proceedings in order to utilize § 1983 "would be to deny any federal forum for claiming a deprivation of federal rights . . . . That would be an untoward result." *Heck*, 512 U.S. at 500 (Souter, J., concurring in judgment). Meanwhile, Rosen and our dissenting colleague insist that Grant's suit is not cognizable under § 1983, pointing us to *Heck* itself, post-*Heck* caselaw, and principles of comity, finality, and consistency. For the reasons discussed below, we are not convinced.

But first, we think it necessary to set the record straight. We agree with the conclusion Grant arrives at, but to say that *Heck* does not apply *because* she is no longer in custody puts the cart before the horse. *See Powers v. Hamilton Cnty. Pub. Def. Comm'n*, 501 F.3d 592, 601 (6th Cir. 2007) ("What is dispositive in [the plaintiff's] situation is not that he is no longer incarcerated, but that his term of incarceration . . . was too short to enable him to seek habeas relief."). Instead, a proper reading of *Heck* and its origins confirms that the applicability of the favorable termination requirement turns on the availability of federal habeas relief. *See Wilson v. Midland Cnty.*, 116 F.4th at 410 (Willet, J., dissenting); *see also Preiser v. Rodriguez*, 411 U.S. 475, 490 (1973) ("Congress has determined that habeas corpus is the appropriate remedy for *state prisoners* attacking the validity of the fact or length of their confinement, and that specific determination must override the general terms of [§] 1983.") (emphasis added). The availability of federal habeas relief for individuals like Grant, in turn, depends on custodial status. *See* 28 U.S.C. § 2254(a).

We begin with § 2254 and § 1983—the "two most fertile sources of federal-court prisoner litigation." *See Heck*, 512 U.S. at 480. As we noted above, the more specific § 2254 is the federal habeas statute, while the presumptively available § 1983 provides a broad cause of action to "every person" whose federal rights are violated by state officials. 42 U.S.C. § 1983. Against this statutory backdrop, the Court in *Preiser v. Rodriguez* took up the question of whether state "prisoners could use § 1983 instead of habeas to obtain an injunction to restore their good-time credits." *See Wilson*, 116 F.4th at 409 (Willet, J., dissenting) (citing *Preiser*, 411 U.S. at 487). The problem, however, was that granting the § 1983 injunction would have resulted in an early release for the prisoners despite the fact that habeas corpus is the traditionally accepted vehicle by which a prisoner may challenge the validity of their confinement. *Preiser*, 411 U.S. at 489.

Driven by concerns that prisoners might attempt to use § 1983 as an end-run around the exhaustion requirement imposed by the habeas statute,[3] the Supreme Court determined that claims brought by state prisoners challenging the "fact or duration" of their confinement are properly channeled away from the more generally applicable § 1983 and instead brought in habeas. *See id.*, 411 U.S. at 489-90. To hold otherwise, the Court noted, "would wholly frustrate explicit congressional intent" by allowing state prisoners to mount challenges "just as close to the core of

[3] *See also Nance v Ward*, 597 U.S. 159, 178 (2022) (Barrett, J., dissenting) ("I understand the impulse to find a way out of habeas and into § 1983.").

habeas" as attacks on the convictions themselves while evading the legislatively imposed prerequisites to invoking habeas relief. *Id*. But what about similarly situated § 1983 claims for damages?

Two decades later in *Heck*, the Court addressed that very question: "This case presents the question whether a *state prisoner* may challenge the constitutionality of his conviction in a suit for damages under 42 U.S.C. § 1983." *See Heck*, 512 U.S. at 478 (emphasis added). Drawing on the common law tort of malicious prosecution by way of analogy, the Court famously held:

> [W]hen a *state prisoner* seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated.

Id. (emphasis added). Today, both Rosen and our dissenting colleague argue for an interpretation of *Heck*'s holding that sweeps beyond its facts to apply in circumstances the *Heck* Court had no occasion to address. They direct us to *Heck*'s now infamous footnote 10, where the Court mused that "the principle barring collateral attacks . . . is not rendered inapplicable by the fortuity that a convicted criminal is no longer incarcerated." *Id.* at 490 n.10.

We are not impressed. And for all its insistence on respecting the deep roots underpinning the Court's reasoning in *Heck*, the dissent conveniently overlooks another deeply rooted principle in our jurisprudence to make its point.[4] Like our learned colleague Judge Easterbrook, we think "a clearer example of dicta is hard to imagine . . . . The footnote concerns a subject that had not been briefed by the parties, that did not matter to the disposition of Heck's claim, and that the majority

[4] *See Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399–400 (1821) ("It is a maxim not to be disregarded, that general expressions . . . are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.").

thought would not matter to anyone ever." *Savory v. Cannon*, 947 F.3d 409, 432 (7th Cir. 2020) (en banc) (Easterbrook, J., dissenting). In fact, the *Heck* Court itself declined the suggestion to follow language from *Preiser* regarding a question it "had no cause to address" or "carefully consider." *See Heck*, 512 U.S. at 482. Later caselaw only confirms our view of footnote 10.

After all, five justices—forming two concurrences and a dissent[5]—seemed to think the question still open just four years later in *Spencer v. Kemna* with Justice Souter penning yet another concurrence to express that *Heck*'s bar should not extend to "former prisoner[s] . . . no longer in custody." 523 U.S. 1, 21 (1998) (Souter, J., concurring). Justice Ginsburg, who sided with the majority in *Heck*, had a change of heart: "Individuals without recourse to the habeas statute because they are not in custody (people merely fined or whose sentences have been fully served, for example) fit within § 1983's broad reach." *Id*. at 21 (Ginsburg, J., concurring) (citing *Heck*, 512 U.S. at 503 (Souter, J., concurring in judgment)).

Six years after *Spencer*, the Court commented on the debate sparked by Justice Souter's concurrence in *Heck* to say the issue remained unsettled. *See Muhammad v. Close*, 540 U.S. 749, 752 n.2 (2004) ("Members of the Court have expressed the view that unavailability of habeas for other reasons may also dispense with the *Heck* requirement . . . . This case is no occasion to settle the issue."). This is, of course, to say that the matter originally raised in Justice Souter's *Heck* concurrence—whether the favorable termination requirement still applies when federal habeas is unavailable—remains open and within our power to resolve as part of the "ordinary rule refinement that appellate courts necessarily engage in." *See Powers*, 501 F.3d 592, 602 (6th Cir. 2007) (holding that "*Heck*'s favorable termination requirement cannot be imposed against § 1983 plaintiffs who lack a habeas option for the vindication of their federal rights").

[5] *See Spencer*, 523 U.S. at 19 (Souter, J., concurring, joined by O'Connor, J., Ginsburg, J., and Breyer, J.); *id.* at 21 (Ginsburg, J., concurring); *id.* at 25 n.8 (Stevens, J., dissenting).

Bearing that in mind, we are persuaded by the Fourth Circuit's read on the matter—that "*Heck* and its predecessors limited our inquiry to whether a *prisoner's* § 1983 action . . . would compromise the validity of his underlying sentence." *Wilson v. Johnson (Johnson)*, 535 F.3d 262, 266 (4th Cir. 2008) (emphasis added). And because we cannot say it any better ourselves, we hereby adopt the reasoning of the Fourth Circuit below in full:

> [The plaintiff] does not fall squarely within the holdings of *Preiser*, *Wolff*, *Heck*, or *Spencer*. Thus, while Supreme Court dicta in *Heck* and *Spencer* provides grist for circuits on both sides of this dilemma, we are left with no directly applicable precedent upon which to rely. We believe that the reasoning employed by the plurality in *Spencer* must prevail in a case . . . where an individual would be left without any access to federal court if his § 1983 claim was barred. . . . Additionally, the sweeping breadth, "high purposes," and "unique[ness]" of § 1983 would be compromised [and] . . . § 1983's purpose of providing litigants with "a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution" . . . would be severely imperiled.

Id. at 267-68 (4th Cir. 2008) (internal citations omitted). Relying on this reasoning, we join the circuits who, like the Fourth Circuit, have adopted Justice Souter's "better view" of *Heck*. *See Spencer*, 523 U.S. at 21 (1998) (Souter, J., concurring). Accordingly, we take those justices in *Heck* and *Spencer* at their word to hold that a § 1983 claimant, like Grant, is not barred by *Heck* when she no longer has access to federal habeas relief "through no lack of diligence on [her] part." *Cohen v. Longshore*, 621 F.3d 1311, 1317 (10th Cir. 2010).

II.

Having concluded that *Heck* does not apply to the instant case, Grant now seeks to hold Assistant District Attorney Rosen liable for his alleged violation of her constitutional right to due process. Namely, Grant alleges that Assistant District Attorney Rosen fabricated surveillance footage during the investigation and later presented that footage at trial, leading to a wrongful deprivation of liberty.

As a preliminary matter, it bears repeating that the constitutionality of Grant's fabrication of evidence claim is not at issue. Instead, we are only asked to determine whether Rosen is absolutely immune for his actions. Therefore, we assume, without deciding, the soundness of the right Grant asserts in her claim when reviewing the question presently before us. *See McDonough*, 588 U.S. at 116.

We begin by reaffirming the doctrine of prosecutorial immunity as outlined in *Imbler v. Patchman*, in which this Court held that a state prosecutor is absolutely immune from a civil suit for damages under 42 U.S.C. §1983 for actions that are "intimately associated with the judicial phase of the criminal process."424 U.S. 409, 430. This includes preparation for trial and the presentation of the state's case at trial. Immunity turns on the nature of the conduct itself, not the injury the conduct caused or the legality of the conduct itself. Here, as in *Imbler*, while "the location of the injury may be relevant to the question of whether a complaint has adequately alleged a cause of action for damages," such a question is not present in this case. *Buckley v. Fitsimmons*, 509 U.S. 259, 271.

The Court has established that several functions are not protected by absolute immunity, including giving legal advice to police during a criminal investigation, *Kalina v. Fletcher*, 522 U.S.118, 126 (1997), giving statements to the media, *Buckley v. Fitzsimmons*, 509 U.S. 259, 277 (1993), or when a prosecutor functions as a complaining witness in support of a warrant, *Kalina*, 522 U.S. at 130-31.

In *Buckley*, the Court clearly distinguishes between advocative functions, such as presenting evidence at trial, and investigative or administrative actions, such as gathering or fabricating evidence, which are not protected by absolute immunity. In that case, prosecutors were not shielded by absolute immunity for obtaining a footprint analysis during the investigatory phase of the case. Under the "functional approach" adopted in *Imbler* and later refined in *Buckley*, courts must evaluate the nature of the function, rather than the title of the actor performing it. *Buckley*, 509 U.S. at 259. We hold that at the time the footage was altered, Rosen was functioning as an investigator, and not an advocate of the state. Therefore, he is not entitled to absolute immunity for this conduct.

Moreover, the Seventh Circuit pointedly reminds us that "alleged constitutional wrongs completed outside of court are actionable even if they lead to immunized acts." *Buckley v. Fitzsimmons (Buckley II)*, 20 F.3d 789, 796 (7th Cir. 1994) (citation omitted). Rosen now attempts to cover his conduct under the blanket of immunized actions of advocates of the state by subsequently presenting this evidence at trial. But Rosen's later use of the fabricated surveillance footage at trial does not miraculously transform his prior unconstitutional conduct into a protected function.

This type of overextension of prosecutorial immunity was to be addressed by the Supreme Court in *Pottawattamie County v. McGhee*, 547 F.3d 922 (8th Cir. 2008), but was settled before an opinion could be rendered. In *McGhee*, the Eighth Circuit held that prosecutors were not entitled to absolute immunity when they allegedly fabricated evidence before trial. And while the act of presenting evidence at trial is generally entitled to absolute immunity, courts have since made clear that immunity does not attach retroactively to shield prior unlawful conduct. As the Seventh Circuit explained in *Fields v. Wharrie*, 740 F.3d 1107, 1112 (7th Cir. 2014), "a prosecutor cannot shield [themself] from liability for fabricating evidence during the investigative phase of a prosecution by later introducing that same evidence at trial."

To allow the act of trial presentation to immunize all prior conduct would incentivize prosecutors to engage in misconduct during the investigative phase, so long as they ultimately introduce the fruits of that misconduct in court. Such a result would render the functional approach meaningless, converting a narrow and necessary protection into a sweeping and dangerous license for abuse. So why then would the law implicate an officer who fabricates evidence under 42 U.S.C §1983, but not a prosecutor who does the same and furthers the injustice by presenting the evidence at trial? As Judge Posner noted in *Wharrie*, extending absolute immunity to a prosecutor who fabricates evidence and then uses that same evidence at trial would create "a license to lawless conduct." 740 F.3d at 1110. The Seventh Circuit there rejected the idea that the protections of the work for and at trial could retroactively sanitize prior unconstitutional conduct. *Id*. Ultimately, our legal system cannot condone the notion that two wrongs make a right.

To grant absolute immunity to the prosecutor who fabricates evidence, because they have taken the extra step of presenting that same evidence at trial is a perverse result indeed. Here, it was revealed that ADA Rosen altered surveillance footage using artificial intelligence after Grant's arrest, but before trial, to reinforce her alleged connection to the arson. While respondents may argue that probable cause existed, Rosen's conduct is still investigative. He fabricated this footage of Grant with this "police-type conduct" to accumulate more evidence for his case. *Buckley*, 509 U.S. 259 at 273 (citation omitted).

As the Court instructed in *Buckley,* "a prosecutor may not shield his investigative work under the aegis of absolute immunity merely because, after a suspect is eventually arrested, indicted, and tried, that work may be retrospectively described as 'preparation' for a possible trial." *Id* at 276. This is exactly what Assistant District Attorney Rosen intends to do. To deny Grant the opportunity to present her claim, Rosen asks us to stretch the doctrine of absolute immunity beyond its intended limits and to eviscerate the very functional boundaries the Court has long endorsed. We decline the invitation. Accordingly, we hold that ADA Rosen is not entitled to absolute immunity for his conduct in the fabrication of surveillance footage nor in presenting it during trial.

III.

We hereby **AFFIRM** the decision of the district court.

PEARSON, *Circuit Judge*, dissenting:

Today, our panel is faced with two difficult questions that have proven divisive amongst the circuits. While the majority has noble intentions, the conclusions it reaches are not supported by the law. Accordingly, I must respectfully dissent on both issues.

I.

With respect to the first issue, I would have reversed the district court and held that Grant may not proceed with her § 1983 claim until the favorable termination of her criminal conviction. *Heck* relied on the "hoary principle" against allowing collateral attacks on the validity of outstanding criminal judgments through "civil tort actions." *Heck v. Humphrey*, 512 U.S. 477, 486 (1994). That is precisely what Grant would accomplish by permitting her suit to proceed at this time. Accordingly, I dissent.

As a preliminary matter, it is worth pointing out that, despite the hardship *Heck*'s bar would impose on Grant, she would not be left without recourse—unable to satisfy the favorable termination requirement. She could, of course, seek relief under Emory state law through either state habeas review[6] or administrative expungement. [Plaintiff's **Exhibit H**]; *see also Wilson v. Midland Cnty. (Wilson)*, 116 F.4th 384, 397 (5th Cir. 2024) (en banc) (discussing how plaintiffs may satisfy the favorable termination requirement). Moreover, for the five years Grant was "in custody" at Emory State Prison, she could have accessed federal habeas review, yet she did not. Even in circuits that permit the *Heck* exception Grant is seeking, the mere fact Grant did not know (and could not know) of Rosen's misdeeds during the course of her confinement did not render federal habeas inaccessible within the meaning of the exception. *See, e.g., Griffin v. Baltimore Police Dept.*, 804 F.3d 692, 697 (4th Cir. 2015) (barring the plaintiff's suit absent a favorable termination).

Moving on, we need not become unnecessarily hung up on custodial status and the availability of federal habeas relief in the present case, as the *Heck* Court has already addressed those concerns:

> We think the principle barring collateral attacks—a longstanding and deeply rooted feature of both the common law and our own jurisprudence—is not rendered inapplicable by the fortuity that a convicted criminal is no longer incarcerated.

Heck, 512 U.S. at 490, n.10. Pointing to *Spencer*, the majority seems to think that it can transmute dicta into binding precedent by "cobbl[ing] together . . . a new majority" to overrule footnote 10 in *Heck*, but that is not how our legal system works. *See Savory v. Cannon*, 947 F.3d 409, 421 (7th Cir. 2020) ("[I]t is axiomatic that dicta from a collection of concurrences and dissents may not overrule majority opinions." (citation omitted)).

[6] The Emory state habeas statute is unique. Unlike most habeas statutes, including § 2254, individuals may still file for relief even after custody has ended. *See* [Plaintiff's **Exhibit F**] ("[T]he applicant must be, *or have been*, in custody.").

Undeterred, the majority responds that footnote 10 itself is also dicta. Fair enough. But in dismissing footnote 10, the majority "divorce[s] a significant part of the Court's rationale from its holding. The Court was simply making clear how broadly it intended its holding to apply." *Id*. at 422. That is because *Heck*'s bar is not grounded in the same reasoning of *Preiser* but instead, in tort law. *See Heck*, 512 U.S. at 483 ("[T]o determine whether there is any bar to the present suit, we look first to the common law of torts."). Or as the Fifth Circuit eloquently put it:

> *Heck* and *Preiser* announced distinct rules rooted in distinct genealogies. True, *Preiser* and *Heck* are superficially similar in the sense that both charted the boundaries of § 1983. But the similarities end there. *Heck* relied on tort law, while *Preiser* relied on habeas. That's why *Heck* applies outside of prison, while *Preiser* mostly does not.

See Wilson, 116 F.4th at 399.

Consequently, the majority misreads the significance of these principles and their presence in the *Heck* opinion to mean that we must consider the availability of federal habeas. But as the Court in *Heck* noted, the principles of finality, consistency, and comity have also appeared in previous decisions in different legal contexts. *See Heck*, 512 U.S. at 484-85. That is because these principles, which justified the rule at common law, are implicated in *any* civil action that impugns an outstanding criminal proceeding. *See Wilson*, 116 F.4th at 396; *see also Savory*, 947 F.3d at 431. Indeed, Supreme Court decisions authored in the years after *Heck* only confirm the soundness of this tort-based reading of the favorable termination requirement. *See Wilson*, 116 F.4th at 394-96 (discussing treatment of the favorable termination requirement in *Edwards*, *McDonough*, and *Thompson*).

Thus, and because *Heck*'s bar depends on reasoning wholly unconnected to a plaintiff's custodial status, the favorable termination requirement is best read broadly. *Savory*, 947 F.3d at 420 ("[*Heck*] expressly rejected a rule tied to the end of custody."). Accordingly, I would take the

Court in *McDonough* to mean what it said—that *Heck* applies "*whenever* 'a judgment in favor of the plaintiff would necessarily imply' that [her] prior conviction or sentence was invalid." *McDonough v. Smith*, 588 U.S. 109, 119 (2019) (emphasis added) (quoting *Heck*, 512 U.S. at 487); *see also Wilson*, 116 F.4th at 401 ("*Whenever* means *whenever* . . . the only entities that can say otherwise are Congress and the Supreme Court.").

Here, if Grant were successful on her § 1983 claim, the resulting judgment would necessarily impugn the validity of her underlying criminal conviction. Unfortunately for Grant, custodial status and access to federal habeas (or lack thereof) do not alter the analysis. To be sure, barring Grant's § 1983 claim under *Heck* would enact a harsh result, but that is what our precedent requires until the Supreme Court says otherwise.

II.

Turning to the second issue, the majority concludes that Assistant District Attorney Dale Rosen is not entitled to absolute immunity for his conduct in fabricating surveillance footage during the investigation and subsequently presenting it at trial. I respectfully dissent.

The question here is whether Assistant District Attorney Rosen was functioning as an investigator or as an advocate of the state when he allegedly fabricated the surveillance footage and presented this footage in trial. Rosen contends that there was probable cause to arrest the respondent based on witness statements and the fingerprint on the melted gas can, which could not exclude the respondent as a match. Here, after probable cause has been established, these investigative and judicial functions collide and are entangled with the alleged constitutional violation of fabricating evidence by the same prosecutor. The function of Rosen's conduct must be assessed in determining whether he was entitled to prosecutorial immunity.

In *Buckley v. Fitzimmons*, the Supreme Court elaborated upon its decision in *Imbler*. Under this approach, it is not the title of prosecutor that denotes access to such immunity, but the nature of the function the prosecutor performed. A prosecutor's administrative and investigative conduct that is not related to judicial proceedings is not entitled to absolute immunity. A temporal line for absolute immunity was also established. Before probable cause to arrest someone, a prosecutor is not functioning as an advocate, but as an investigator and therefore is not entitled to absolute immunity. Conversely, actions taken after probable cause has been established are generally considered advocative and entitled to absolute immunity. *Id*. That includes, of course, preparation for trial and the presentation of evidence at trial.

However, in granting prosecutors the latitude necessary to exercise their discretion to bring forth cases, the Supreme Court left open the question of where this conduct ends and where the activities associated with the prosecutor's role as an advocate begin. This has led to a case-by-case application of the functional test to determine when absolute immunity attaches. Here, after reviewing the record, I would hold that Rosen's conduct was within his role as an advocate of the state. Rosen's alleged fabrication of the surveillance footage, though troubling, occurred after Grant was arrested and charged at the time Rosen was preparing to present the State's case. This is precisely the zone of conduct that prosecutorial immunity is designed to protect.

In *Imbler*, the Court also acknowledged the potential cost of this immunity: defendants who have been genuinely wronged have no form of civil redress against a prosecutor who has wrongfully deprived them of liberty. This risk is outweighed by the "broader public interest in having prosecutors who can exercise their judgment vigorously and uninhibited by the fear of retaliatory litigation." *Imbler*, 424 U.S. 409 at 409. While civil remedies may be unavailable, other forms of remedy are in the form of oversight through bar associations and professional avenues of disciplinary action. Fabrication of evidence is a violation of Model Rules of Professional Conduct (the "MRPC") 3.4(b). Under this rule, "a lawyer shall not falsify evidence, counsel, or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law." Although Rosen has been retired since 2020, should the bar association investigate any prosecutor's conduct and find that the fabrication was a violation of Model Rule 3.4, the MRPC serves as not only a guide but a deterrent for improper behavior so that it not go unpunished.

The Due Process Clause states: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, Section 1. Because this deprivation of liberty occurred amid Rosen's advocative role as a representative of the state, Rosen is immune from liability for the violation. Should the deprivation of liberty be traced back to a prosecutor's conduct before trial, prosecutors would find themselves wary of conducting their duties in preparing for trial for fear of potential prosecution for frivolous litigation. This increase in potential litigation would undoubtedly lead to the chilling effect that *Imbler*, at its essence, intends to prevent. Accordingly, I would hold that ADA Rosen should be absolutely immune from liability.

III.

For the reasons above, I must respectfully dissent.

CLIFTON COUNTY POLICE INCIDENT REPORT

Case No: 1983-0387-SW
Date of Report: March 11, 2018
Time of Report: 7:18 am
Reporting Officers:
Det. Jake Rowan and Quinn Lewis

Incident Type:
Suspected Arson- Commercial Property (Storage Facility)

Location of Incident:
Liberty Lock and Storage 2901 North Eagle Avenue Clifton County, Emory 30043

Date/Time of Incident:
March 11, 2018, approx. 3:00 am

Involved Parties:

Suspect:
Unknown at the time of report
Reporting Party:
Kim Tanner (Night shift manager at Qtrip Gas station
Victim:
Liberty Lock and Storage (Property Owner: Walt Dorsey)

Narrative:

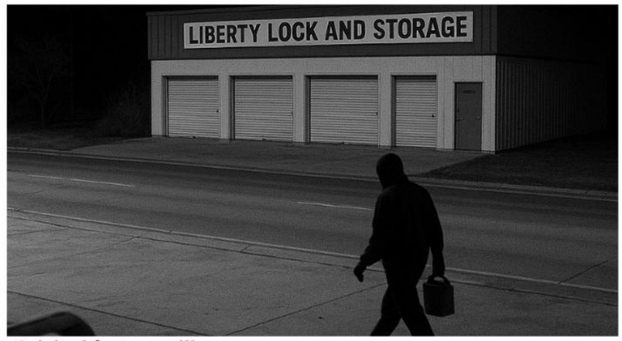
At approximately 3:27 on March 11, 2018, Clifton County Fire and Rescue responded to a 911 call reporting visible flames and smoke at Liberty Lock and Storage, a commercial storage facility on North Eagle Avenue.
Upon arrival, fire units saw heavy smoke and an active fire within the building. The fire was contained and suppressed by 4:02 am. No injuries were reported. After the fire was suppressed, fire marshal Wes Smith discovered a partially melted gas can. Det. Lewis collected this as evidence and processed it accordingly. Surveillance footage from the gas station was also collected and processed accordingly. Upon interviewing the owner, Walt Dorsey, he reported seeing a red gas can in the unit of former renter Alina Grant, reporting that he had a "bad feeling." Det. Lewis conducted interviews with several current renters who expressed frustration about missing items from their units.

PLAINTIFF'S EXHIBIT A

Gambrell Times

Volume 19, Issue 5 2024

BURNED BY THE SYSTEM: HOW A PROSECUTOR'S AI DECEPTION SPARKED A WRONGFUL CONVICTION



Original footage still

Fabricated footage still

A Dream Destroyed

We sat down with Alina Grant, the 24-year-old firefighter who was accused and convicted of first-degree arson in a prosecution led by Assistant District Attorney Davis Rosen.

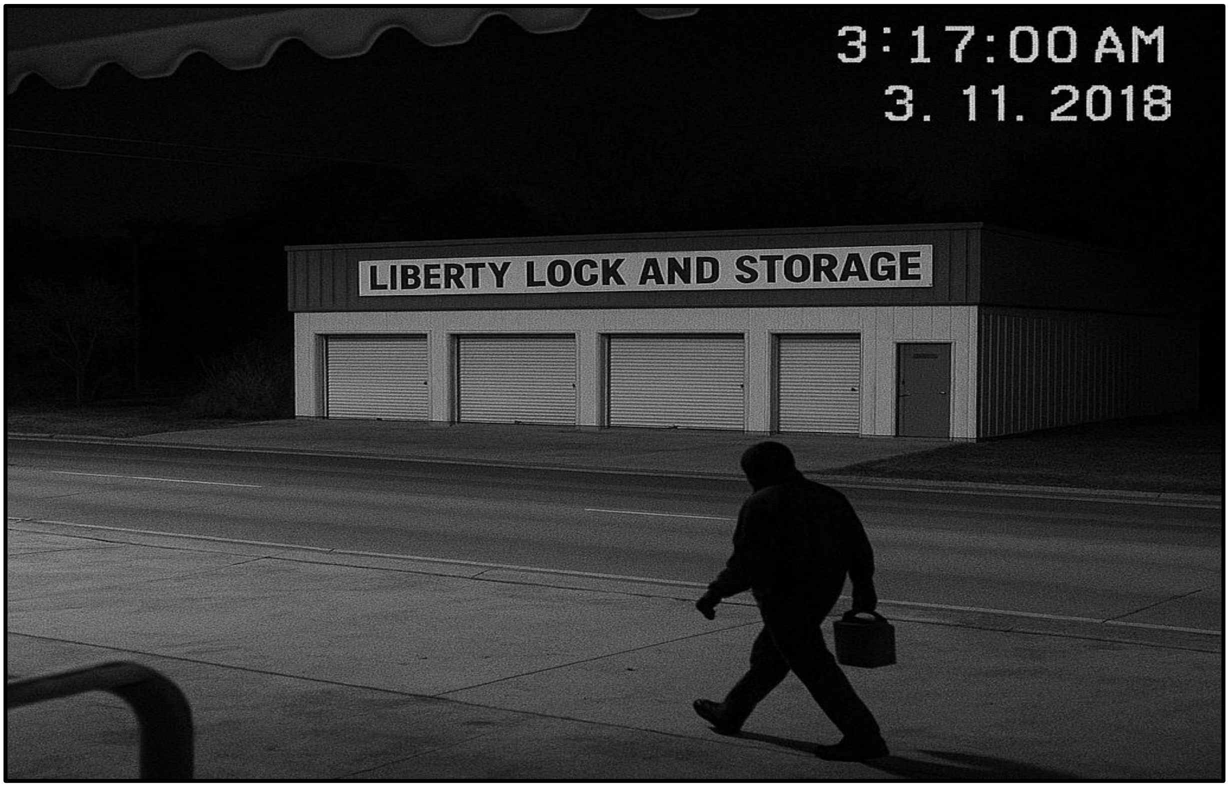
"It's been a nightmare... my dream was to be a firefighter," Grant said. She told us how her lifelong ambition was cut short by what she now knows was a wrongful conviction. At the heart of the case was surveillance footage introduced by ADA Rosen. Surveillance footage that was later confirmed to be altered using artificial intelligence to make the figure in the video more closely resemble Grant. When asked about the alleged fabrication, Rosen responded: "Even if the video was altered, there was still enough evidence to convict her." One of the key pieces of physical evidence was a red gas can with fingerprints that could not conclusively rule out as a match for Grant.

According to Grant, that gas can was identical to the one that she stored in her personal unit at Liberty Lock and Storage: "I used it weeks earlier to fuel my lawn equipment and just dropped it off in storage. I had no idea it would somehow end up in a crime scene." Said Grant. Since her release, Grant has been unable to return to work in any first responder role. She came forward not only to reclaim her story, but to raise awareness for others who may have also been wrongfully convicted under Rosen's tenure. Since the launch of our investigation, more than a dozen cases have surfaced in which Rosen is suspected of evidence fabrication. Though he quietly retired in 2020, the legacy of his prosecutions continues to unravel. Following our initial report, we received letters from multiple individuals who believe they, too, may have been convicted based on falsified evidence ... [con't on page 11]

PLAINTIFF'S EXHIBIT B

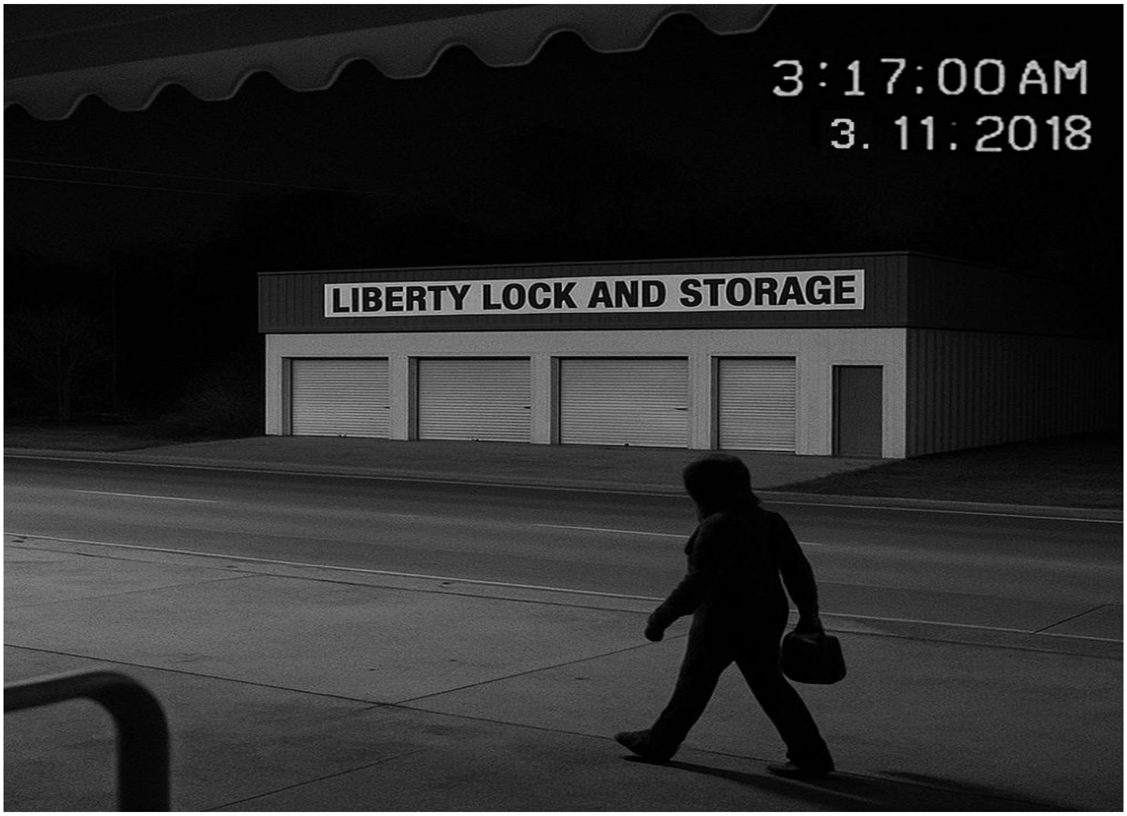
PLAINTIFF'S EXHIBIT C

Original Video Still



PLAINTIFF’S
EXHIBIT
D

Fabricated Video Still



PLAINTIFF'S
EXHIBIT
E

Art. 11.15. EMORY POST-CONVICTION RELIEF PROCEDURE

Sec. 1. This article establishes the procedures for an application for a writ of habeas corpus in a felony or misdemeanor case in which the applicant seeks relief from an order or a judgment placing the applicant in the custody of this State.

Sec. 2. (a) An application for a writ of habeas corpus under this article must be filed with the clerk of the court in which custody was imposed.

(b) At the time the application is filed, the applicant must be, or have been, in custody, and the application must challenge the legal validity of:

(1) the conviction for which or order in which custody was imposed; or **(2)** the conditions of custody.

[. . . . .]

Sec. 8. If the application is denied in whole or part, the applicant may appeal. If the application is granted in whole or part, the state may appeal.

Sec. 9. (a) If a subsequent application for a writ of habeas corpus is filed after final disposition of an initial application under this article, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that the current claims and issues have not been and could not have been presented previously in an original application or in a previously considered application filed under this article because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application.

(b) For purposes of Subsection (a), a legal basis of a claim is unavailable on or before a date described by that subsection if the legal basis was not recognized by and could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date.

(c) For purposes of Subsection (a), a factual basis of a claim is unavailable on or before a date described by that subsection if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date.

PLAINTIFF'S EXHIBIT F

Dooley Code Ann. § 11-37-1. AVAILABILITY OF RELIEF

The writ of habeas corpus shall extend to all cases of illegal confinement or detention by which any person, at the time of filing, is deprived of his liberty, or by which the rightful custody of any person is withheld from the person entitled thereto, except in the cases expressly excepted.

PLAINTIFF'S EXHIBIT G

EMORY CONST. Art. 4, § 10. GOVERNOR – PARDONS

The Governor may grant pardons, after conviction, for all offenses on such terms as they think proper. A pardon granted under this Section shall cause the acquittal and authorize the expungement of the conviction for which the recipient is pardoned. The manner of applying therefore may be regulated by law.

PLAINTIFF'S
EXHIBIT
H