

No. _____

CAPITAL CASE

IN THE SUPREME COURT OF THE UNITED STATES

JERRY SCOTT HEIDLER,

Petitioner,

-v-

Christopher Carr, Tyrone Oliver,
Jacob Beasley, and Tripp Fitzner,

,

Respondents.

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

Zack Greenamyre (Ga. 293002)
Mitchell, Shapiro, Greenamyre
And Funt LLP
881 Piedmont Avenue
Atlanta, GA
Phone: (404) 812-4747

Anna Arceneaux* (Ga. 401554)
Georgia Resource Center
104 Marietta Street NW, Suite 260
Atlanta, Georgia 30303
Phone: 404-222-9202

COUNSEL FOR PETITIONER,
JERRY SCOTT HEIDLER

*Counsel of record

TABLE OF CONTENTS

Appendix A.....	1a
-----------------	----

Heidler v. Carr, et al., No. 24CV8914 (DeKalb Cty. Sup. Ct. Feb. 24, 2026)

Appendix B.....	28a
-----------------	-----

Heidler v. Carr, et al., No. S26D1085 (Ga. Apr. 16, 2026)

Appendix C.....	29a
-----------------	-----

Hearing Transcript, *Heidler v. Carr, et al.*, No. 24CV8914 (DeKalb. Cty. Sup. Ct. Jan. 28, 2026)

**SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA**

JERRY SCOTT HEIDLER,	)	
Plaintiff,	)	
	)	
vs.	)	Civil Action No.
	)	24CV8914
CHRISTOPHER CARR, Attorney	)	
General for the State of Georgia, in	)	
his individual and official capacity;	)	
	)	
TRIPP FITZNER, District Attorney,	)	
Middle Judicial Circuit, in his	)	
individual and official capacity;	)	
	)	
SHAWN EMMONS, Warden,	)	
Georgia Diagnostic and Classification	)	
Prison, in his individual and	)	
official capacity; and	)	
	)	
TYRONE OLIVER, Commissioner	)	
Georgia Department of Corrections,	)	
in his individual and official capacity;	)	
	)	
Defendants.	)	

ORDER

Plaintiff Jerry Scott Heidler, through next friend Eleanor Hopkins, filed a Complaint for Declaratory and Injunctive Relief and a Motion for Temporary Restraining Order and Interlocutory Injunction challenging the constitutionality of OCGA § 17-10-60 et. seq., which sets forth the procedures for challenging competency to be executed. Specifically, Heidler argues that the timeframe given in OCGA § 17-10-67 for filing an application challenging competency to be executed, read

in conjunction with O.C.G.A. § 17-10-40 (b), is too short to accommodate his constitutional rights. Based upon the Court's review of the pleadings and the arguments of counsel, the Court finds it lacks subject matter jurisdiction and Heidler has failed to state a claim upon which relief can be granted, therefore, the Court DISMISSES the complaint and motion for interlocutory injunction.

STATEMENT OF THE CASE

A. Trial, Direct Appeal, and Collateral Proceedings

Heidler was convicted by a jury of four counts of malice murder, one count of kidnapping with bodily injury, one count of aggravated sodomy, one count of aggravated child molestation, one count of child molestation, one count of burglary, and two counts of kidnapping. *Heidler v. State*, 273 Ga. 54, 54 n.1 (2000). On September 3, 1999, Heidler was sentenced to death for each count of malice murder. *Id.* Heidler was also sentenced to life for kidnapping with bodily injury, life for aggravated sodomy, thirty years for aggravated child molestation, twenty years for child molestation, twenty years for burglary, and twenty years for kidnapping, all to be served consecutively. *Id.*

The Georgia Supreme Court generally affirmed Heidler's convictions and death sentences on October 2, 2000 (reversing only the child molestation count because it merged into the aggravated sodomy conviction). *Heidler*, 273 Ga. 54.

For the next twenty years, Heidler challenged his convictions and sentences through habeas proceedings in state and federal court, which

resulted in a denial of relief in all courts. *See Heidler v. Warden, GDCP*, No. 20-13752, 2023 U.S. App. LEXIS 19941 (11th Cir. Aug. 2, 2023), *cert. denied Heidler v. Emmons*, 144 S. Ct. 2565 (2024).

B. Current Proceedings

On September 26, 2024, Heidler's next friend Eleanor Hopkins filed a complaint and motion for a temporary restraining order and interlocutory injunction. Ms. Hopkins alleged that Heidler was incompetent, which allowed her to bring the action on Heidler's behalf. There was no competency evaluation provided in support of Ms. Hopkins's allegation of incompetence. *See Complaint*. Defendants filed a motion challenging standing on two grounds: 1) that next friend Eleanor Hopkins's lacked standing to bring the action on Heidler's behalf because he had not shown he was incompetent; and 2) that Heidler lacked standing to bring his challenge to OCGA § 17-10-60 et. seq., because his threat of injury was "conjectural or hypothetical." Defendants' Motion Challenging Standing, pp. 2–3. Defendants requested that Heidler be evaluated for competency for the next friend to bring the current action and competency for execution. *Id.* at 10–12.

On November 18, 2024, this Court held a hearing on Heidler's motion for a temporary restraining order and interlocutory injunction and Defendants' motion challenging standing. Regarding the challenge to standing, counsel for Heidler objected to Defendants' request for evaluation stating it was too "intrusive," and that the evaluation would give Defendants "multiple bites at the apple." Motions Hearing

Transcript (11-18-24) at 63:6; 64:1; 70:12–13. Counsel for Heidler then chose to remove next friend Eleanor Hopkins and agreed for Heidler “to proceed sui juris.” *Id.* at 73:7–9; Plaintiff’s Response in Opposition to Defendants’ Motion Challenging Standing, p. 3, ¶ 3. Defendants agreed to the substitution, which nullified the issue for an evaluation of Heidler’s competency regarding Ms. Hopkins’s right to bring this action. *Id.* at 73:7–9. At the conclusion of the hearing, the Court requested proposed orders from the parties on the motions and subsequently requested that the parties address “whether a Declaratory Judgment action is the proper vehicle to bring [Heidler’s] claims forward.”

After the hearing, Heidler filed a Response in Opposition to Defendants’ Motion Challenging Plaintiff’s Standing and Request for Compelled Mental Evaluation. On the same day, Defendants filed their Answer and Defenses to Plaintiff’s Complaint. Three months later, Defendants filed a motion to dismiss Heidler’s complaint for declaratory and injunctive relief for lack of subject matter jurisdiction and for failure to state a claim under O.C.G.A. § 9-11-12(b)(1), (6). Additionally, Defendants withdrew their motion for Heidler to be evaluated for competency to be executed. *See* Defendants’ Motion to Dismiss, p. 8. Heidler filed a Brief in Opposition to Defendants’ Motion to Dismiss. The Court held a hearing on Defendants’ motion to dismiss on January 28, 2026, and GRANTED Defendants’ Motion to Dismiss for

lack of subject matter jurisdiction and Heidler's failure to state a claim upon which relief can be granted.

C. Heidler's Competency Claims

In support of Heidler's claim of incompetency to bring the current action, Ms. Hopkins attached 11,000 pages of medical records to the complaint and a statement by a licensed clinical social worker stating that the paragraph in the complaint which alleged Heidler was incompetent was correct. *See* Complaint, Pl. Ex. A; Complaint, Pl. Ex. C, p. 3, ¶ 7. The complaint and motion for injunction references portions of Heidler's mental health records, in support of his allegations of long-standing severe mental health issues and incompetency, but there was no determination of incompetency referenced or attached to Heidler's complaint or motion for injunction from a mental health expert. *See* Complaint, pp. 9–17, ¶¶ 8–23; Motion for Injunction, pp. 3–6.

Although Defendants do not dispute that Heidler has long-standing serious mental health issues, Defendants pointed out that his mental health was evaluated prior to trial and all the experts found him to be competent, and the trial court ultimately found him to be competent to stand trial. *See* Defendants' Motion Challenging Standing, Def. Att. A; Def. Att. B at 4–6, 9, 11, 15, Def. Att. C. Heidler did not raise an issue regarding his competency on direct appeal. *See Heidler v. State*, 273 Ga. 54 (2000).

Thereafter, in Heidler’s second amended state habeas petition he raised a claim that he was “incompetent to be executed” and he was “incompetent to proceed in the instant case.” *See* Second Amendment to Petition for Writ of Habeas Corpus, *Heidler v. Terry*, No. 01-v-844 (Butts Cty., Jan. 6, 2006) at 60–63. However, in his post-hearing briefing, Heidler did not argue that he was incompetent but that the law had evolved to preclude the severely mentally ill from a death sentence under the Eighth Amendment. *See* Petitioner’s Post-Hearing Brief, *Heidler v. Terry*, No. 01-v-844 (Butts Cty., Jan. 25, 2007), pp. 283–308. The state habeas court found that while Heidler “ha[d] been significantly impaired by his mental illness” “for “the majority of [his] life,” Heidler’s Eighth Amendment claim that the severely mentally ill should be exempt from a death sentence, as presented in his state habeas post-hearing brief and presented in Claims I and II of his second amended state habeas petition, was without merit. *See* Final Order, *Heidler v. Terry*, No. 01-v-844 (Butts Cty., Jan. 25, 2007), pp. 9–2. The court found his claim that he was “currently incompetent to be executed” was not “ripe for review” and that his claim of incompetence “to proceed in his current state habeas action” was non-cognizable. *Id.* at 20.

In federal habeas, Heidler alleged that he was “incurably incompetent” to be executed and requested an evidentiary hearing to prove his incompetence; however, there was no competency mental health evaluation provided in support of this allegation. *See* Complaint,

Pl. Att. B. The federal habeas court found his claim was “not ripe” and denied the request for a hearing. *See Heidler v. Chatman*, Southern District of Georgia, No. 6:11-cv-00109, ECF Doc. 86 at 10.

D. Relevant Statutes

The statutes relevant to this Court’s determination are O.C.G.A. § 17-10-40(b) and O.C.G.A. §§ 17-10-60 thru 17-10-68. The most pertinent to Heidler’s claims are the following:

O.C.G.A. § 17-10-40. Change of time period for execution when time period set for execution has passed; recordation on court minutes; length of and time limitation for new time period for execution; setting day and time for execution:

(b) The new time period for the execution shall be seven days in duration and shall commence at noon on a specified date and shall end at noon on a specified date. The new time period for the execution fixed by the judge shall commence not less than ten nor more than 20 days from the date of the order.

O.C.G.A. § 17-10-61. No execution upon determination of mental incompetency to be executed:

A person under sentence of death shall not be executed when it is determined under the provisions of this article that the person is mentally incompetent to be executed as defined in Code Section 17-10-60.

O.C.G.A. § 17-10-63. Filing of application; contents:

(a) An application brought under this article must be filed in the superior court of the county in which the applicant is being detained. The named respondent shall be the person having actual custody of the applicant.

O.C.G.A. § 17-10-65. Answer by respondent:

As soon as possible after the filing and docketing of the application under this article, the respondent shall answer the application. *The court may schedule a case for a hearing prior to the filing of responsive pleadings but, in any event, shall schedule the case for a hearing as soon as possible so that the proceedings may move expeditiously.*

(Emphasis added).

O.C.G.A. § 17-10-66. Examination of applicant:

(b) Simultaneously with the filing of the application, the applicant, if he or she wishes the court to consider any request for appointment of an expert, shall file such a request and shall state specific facts in support of that request so that the court may determine if the applicant's mental competency to be executed is in fact a significant issue. The applicant shall further submit with the motion a specific statement as to the particular expert requested, the nature of the examination to be conducted, the time period within which an examination can be conducted, and an estimate of the expenses to be incurred.

O.C.G.A. § 17-10-67. When application to be filed:

An application under this article shall not be filed until completion of direct appeal and until an order has been signed by a judge of the trial court setting a time period for the execution.

O.C.G.A. § 17-10-68. Proof; disposition:

(d) After reviewing the pleadings and evidence offered at the hearing, the judge of the superior court hearing the case shall make written findings of fact and conclusions of law upon which the judgment is based. The findings of fact and conclusions of law shall be recorded as part of the record in the case.

(e) If the court finds in favor of the applicant by finding that the applicant has proven his or her mental incompetence to be executed by a preponderance of the evidence, the court shall

enter an appropriate order with respect to any scheduled execution time period and shall enter such supplementary orders as necessary and proper. If the court denies the application, the court shall direct that immediate telephonic notification be given to the parties *and any stay presently entered under this article shall be dissolved instantly*.

(Emphasis added).

CONCLUSIONS OF LAW

I. The Court lacks subject matter jurisdiction under O.C.G.A. § 9-11-12(b)(1).

“Before reaching the merits of any case, a court must make a threshold determination as to whether the case at bar is properly before it—that is, whether one or several of the doctrines of jurisdiction and justiciability preclude judicial review.” *City of Atlanta v. Atlanta Indep. Sch. Sys.*, 307 Ga. 877, 879 (2020). “Under Georgia law, a trial court lacks subject matter jurisdiction to address the merits of a constitutional challenge to a statute brought by a party who does not have standing to bring that challenge.” *Black Voters Matter Fund, Inc. et al. v. Kemp et al.*, 313 Ga. 375, 380 (2022) (citing *Parker v. Leeuwenburg*, 300 Ga. 789, 790 (2017)). Subject matter jurisdiction “cannot be waived and may be raised at any time either in the trial court, in a collateral attack on a judgment, or in an appeal.” *Abushmais v. Erby*, 282 Ga. 619, 622 (2007) (citation and punctuation omitted.).

The Declaratory Judgment Act, OCGA § 9-4-1 et seq., which governs this proceeding, requires “an actual, justiciable controversy ... antecedent to relief.” *Willis v. Cheeley*, 363 Ga. App. 341, 342–43 (2022). This requirement is born by the plaintiff who must show: “(1) an

injury in fact, (2) a causal connection between the injury and the alleged wrong, and (3) the likelihood that the injury will be redressed with a favorable decision.” *Black Voters Matter Fund, Inc.*, 313 Ga. at 382. “An ‘injury in fact’ is one that is both ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.’” *Id.* (quoting *Center for a Sustainable Coast, Inc. v. Turner*, 324 Ga. App. 762, 764 (2013). *See also Mullin v. Roy*, 287 Ga. 810, 812 (2010) (“A controversy is justiciable when it is definite and concrete, rather than being hypothetical, abstract, academic, or moot.”) (citation and punctuation omitted). Additionally, a “[d]eclaratory judgment will not be rendered based on a possible or probable [future] contingency.” *Baker v. City of Marietta*, 271 Ga. 210, 215 (1999) (alteration in original) (quoting *Atlanta Cas. Co. v. Fountain*, 262 Ga. 16, 18 (1992)). And the “Declaratory Judgment Act makes no provision for a judgment that would be ‘advisory.’” *Id.* at 214 (quoting *King v. Peagler*, 227 Ga. 29, 32 (1970)).

B. Heidler’s Claims

Heidler presents three claims in his complaint: (1) “The Time Constraints Imposed by O.C.G.A. §§ 17-10-67 and 17-10-40 (b) Violate Mr. Heidler’s Right to Due Process Under the Fourteenth Amendment to the United States Constitution and Ga. Const. Art. I, § I, Para. I”; (2) “The Time Constraints Imposed by O.C.G.A. §§ 17-10-67 and 17-10-40 Violate Mr. Heidler’s Right to Be Free from Cruel and Unusual Punishment Under the Eighth and Fourteenth Amendments to the

United States Constitution and Ga. Const. Art. I, § I, Para. XVII”; and (3) “The Time Constraints Imposed by O.C.G.A. §§ 17-10-67 and 17-10-40 Deny Mr. Heidler Adequate, Effective, and Meaningful Access to the Courts Under the First and Fourteenth Amendments to the United States Constitution and Ga. Const. Art. I, § I, Para. I of the Georgia Constitution.” Complaint at 29, 46, 50. Specifically, Heidler argues that under O.C.G.A. §§ 17-10-67 and 17-10-40 (b), the applicant only has 10 to 20 days to litigate a claim of alleged incompetency because the start of an execution window cannot be “less than ten nor more than 20 days from the date of the order” *and* an application cannot be filed until “an order has been signed by a judge of the trial court setting a time period for the execution.” O.C.G.A. § 17-10-67; O.C.G.A. § 17-10-40 (b). This timeframe, according to Heidler, is in violation of his state and federal constitutional rights. Heidler argues that he only has to show “uncertainty as to his legal rights” in order to demonstrate a “justiciable controversy.” Motions Hearing Transcript (11-18-24) at 98:1–2; *see also* Plaintiff’s Brief in Opposition to Defendants’ Motion to Dismiss at 3. However, the Court finds that because Heidler’s “uncertainty” is based on conjecture and seeks an advisory opinion, he has not shown a “justiciable controversy.”

Reviewing the relevant statutes as a whole reveals several important points in support of the Court’s decision. First, the application must “give the date of the signing of the order and the dates of the designated time period for execution.” O.C.G.A. § 17-10-63(b).

Second, the application “shall clearly set forth alleged facts in support of the assertion that the applicant is presently mentally incompetent to be executed” and “shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached.” *Id.* Third, “[s]imultaneously with the filing of the application, the applicant, if he or she wishes the court to consider any request for appointment of an expert, shall file such a request and shall state specific facts in support of that request.” *Id.* Additionally, the applicant must “submit with the motion a specific statement as to the particular expert requested, the nature of the examination to be conducted, *the time period within which an examination can be conducted*, and an estimate of the expenses to be incurred.” *Id.* (emphasis added). Fourth, the trial court must hold a hearing, and “[a]fter reviewing the pleadings and evidence offered at the hearing, the judge ...shall make written findings of fact and conclusions of law upon which the judgment is based.” O.C.G.A. § 17-10-68(d).

Although, as pointed out by Heidler, the relevant statutes encourage the proceedings to move “expeditiously,” (*see* Complaint, p. 20 at ¶26) it does not mandate a specific timeframe for the entire course of the proceedings. *See, e.g.*, O.C.G.A. § 17-10-65 (“The court may schedule a case for a hearing prior to the filing of responsive pleadings but, in any event, *shall schedule the case for a hearing as soon as possible so that the proceedings may move expeditiously.*”) (emphasis added). Most importantly, the statute allows for a stay of execution

prior to the trial court ruling on the application. *See* O.C.G.A. § 17-10-68 (e) (“If the court denies the application, the court shall direct that immediate telephonic notification be given to the parties and *any stay presently entered under this article shall be dissolved instante*.”) (emphasis added).

Heidler claims that “Georgia’s criteria for granting a stay of execution are less than clear” where there has not been a hearing and will be difficult to obtain if they have not had time to conduct discovery. Complaint, p. 32, n. 24; Plaintiff’s Brief in Opposition to Defendant’s Motion to Dismiss at 15. Continuing in this vein, Heidler argues that whether a stay of execution will be granted is merely “conjectural.” Plaintiff’s Brief in Opposition to Defendant’s Motion to Dismiss at 10. Whether the motion-for-stay-of-execution standard is clear or unclear, a motion for stay of execution, which the applicant could never be precluded from filing, would have to be considered by the trial court. Moreover, the statute clearly states that the trial court must hold a hearing, and there is nothing in the statute preventing the applicant from raising a stay of execution at the hearing. *See* O.C.G.A. § 17-10-68 (e) (the court “*shall* schedule the case for a hearing”) (emphasis added). And whether obtaining a stay is “conjectural” only proves that Heidler’s alleged injury is hypothetical. Thus, the Court can discern no legal impediment, at least not one created by the relevant statutes, to an applicant requesting a stay of execution based upon his claim of incompetency to be executed.

Currently, Heidler is not under an execution warrant, and based on the record before the Court, Heidler has not been found to be incompetent by a qualified mental health expert. However, Defendants do not dispute that an execution warrant will be sought, and Heidler has stated that he will challenge his competency to be executed. Still any decision by the Court at this juncture would be merely advisory as Heidler's rights have not been violated and a future violation would be based on conjecture that the trial court will not allow itself enough time to adequately consider Heidler's claim. As shown above, O.C.G.A. § 17-10-68 (e) acknowledges that a stay of execution may be entered prior to the trial court's competency decision. Additionally, O.C.G.A. § 17-10-63 (b) requires an applicant to inform the trial court, when requesting a mental examination, "the time period within which an examination can be conducted" and does not mandate a specific timeframe for the examination. In fact, nothing in the relevant statutes mandates that the trial court must conduct the proceedings within the 10 to 20 days of the filing of the application and the execution date. The statute simply encourages "expediency," which Heidler has not pled in and of itself is unconstitutional.

This leaves the Court with no justiciable controversy because, for there to be an injury in fact, the Court would have to hypothesize that the trial court would choose not to provide an applicant enough time to litigate a claim of incompetency to be executed or would not grant a necessary stay of execution or would not properly consider the claim

due to alleged unconstitutional time constraints. *See Baker*, 271 Ga. at 215 (1999) (“Declaratory judgment will not be rendered based on a possible or probable [future] contingency.”) (alteration in original) (quoting *Atlanta Cas. Co.*, 262 Ga. at 18); *see generally Parker v. Leeuwenburg*, 300 Ga. 789, 793 (2017) (determining that because the statute in question did “not regulate Appellants’ conduct” to obtain a peace bond and there was not an allegation that a “judicial officer” “would exercise such discretion” to allow initiation of the bond, Appellants had only shown a “hypothetical concern” regarding the statute and “lack[ed] lack standing to challenge it”). The mere existence of the statute, in this case, does not create a constitutional violation because O.C.G.A. § 17-10-67 only designates when the action is initiated, not when it must be completed. *See generally, Doe v. Broady*, 369 Ga. App. 493, 497 (2023) (overruled on other grounds by *Wasserman v. Franklin Cty.*, 320 Ga. 624, 649 n. 14 (2025) (holding that merely because “[a]t some undetermined point in the future the plaintiffs might become pregnant and want to obtain an abortion, and the LIFE Act might prevent them from doing so, [] those outcomes are a matter of speculation at this point”); *Marietta Props., LLC v. City of Marietta*, 319 Ga. App. 184, 187 (2012) (“Marietta Properties’ ‘constitutional rights are not being violated merely by the existence of a certain zoning classification. Those rights would only be violated if the [City] used the new zoning classification to deprive [Marietta Properties] of vested property rights.”) (alteration in original) (quoting

Cooper v. Unified Gov't of Athens-Clarke Cty., 277 Ga. 360, 362 (2003)).

The Court simply “has no province to determine whether or not a statute, in the abstract, is valid.” *Fourth St. Baptist Church v. Bd. of Registrars*, 253 Ga. 368, 369 (1984).

Therefore, because the Court would be merely entering an advisory opinion at this time, the Court finds it does not have subject matter jurisdiction under O.C.G.A. § 9-11-12(b)(1) and DISMISSES the Complaint. *See Baker*, 271 Ga. at 214 (“Declaratory Judgment Act makes no provision for a judgment that would be ‘advisory.’”) ((quoting *King*, 227 Ga. at 32).

II. Heidler fails to state a claim upon which relief can be granted.

For much the same reason this Court also lacks subject matter jurisdiction, because Heidler has failed to state a claim upon which relief may be granted because his arguments are based on unfounded conjecture. A motion to dismiss for failure to state a claim should be granted “if the allegations of the complaint, construed most favorably to the plaintiff, disclose with certainty that the plaintiff would not be entitled to relief under any state of provable facts.” *Ewing v. City of Atlanta*, 281 Ga. 652, 653 (2007). Here, under binding statutory construction law, Heidler’s constitutional challenges could never garner relief in this action.

Heidler argues that he is challenging O.C.G.A. § 17-10-60 et seq. read in conjunction with O.C.G.A. § 17-10-40 (b) both facially and as-

applied.¹ the Heidler’s claims challenge the facial validity of Georgia statutes, “A facial challenge ‘is, of course, the most difficult challenge to mount successfully.’” *Women’s Surgical Ctr., LLC v. Berry*, 302 Ga. 349, 352-353 (2017) (quoting *Bello v. State*, 300 Ga. 682, 685-686 (2017) and *United States v. Salerno*, 481 U. S. 739, 745 (1987)). When addressing such challenges, Georgia courts recognize that

all presumptions are in favor of the constitutionality of an [A]ct of the legislature and that before an Act of the legislature can be declared unconstitutional, the conflict between it and the fundamental law must be clear and palpable and th[e] [C]ourt must be clearly satisfied of its unconstitutionality. Moreover, because statutes are presumed to be constitutional until the contrary appears, . . . the burden is on the party alleging a statute to be unconstitutional to prove it.

JIG Real Estate, LLC v. Countrywide Home Loans, Inc., 289 Ga. 488, 490 (2011) (quoting *Dev. Auth. of DeKalb County v. State of Ga.*, 286 Ga. 36, 38 (2009)). Furthermore,

outside the First Amendment overbreadth context, a plaintiff can succeed in a facial challenge only by establishing that no set of circumstances exists under which the statute would be valid, i.e., that the law is unconstitutional in all of its

¹ In Heidler’s complaint he did not state whether he was asserting a facial or as-applied challenge. Defendants argued in their motion to dismiss that Heidler had only asserted a facial challenge to the statutes at issue. Motion to Dismiss, p. 15. In Heidler’s brief in opposition to Defendants’ motion to dismiss, in a footnote Heidler argued that whether his claims were “construed as a facial or an as-applied challenge to Georgia’s procedures, dismissal [was] inappropriate.” Plaintiff’s Brief in Opposition, p. 27, n. 19. Therefore, the Court has considered it under both constructions.

applications, or at least that the statute lacks a plainly legitimate sweep.

Blevins v. Dade County Bd. of Tax Assessors, 288 Ga. 113, 118 (2010).

A. Due Process and Eighth Amendment Claims (Counts One and Two)

Heidler argues that under O.C.G.A. § 17-10-67 et seq. and 17-10-40 (b), competency to be executed must be litigated at “breakneck speed,” which violates his rights to due process and to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendment to the United States Constitution and Ga. Const. Art. I, § I, Para. I & XVII. Complaint, p. 32, ¶ 38; *see also id.* at 47–48, ¶ 55. However, a reasonable construction of O.C.G.A. § 17-10-60 et seq. and O.C.G.A. § 17-10-40 (b) shows that no such mandate exists, and it is contrary to binding law to read the statutes in a manner that could create a constitutional violation where another more reasonable construction can be made.

Two seminal cases, *Ford v. Wainwright*, 477 U.S. 399, 409–10, 418 (1986) and *Panetti v. Quarterman*, 551 U.S. 930, 934–35 (2007), set the standard for reviewing whether a state’s competency to be executed procedures pass constitutional muster. The *Ford* Court held that “the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane” and that the “factfinding procedure” must be “‘adequate to afford a full and fair hearing’ on the critical issue” of competency. *Ford*, 477 U.S. at 409–10. The procedures for determining competency to be executed, which the *Ford* court

determined to be unconstitutional, involved a determination made solely by the Governor of Florida. *Id.* at 412. The inmate was examined by three court appointed psychiatrists “at the same time.” *Id.* A report from the psychiatrists was provided to the Governor who determined competency. *Id.* “The procedure [was] conducted wholly within the executive branch, *ex parte*, and provide[d] the exclusive means for determining sanity.” *Id.* The Court found these procedures to be unconstitutional. *Id.* at 416.

Years later, in *Panetti*, the Court reiterated that “[u]nder *Ford*, once a prisoner makes the requisite preliminary showing that his current mental state would bar his execution, the Eighth Amendment, applicable to the States under the Due Process Clause of the Fourteenth Amendment, entitles him to an adjudication to determine his condition.” *Panetti*, 551 U.S. at 934–35. And “[t]hese determinations are governed by the substantive federal baseline for competency set down in *Ford*.” *Id.* The procedures used in *Panetti* that were found lacking were created by errors made by the trial court tasked with determining the inmate’s competency to be executed. The trial court “appoint[ed] the mental health expert without input from the parties,” the experts found *Panetti* to be competent, and the trial court sent a letter to the parties stating this fact. *Id.* at 939–41. The trial court then “released a short order identifying the report submitted by the court-appointed experts and explaining that ‘[b]ased on the aforesaid doctors’ reports, the Court finds that [petitioner] has failed to show, by a

preponderance of the evidence, that he is incompetent to be executed.” *Id.* at 941 (alteration in original). The case was closed over many objections by Panetti, which included a request for an independent evaluation and a hearing. *Id.* at 940–41. The Court held the trial court had not meet the “basic requirements” of *Ford*, because Panetti had not been given the “opportunity to submit ‘evidence and argument from the prisoner’s counsel, including expert psychiatric evidence that may differ from the State’s own psychiatric examination.’”² *Id.* at 950 (quoting *Ford*, *supra*, at 427).

While Heidler discusses at length the due process and Eighth Amendment issues set out in *Ford* and *Panetti*, he only alleges constitutional violations in Georgia’s statutory framework regarding the timeframe for adjudicating a claim of incompetency.³ See Complaint, pp. 29-49, ¶¶ 36–58. In evaluating Heidler’s claim, as stated above, the Court must consider any reasonable construction of the statute. See *Barnhill*, 315 Ga. at 311 (“every reasonable construction must be resorted to [] in order to save a statute from unconstitutionality.” (alteration in original) (quoting *In the Interest of*

² The Court also held that “[t]here [was] also a strong argument the court violated state law by failing to provide a competency hearing.” *Id.* (citing Tex. Code Crim. Proc. Ann., Art. 46.05(k)).

³ Heidler also compares Georgia’s timeframe between the entry of execution warrant and the commencement of the execution seven-day window with the timeframes from other states. See, e.g., Complaint, p. 40, ¶ 47. However, Heidler does not argue, or cite to any precedent, that this timeframe by itself is a violation of his due process or Eighth Amendment rights.

M. F., 298 Ga. at 146). As previously stated, while O.C.G.A. § 17-10-67 only authorizes an application to be filed after the entry of an execution order, it does not mandate that competency must be adjudicated within a specific timeframe nor does it prohibit the entry of a stay of execution. In fact, the next section, O.C.G.A. § 17-10-68 (e), acknowledges that a stay could have been entered prior to the competency determination. O.C.G.A. § 17-10-68 (e) (“If the court denies the application, the court shall direct that immediate telephonic notification be given to the parties and any stay presently entered under this article shall be dissolved *instante*.”).

Nothing in *Ford* and *Panetti* suggests Georgia’s competency to be executed procedures are unconstitutional under the “reasonable construction” shown above. That other states may allow for filing a competency challenge prior to the entry of an order or provide for an automatic stay does not alter the Court’s analysis. The *Panetti* Court reiterated that *Ford* “did not set forth ‘the precise limits that due process imposes in this area.’” *Panetti*, 551 U.S. at 949–50 (quoting *Ford* 477 U.S. at 427). And that “a State ‘should have substantial leeway to determine what process best balances the various interests at stake’ once it has met the ‘basic requirements’ required by due process.” *Id.* (quoting *Ford*, *supra*). “These basic requirements include an opportunity to submit ‘evidence and argument from the prisoner’s counsel, including expert psychiatric evidence that may differ from the State’s own psychiatric examination.’” *Id.* (quoting *Ford*, *supra*). A

reasonable construction of the statutes shows they meet these “basic requirements.”

Because the Court cannot read the statutes in the unconstitutional manner Heidler advocates, the Court finds he has failed to state a claim upon which relief may be granted regarding his facial challenge to O.C.G.A. § 17-10-60 et seq. and O.C.G.A. § 17-10-40 (b) in Counts One and Two.

Turning to Heidler’s as-applied challenge, he has also failed to state a claim. Even with as-applied challenges, “a presumption that a statute is constitutional” applies. *Chatham Cty. v. Massey*, 299 Ga. 595, 597 (2016) (citing *Judicial Council of Ga. v. Brown & Gallo, LLC*, 288 Ga. 294, 297 (2010)). For largely the same reasons that his facial challenge fails to state a claim, so does Heidler’s as-applied challenge. While the Court recognizes Heidler’s allegations and evidence regarding his long-standing mental health issues and lengthy records in support, the statutes in question do not preclude a court from taking the necessary time to consider a claim of incompetency to be executed. Thus, Heidler fails to state a claim under his as-applied challenge.

Accordingly, the Court DISMISSES Claims One and Two for failure to state a claim.

B. Access to Courts (Count Three)

Heidler also argues the “sever time constraints” allegedly created by the relevant statutes infringes on his right to access the courts in violation of his “First and Fourteenth Amendments to the United

States Constitution and Ga. Const. Art. I, § I, Paras. I and XII of the Georgia Constitution.” Complaint, p. 50, 52, ¶ 61. As with his other claims, Heidler’s argument is premised on an improperly cabined reading of O.C.G.A. § 17-10-60 et seq. and O.C.G.A. § 17-10-40 (b).

Starting with Heidler’s state constitutional right of access to court, as recently reiterated by the Georgia Supreme Court, neither “Article I, Section I, Paragraph XII of the Georgia Constitution” nor “any other provision of the Georgia Constitution ...afford[s] a right of access to the courts.” *Sumrall v. State*, 320 Ga. 617, 622 (2024); *see also Smith v. Baptiste*, 287 Ga. 23, 24-25 (2010) (holding that the Georgia Constitution lacks any express provision creating a right to access to the courts). Therefore, Heidler’s claim of a state constitutional right of access to the courts is precluded under the law and his argument fails to state a claim upon which relief may be granted

Heidler’s claim that O.C.G.A. § 17-10-60 et seq. violates his federal constitutional rights also fails to state a claim. “[I]n Georgia, ‘[m]eaningful access [to the courts] is simply the right of an inmate to raise his claims and be heard.’” *Sumrall, supra* (quoting *Gibson v. Turpin*, 270 Ga. 855, 858 (1999)). As previously stated, O.C.G.A. § 17-10-67 only mandates when an application for incompetency is to be filed, and nothing in that code section, or any of the other relevant code sections, requires that an application be adjudicated in a particular timeline. Moreover, the other code sections provide for the applicant to request their own expert, paid for by the state, discovery, a mandatory

hearing, “written findings of fact and conclusions of law,” and specifically acknowledges a possible stay of the execution warrant prior to the trial court’s decision. O.C.G.A. §§ 17-10-65, 17-10-66, 17-10-68.

Again, when reviewing the constitutionality of a statute the Court must look for “every reasonable construction ...in order to save a statute from unconstitutionality.”⁴ *Barnhill*, 315 Ga. at 311 (2022) (quoting *In the Interest of M. F.*, 298 Ga. at 146). In doing so, the Court cannot create requirements that are not set forth in the statute, especially if those requirements could potentially create a constitutional violation. *See S&S Towing & Recovery, Ltd.*, 309 Ga. at 119 (“[i]f a statute is susceptible of more than one meaning, one of which is constitutional and the other not, we interpret the statute as being consistent with the Constitution.” (alteration in original) (quoting *Cobb County School Dist.*, 271 Ga. at 37). A reasonable construction of these code sections gives an applicant a fair opportunity

⁴ Heidler cites to several cases, state and federal, determining a prisoner’s rights of access to courts. *See* Complaint, pp. 51–52, ¶ 60. While those cases are instructive regarding the scope of a prisoner’s right to access the courts, none involve statutory construction, and all involve instances in which a prisoner was denied specific rights that are not indicated here. *See, e.g., Cousins v. Macedonia Baptist Church of Atlanta*, 283 Ga. 570, 572–73 (2008) (the parties were not allowed to call or examine witnesses, the trial court solicited information from unsworn members of the audience and conducted its own investigation of the case). The Court finds that nothing in those cases indicate that a reasonable construction of O.C.G.A. § 17-10-60 et seq. creates an unconstitutional violation of an inmate’s right of access to the courts.

“to raise his claims and be heard.” *Sumrall, supra* (quoting *Gibson*, 270 Ga. at 858).

In sum, Heidler has failed to plead any claim upon which relief may be granted, and the Court finds Heidler’s complaint must be DISMISSED under O.C.G.A. § 9-11-12 (b)(6).

III. Heidler’s request for an interlocutory injunction is moot.⁵

Heidler also requests that this Court enter an interlocutory injunction “barring Defendants from obtaining an execution warrant against Mr. Heidler until the merits of his challenge to the Execution Competency Act have been determined by the Court.” Motion for Injunction, p. 34. However, “a claim for injunctive relief ‘is moot when its resolution would amount to the determination of an abstract question not arising upon existing facts or rights.’” *Sexual Offender Registration Review Bd. v. Berzett*, 301 Ga. 391, 396 (2017) (quoting *City of Comer v. Seymour*, 283 Ga. 536, 537 (2008)). As shown above, there are no existing facts or rights upon which this Court has subject matter jurisdiction, which means Heidler has failed to plead a justiciable claim. Therefore, Heidler’s request for injunctive relief must be dismissed. *See, e.g., City of Atlanta v. Atlanta Indep. Sch. Sys.*, 307

⁵ Heidler also requested a “temporary restraining order preventing the Defendants from setting an execution date” until the Court could hold a hearing on his motion for interlocutory injunction. *See* Motion for Injunction, p. 34. Because this hearing has already occurred, and no execution order has been entered, the Court finds this request to be MOOT.

Ga. 877, 881 (2020) (“APS’s claims for injunctive and mandamus relief, however, depend on a favorable resolution of its claim for declaratory judgment, which we have concluded must be dismissed as nonjusticiable. Therefore, ‘[w]ithout the declaratory judgment as its foundation, the request for injunctive [and mandamus] relief fails.’”) (quoting *Berzett*, 301 Ga. at 395).

Based on the foregoing, Plaintiff Jerry Scott Heidler has failed to prove he is entitled to the injunctive relief sought. It is hereby ORDERED that Heidler’s complaint for declaratory and injunctive relief and motion for an interlocutory injunction is DISMISSED.

SO ORDERED, this 24th day of February, 2026.



Honorable Stacey K. Hydrick
Judge, Dekalb County Superior Court
Dekalb Judicial Circuit

Prepared and presented by:

s/Sabrina D. Graham

Sabrina D. Graham, Bar No. 305755
Senior Assistant Attorney General
Office of the Attorney General
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300
Phone: (404) 694-7975
Email: sgraham@law.ga

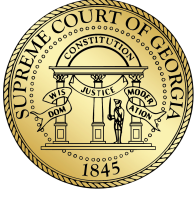
CERTIFICATE OF SERVICE

I do hereby certify that I have this day electronically filed
DEFENDANTS' PROPOSED ORDER with the Clerk of Court, which
will automatically serve all counsel of record.

This 9th day of February 2026.

/s/ Sabrina D. Graham
SABRINA D. GRAHAM 305755
Senior Assistant Attorney General

Georgia Department of Law
40 Capitol Square, S.W.
Atlanta, GA 30334-1300
Telephone: (404) 694-7975
sgraham@law.ga.gov



SUPREME COURT OF GEORGIA
Case No. S26D1085

April 16, 2026

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

JERRY SCOTT HEIDLER v. CHRISTOPHER CARR et al.

Upon consideration of the Application for Discretionary Appeal, it is ordered that it be hereby denied.

All the Justices concur, except Pinson, J., not participating.

Trial Court Case No. 24CV8914

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

 , Clerk

IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

JERRY SCOTT HEIDLER,
Plaintiff,

CIVIL ACTION

v.

FILE NO.

24CV8914-6

CHRISTOPHER CARR; TRIPP FITZNER; SHAWN
EMMONS; TYRONE OLIVER,

Defendant.

~~~~~

HEARING BEFORE  
THE HONORABLE STACEY K. HYDRICK

January 28, 2026

11:55 a.m.

556 N. McDonough Street  
Decatur, Georgia

Amelia Bradley, CCR 5100-8905-8215-5264

1 APPEARANCES OF COUNSEL

2 On behalf of the Plaintiff:

3 ZACK W. GREENAMYRE, Esquire  
4 Mitchell, Shapiro, Greenamyre &  
5 Funt, LLP  
6 881 Piedmont Avenue, N.E.  
7 Atlanta, Georgia 30309  
8 (404) 997-8972  
9 zack@mitchellshapiro.com

7 ANNA ARCENEUX, Esquire  
8 DANIELLE KAYEMBE, Esquire  
9 Georgia Resource Center  
10 104 Marietta Street, N.W.  
11 Suite 260  
12 Atlanta, Georgia 30303  
13 (404) 222-9202  
14 anna.arceneaux@garesource.org  
15 danielle.kayembe@garesource.org

12 On behalf of the Defendant:

13 SABRINA GRAHAM, Esquire  
14 Georgia Attorney General's Office  
15 40 Capitol Square, S.W.  
16 Atlanta, Georgia 30303  
17 (404) 694-7975  
18 sgraham@lawga.gov

17

18

19

20

21

22

23

24

25



1 INDEX TO EXAMINATIONS

2 (None offered.)

3 ---

4 INDEX TO EXHIBITS

5 EXHIBIT DESCRIPTION PAGE

6 (None Marked.)

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 HEARING BEFORE THE HONORABLE STACEY K. HYDRICK

2 JANUARY 28, 2026

3 THE COURT: All right. Scott --

4 Jerry Scott Heidler vs. Christopher Carr; Shawn  
5 Emmons; Tripp Fitzner; Tyrone Oliver --  
6 24CV8914-6.

7 Let me pull my notes. Here we go.  
8 All right. Defendant's motion to dismiss. And  
9 there was a motion to withdraw in December. Do  
10 we no longer -- somebody no longer works for  
11 the resource center.

12 MS. KAYEMBE: Yes, Your Honor.  
13 That's correct. That is one housekeeping item,  
14 there's also a pending motion to seal our --

15 THE COURT: That -- yeah, there was  
16 an --

17 MS. KAYEMBE: There was a proposed  
18 order submitted in December of 2024.

19 THE COURT: What happened -- why  
20 was -- there was a reason that that -- what was  
21 the reason that that wasn't done? We were  
22 holding off for something.

23 MS. KAYEMBE: On that order I don't  
24 believe so, Your Honor.

25 THE COURT: Did I just miss it?

1 Well, I mean, this is possible. Sorry, if I  
2 did -- I mean, that's -- that shouldn't have  
3 happened. I don't remember -- oh, I took  
4 the -- here we go. Oh, there was a -- we had a  
5 hearing November of '24. I took the matter  
6 under advisement, except for the motion to  
7 seal, which I granted. The order was not  
8 entered because we were waiting on the other  
9 orders. It took us a while to get the proposed  
10 orders on the other motions. So, I guess  
11 that's what happened. Anyway, I'll fall on my  
12 sword if -- if that was my -- my fault. So,  
13 all right. Motion to dismiss. Go ahead. Is  
14 that --

15 MS. GRAHAM: Yes. Yes, Your Honor  
16 it's the --

17 THE COURT: Tell me your name again.

18 MS. GRAHAM: Sabrina Graham.

19 THE COURT: Okay.

20 MS. GRAHAM: Okay. So I'm not going  
21 to go over everything you've already briefed,  
22 Your Honor. But I'm just going to hit the  
23 highlights of it --

24 THE COURT: Okay.

25 MS. GRAHAM: -- pretty quick here.

1 Obviously this is a challenge to the  
2 statutes regarding a competency to be executed.  
3 And the main claim -- or really the only claim  
4 here -- is that the -- Mr. Heidler, or anyone,  
5 would not have enough time to fully litigate  
6 this claim in a constitutional manner. So,  
7 looking -- the first issue is subject matter  
8 jurisdiction I'm going to talk about, and the  
9 motion --

10 THE COURT: The first what?

11 MS. GRAHAM: This first issue is  
12 subject matter jurisdiction --

13 THE COURT: Okay.

14 MS. GRAHAM: -- which the Court had  
15 asked us to brief.

16 THE COURT: Right. Okay.

17 MS. GRAHAM: So, going back and  
18 looking at that, when I look at the statutes --  
19 when we look at the statutes, several things  
20 come out. You -- first of all, they can't file  
21 a challenge to competency until there's an  
22 execution order. We all agree on that. An  
23 execution order can't be issued no more than 20  
24 days out from the execution. Everybody agrees  
25 with that.

1                   So -- and the other things in the  
2 statutes that come into play that I think  
3 preclude this Court from having subject matter  
4 jurisdiction, when you look at the statutes, it  
5 says when they file their motion for  
6 competency, they can attach anything.

7                   THE COURT: Has he even been found  
8 incompetent?

9                   MS. GRAHAM: No, Your Honor.

10                  THE COURT: Okay.

11                  MS. GRAHAM: So they can file  
12 reports -- expert reports, all the records,  
13 anything. All of it can be, as I like to say,  
14 "front-loaded". We can already have done all  
15 that. And -- and we -- and -- fully candid  
16 here -- we have talked to you -- I have talked  
17 to opposing counsel about going ahead and  
18 having him evaluated, because it's -- there's  
19 no mystery here. I -- they -- I -- we all know  
20 what we're saying -- we're saying he's  
21 incompetent. And the State has already hired  
22 an expert to look at everything. And so --

23                  THE COURT: But there hasn't been a  
24 determination -- a legal expert determination.

25                  MS. GRAHAM: Correct, Your Honor.

1 At trial he was found to be competent. But,  
2 again, there is significant mental health  
3 history here.

4 THE COURT: Okay.

5 MS. GRAHAM: We're not disputing  
6 that.

7 THE COURT: Understood.

8 MS. GRAHAM: So, the statute  
9 contemplates that we can go ahead and have him  
10 evaluated before you file the motion. So all  
11 of that can already be gone.

12 THE COURT: Didn't we talk about  
13 that last time?

14 MS. GRAHAM: Briefly, yes, Your  
15 Honor, when we talked -- because that was when  
16 it -- they had been filed by an expert in  
17 petition.

18 THE COURT: Okay.

19 MS. GRAHAM: And the thing that  
20 really -- I think that takes away the subject  
21 matter jurisdiction is that the statute  
22 contemplates a stay. It specifically says  
23 there could be a stay. And obviously, anything  
24 that's filed prior to an execution you can ask  
25 for a stay of the execution. So not only does

1 the statute -- but the law in general -- you  
2 know, allows that.

3 And, because that -- because the  
4 statute does not say that it has to be  
5 litigated in that 10-to-20-day period, and they  
6 can get a stay, then that means that any injury  
7 they have would be hypothetical. And this  
8 Court would have to find that whatever court,  
9 you know -- I assume it would be filed in Butts  
10 County -- that the Butts County Superior Court  
11 would not give him a stay. So that's a  
12 hypothetical action there.

13 And I -- and to be clear, you know,  
14 looking at their Brief in Opposition, we aren't  
15 saying that you have to have the injury now.  
16 We're saying that the injury is hypothetical.  
17 Because if the judge does enter a stay -- it  
18 does give them long enough to do it -- then you  
19 would have no injury there. So it all turns  
20 on, specifically, a judge not giving him a  
21 stay, or not giving him enough of a stay,  
22 whatever, you know, they want to say. And  
23 because that's hypothetical, I don't see how  
24 the Court has jurisdiction for that. And --  
25 sorry. Got hooked to the table here.

1 THE COURT: Depends on what another  
2 judge is going to do.

3 MS. GRAHAM: Right. And -- and I  
4 understand, you know, they -- they have a lot  
5 in their Brief in Opposition regarding the  
6 difficulty it is in getting a stay of  
7 execution. And maybe that's so. But it's not  
8 impossible. In fact, our execution we had  
9 scheduled for December is currently under a  
10 stay right now. So, it's not impossible, and  
11 the Court would -- so unless it's impossible  
12 for them to get that, I still don't see how it  
13 being difficult keeps it from being  
14 hypothetical -- the injury from being  
15 hypothetical.

16 So that's an argument on the subject  
17 matter jurisdiction. And going to the motion  
18 to dismiss, it's really largely the same thing.  
19 So for the motion to dismiss, they're  
20 challenging the statute. It's a facial  
21 challenge to the statute, Your Honor, which  
22 means that they have to share -- there's no set  
23 of circumstances out there in which the statute  
24 could be found constitutional -- or you could  
25 read it to be constitutional.



1 But, again, the whole claim is that  
2 they won't have enough time, and because the  
3 statute contemplates a stay, it doesn't say  
4 that it has to be litigated any particular  
5 time, certainly expeditiously, but everything  
6 is done expeditiously prior to an execution.  
7 That doesn't mean that this -- that the trial  
8 court isn't going to get -- enter a stay, that  
9 gives them enough time to litigate this. And  
10 because you -- you -- the statute can be read  
11 in a constitutional manner with that stay, then  
12 you failed to state a claim.

13 So that's the heart of our -- both  
14 of our arguments. We have all the law in  
15 there. If the Court wants me to go through  
16 that, I'm happy to. But it really just turns  
17 on this idea that the Butts County Court -- or  
18 whatever court -- trial court -- they go to  
19 will not give them a proper stay. And that's  
20 just not -- that's not the type of injury that  
21 you can plead, and still have subject matter  
22 jurisdiction, or have stated a claim.

23 THE COURT: All right. Response.  
24 Thank you.

25 MS. KAYEMBE: Yes, Your Honor. And,

1 just briefly -- before driving into Defendant's  
2 arguments -- just like to highlight for the  
3 Court, that as the Court has stated otherwise,  
4 today, at this motion-for-dismiss stage, we are  
5 resolving all doubts in Mr. Heidler's favor.  
6 We're construing all of the pleadings in his  
7 favor, and we are accepting all of his alleged  
8 facts as true. That's facts going to standing  
9 as well as facts relevant to his ability to  
10 state a claim.

11 Just briefly addressing some of the  
12 points that opposing counsel made. First, that  
13 construing our complaint that anyone wouldn't  
14 have enough time to litigate incompetency under  
15 the relevant statute. And again, that's the  
16 intersection of O.C.G.A. § 17-10-67 and  
17 17-10-40(b). I think the Court should have  
18 those.

19 We're -- the complaint doesn't  
20 address just anyone, you know, opposing counsel  
21 mentioned a facial challenge, whether the  
22 challenge is construed as facial, or as  
23 applied, it's with respect to individuals like  
24 Mr. Heidler, who have a very long-standing  
25 history. As the State can see -- it's in their

1 motion -- has a long-standing history of  
2 serious mental illness.

3           You know, the -- it -- the  
4 hypothetical case of someone who has no mental  
5 health history and yet files a claim under the  
6 statute, is -- is not before the Court. We're  
7 addressing Mr. Heidler, who has his 11,000  
8 pages of mental health history -- from the  
9 Department of Corrections -- that is before  
10 Your Honor as an exhibit. That is what we're  
11 addressing here.

12           Your Honor asked whether Mr. Heidler  
13 had been found incompetent previously, and  
14 whether we discussed that at the November  
15 hearing. We did discuss that it's also very  
16 clear that that's not a prerequisite to filing  
17 a claim under the -- what we call the Execution  
18 Competency Act, or O.C.G.A. § 17-10-60 through  
19 17-10-70. And the Federal Constitutional Law  
20 is also very clear on this. It's why  
21 competency is litigated at this end stage,  
22 because it's an evolving condition.

23           Your -- your competency -- in  
24 addition to the fact that those are two  
25 different legal standards -- competency to

1 stand trial, versus competency to be executed.  
2 Your mental condition fluctuates, it evolves,  
3 it can deteriorate. That's why these things  
4 are assessed at this later stage. And -- and  
5 that's why the -- the fact -- it's not a  
6 prerequisite that he's found incompetent prior  
7 to challenging his competency. Certainly not a  
8 prerequisite for standing.

9                   And with respect to the trial  
10 competency findings, Mr. Heidler has litigated  
11 that. But those were -- had largely not  
12 been -- not been challenged, and there's reason  
13 to question those findings by the -- by the  
14 trial experts. I think opposing counsel  
15 mentioned that it's possible to front-load sort  
16 of the proof you would need in this action.

17                   I think there are several problems  
18 with that -- first being that even if expert  
19 evaluations were already complete, prior to  
20 filing a complaint by both -- by both parties,  
21 you would still have all of the procedures,  
22 outlined in the ECA, that the statute  
23 contemplates occurring within this maximum  
24 20-day period.

25                   So you have Mr. Heidler filing his

1 application, attached to a request for an  
2 expert evaluation. You have -- and again, that  
3 application is a fact-intensive application  
4 requiring all of these forms of proof. Then  
5 you have the statute contemplates, and an  
6 answer from the respondent, as well as a  
7 discovery period to include potentially  
8 depositions compelling state witnesses who may  
9 not be available without a court order.

10               You have time for a hearing as well  
11 as an order, which, you know, needs to be  
12 reasoned and well-thought-out. This is, again,  
13 an issue that has very rarely been addressed in  
14 Georgia -- never really meaningful addressed.  
15 And so the first court that hears this case is  
16 going to want to take a thorough time drafting  
17 this order.

18               And then this 20-day time frame also  
19 encompasses the time frame for appeal -- by  
20 either side -- of the order. And so just  
21 thinking about the logistics of that, even  
22 scheduling experts to come in, scheduling and  
23 testify -- scheduling lay witnesses, whether  
24 they're at the prison, whether they're other  
25 mental-health-related witnesses -- scheduling

1 to come in -- just the Court's schedule  
2 itself -- all of the impracticality of that  
3 occurring within -- within 20 days.

4 THE COURT: All right. I think  
5 we're getting ahead of ourselves, though. So,  
6 how is this not an advisory opinion, given that  
7 he hasn't been found incompetent, a judge  
8 hasn't denied a stay? It seems like future  
9 harm is based on speculation, and there hasn't  
10 even been -- there has not been a finding yet  
11 of incompetency. I -- I just -- how is this  
12 not an advisory opinion? I just -- I'm not  
13 sure declaratory judgment is the correct  
14 mechanism for what you're trying to accomplish.  
15 So, tell me why I'm wrong.

16 MS. KAYEMBE: Yes. Respectfully,  
17 Your Honor, I think this is exactly why the  
18 Georgia Declaratory Judgment Act was passed.  
19 And so happy to walk through a little bit both  
20 the cases under our Declaratory Judgment Act,  
21 as well as some general standing of  
22 principles -- the "injury in fact" requirement,  
23 as it applies to pre-enforcement challenges to  
24 statutes, and that sort of the identical  
25 requirement comes up in both the federal and

1 the state case law.

2           With respect to the Declaratory  
3 Judgment Act, it was passed in 1945 -- it's  
4 codified at O.C.G.A. § 9-4-2. There's two  
5 jurisdictional provisions, and specifically  
6 Subsection B is where this Court enjoys a broad  
7 scope of its authority. And that provision  
8 says that the Court has jurisdiction in any  
9 civil case in which it appears, to the Court,  
10 that the ends of justice require that a  
11 declaration should be made.

12           In an early case construing the  
13 statute -- 1951 Calvary Independent Baptist  
14 Church vs. Rome -- a Georgia Supreme Court  
15 case, the Court said there that the purpose of  
16 the act is to afford relief from uncertainty  
17 and insecurity, with respect to rights, status,  
18 and legal relations. And the act is to be  
19 liberally construed and administered by the  
20 Courts. And that because of Subsection B, our  
21 Declaratory Judgment Act is much broader in  
22 scope and more comprehensive in jurisdiction.

23           There's some key elements that one  
24 can gather -- from the Georgia case law, under  
25 the Declaratory Judgment Act -- in establishing

1 standing to challenge a statute. Those being,  
2 first, the plaintiff can show uncertainty or  
3 insecurity with respect to some future conduct.  
4 Second, related, whereas here the plaintiff is  
5 challenging a state statute, the plaintiff can  
6 show that that statute adversely affects the  
7 plaintiff's future plans. And finally, the  
8 existence of the justiciable controversy or,  
9 specifically, parties who are asserting adverse  
10 claims upon the same set of facts.

11 All of those elements are  
12 established here. We have the future conduct,  
13 and the statutory harm to that future  
14 conduct -- elements one and two -- linked here.  
15 Mr. Heidler -- as the State concedes in their  
16 motion -- does intend to file a claim  
17 challenging his competency to be executed.

18 This statute places his rights to do  
19 that at risk, by creating this 20-day time  
20 frame, which, just clearly of comparison, a  
21 case we've cited in prior-art briefing --  
22 Panetti versus Davis, 2017, from the 5th  
23 Circuit -- that case found a 34-day time frame,  
24 quote, unquote, "impossible". So, just for  
25 reference here. So we have that future conduct



1 and statutory harm established.

2                   Going to justiciable controversy, we  
3 have the set of facts that has accrued. Again,  
4 the parties agree Mr. Heidler has a long-  
5 standing history of serious mental illness.  
6 The state will seek a warrant for his  
7 execution, and Mr. Heidler does intend to  
8 challenge his competency to be executed.

9                   The adverse claims here are the  
10 parties competing construction of the statute,  
11 which, again, the State contends that the  
12 statute doesn't prohibit a stay and therefore  
13 the time frame is not unreasonable or that the  
14 litigation does not need to be completed within  
15 20 days. The very fact that the parties offer  
16 competing constructions, within the statute  
17 itself, establishes a justiciable controversy  
18 sufficient to confer jurisdiction on this  
19 Court.

20                   And just the last point here, as to  
21 the existence of adversity. It's -- this is  
22 not really an element that's challenged, but  
23 it's difficult to conceive of a more adverse  
24 set of parties. The defendants in this case  
25 are the Attorney General for the state of

1 Georgia, the District Attorney for the Middle  
2 Judicial Circuit, the Warden of Georgia  
3 Diagnostic and Classification Prison, and the  
4 Commissioner for the Georgia Department of  
5 Corrections.

6                   These are all individuals who will  
7 seek, obtain, and carry out an execution  
8 warrant against Mr. Heidler. So, again, it's  
9 hard to conceive of a set of parties more  
10 adverse to his claim that he's incompetent to  
11 be executed, and is entitled to sufficient time  
12 to prove that.

13                   THE COURT: I don't think they're  
14 challenging -- I mean, there hasn't been a  
15 finding of incompetency, and so how can anybody  
16 challenge that at this point; right?

17                   MS. KAYEMBE: Yes, Your Honor,  
18 that -- they're not -- we're not speaking to  
19 the substance now. We're -- this lawsuit  
20 pertains to whether the Execution Competency  
21 Act provides sufficient protection for  
22 Mr. Heidler's constitutional rights --

23                   THE COURT: Okay.

24                   MS. KAYEMBE: -- in the sense of the  
25 procedure envisioned. Yes. And just -- the

1 Panetti case we cited, where the -- with the  
2 "impossible" quotation, there was no prior  
3 determination of incompetency in that case. In  
4 fact, he had actually been previously found  
5 competent in decisions that were subsequently  
6 overturned by the U.S. Supreme Court.

7 But, with respect to the procedural  
8 in -- issue in that case, whether the  
9 process -- the 30-day- -- 34-day period was  
10 sufficient, the Court adjudicated that issue  
11 without requiring a prior finding of  
12 incompetency. And, in fact, in that case,  
13 circumstances differ than we have here, in that  
14 he had actually been found competent to be  
15 executed by other courts.

16 Just a little bit more here. And,  
17 again, if the Court -- most of the cases, as to  
18 those elements of standing under the  
19 Declaratory Judgment Act, are cited in our  
20 response and opposition. I would be happy to  
21 provide some examples if the Court is  
22 interested, but also just -- it's in our  
23 briefing. I -- I don't to waste Your Honor's  
24 time.

25 THE COURT: No, I have -- I have

1 the -- all the briefs. I have memos, I've  
2 got --

3 MS. KAYEMBE: Yeah.

4 THE COURT: -- notes.

5 MS. KAYEMBE: Okay. What's not in  
6 our briefing, I think it's useful to draw some  
7 examples from the federal "injury in fact"  
8 cases, because again, this requirement is the  
9 same in state court and Georgia courts. And,  
10 specifically, there's a set of cases addressing  
11 "injury in fact" when a pre-enforcement  
12 constitutional challenge to a statute is  
13 brought, as it is here. And so it's just --

14 THE COURT: Slow down.

15 MS. KAYEMBE: Yeah.

16 THE COURT: Pre-enforcement  
17 constitutional challenge -- is that what you  
18 said?

19 MS. KAYEMBE: Yes. A  
20 pre-enforcement challenge to a statute, that  
21 the plaintiff is asserting violates the  
22 Constitution, or is otherwise unlawful.

23 THE COURT: Okay.

24 MS. KAYEMBE: So it's useful to look  
25 at the language from these cases, because

1 again, as this Court well knows, the federal  
2 constitution is a floor in terms of protection  
3 that must be provided to Mr. Heidler's  
4 constitutional rights. And the language used  
5 by the federal court suggests that this "injury  
6 in fact" requirement is not a demanding  
7 standard.

8               Babbitt versus United Farm Workers,  
9 that's a 1979 case from the United States  
10 Supreme Court. In there is -- the language  
11 used was "realistic danger of sustaining a  
12 direct injury". In Florida, NAACP vs.  
13 Browning -- that's an 11th Circuit case from  
14 2008 -- in there, the Court used the phrase,  
15 "probabilistic harm". Another useful case,  
16 from the 11th Circuit, 1984 Lynch vs. Baxley.  
17 There the operative language was "realistically  
18 threatened".

19               So just diving into this a little  
20 bit more, and this relates to opposing  
21 counsel's point that we would somehow have to  
22 prove that the trial court would not grant a  
23 stay. That's not what we have to prove. We  
24 have to prove that it's unlikely that there's a  
25 realistic likelihood that a stay would not be

1 granted, and again --

2 THE COURT: Based on what?

3 MS. KAYEMBE: Yes, this -- I'm

4 sorry, Your Honor, could you clarify.

5 THE COURT: Yeah. You said you have  
6 to show that there's a realistic likelihood.

7 MS. KAYEMBE: Like, drawing from the  
8 language -- I'm sorry, Your Honor -- from these  
9 federal cases on "injury in fact", the language  
10 being "probabilistic harm", "realistic danger  
11 of injury", "realistic threat from -- of harm",  
12 under the statute.

13 THE COURT: Okay. So in -- I guess  
14 in this case, what is the anticipated realistic  
15 harm?

16 MS. KAYEMBE: The anticipated  
17 realistic harm is that Mr. Heidler waits, as he  
18 must, by a statute, to file, until the  
19 execution warrant issues. But he moves for a  
20 stay, the trial court does not grant one, and  
21 then he is forced to litigate his incompetency  
22 within this 20-day time frame.

23 THE COURT: Why isn't that the more  
24 appropriate setting to make this argument, than  
25 this separate action here? That's the missing

1 link. Shouldn't the -- in other words,  
2 shouldn't the constitutionality of that statute  
3 be argued in that litigation?

4 MS. KAYEMBE: Your Honor, I -- and  
5 speaking to this sort of -- the conjectural  
6 nature -- and again, it's Mr. Heidler's  
7 position that it's not his injury that's  
8 conjectural. It's the state's purported remedy  
9 or fix -- a stay that's actually conjectural.

10 Federal courts have addressed the  
11 fact that the stay should be granted only in  
12 the rarest of circumstances, and never  
13 available as a matter of right -- Barber vs.  
14 the Governor of Alabama [sic], 11th Circuit,  
15 2023. In that -- in that case -- and this is  
16 language that court, federal courts, and -- and  
17 state courts have repeated over and over --  
18 that last-minute stays are especially  
19 disfavored. So that's exactly why Mr. Heidler  
20 has brought this action now, because the  
21 Declaratory Judgment Act authorizes him to do  
22 so.

23 To seek a determination of his  
24 constitutional rights and whether they're  
25 violated by the statute, prior to being forced

1 to litigate under its restrictions, under this  
2 impossible 20-day time frame. That's exactly  
3 what the language of the Declaratory Judgment  
4 Act cases set forth. He has this  
5 uncertainty -- this risk, with respect to his  
6 rights in the future. That's why the  
7 Declaratory Judgment Act was passed.

8           There's a useful quote from a 1945  
9 Georgia Supreme Court case, Shippen vs. Folsom.  
10 In there the Court provides an analogy that the  
11 law -- prior to the act being passed -- was  
12 essentially you take a step, and then you turn  
13 on a light to -- I'm paraphrasing -- you turn  
14 on a light to see if you stepped on a  
15 hole -- in a hole.

16           And with the passage of the  
17 Declaratory Judgment Act, you turn on the light  
18 before you take the step, so you are able to  
19 see what you're legal status is before taking  
20 action. That's exactly why Mr. Heidler has  
21 brought this action pre-warrant. And again,  
22 just all the Court's emphasizing how disfavored  
23 last-minute litigation and last-minute stays  
24 are.

25           Mr. Heidler sought to be diligent



1 and bring -- seeking this determination of his  
2 constitutional rights, again, as the  
3 Declaratory Judgment Act authorizes him to do  
4 at this juncture.

5 THE COURT: Okay.

6 MS. KAYEMBE: Just briefly, walking  
7 through those federal cases a bit more again,  
8 because for Your Honor's benefit they aren't  
9 cited in our brief. In Babbitt, the Court --  
10 U.S. Supreme Court used the language "realistic  
11 danger of sustaining a direct injury" as a  
12 result of the statutes operation or  
13 enforcement. But that one does not have to  
14 await the consummation of threatened injury to  
15 a pain preventative relief.

16 Again, that's exactly why Georgia's  
17 Declaratory Judgment Act was passed. Florida  
18 NAACP vs. Browning, that's probabilistic harm.  
19 And I think the fact -- brief facts of that  
20 case are a little bit useful. Again, speaking  
21 to the State's argument, that Mr. Heidler was  
22 certainly -- would somehow have to demonstrate  
23 that it would be impossible that he would get a  
24 stay.

25 Again, that's not what he has to

1 demonstrate. In that case, it was a challenge  
2 to Florida's voter registration law, and it  
3 required an exact match between a voter  
4 registration application and the individual's  
5 other government documentation -- name, Social  
6 Security number, all of that information.

7               Clearly the plaintiffs couldn't  
8 demonstrate that their voter registration  
9 applications would be denied because those  
10 mismatches hadn't happened yet. But the Court  
11 found that they could demonstrate that it was  
12 probable that at least one mismatch might  
13 happen. And the language, again, is  
14 probabilistic harm is enough "injury in fact"  
15 to confer standing in the undemanding  
16 Article III sense.

17               How much more so here -- again,  
18 we're in state court, where the standard has to  
19 be, if anything, more protective to  
20 Mr. Heidler. Lynch vs. Baxley, final federal  
21 case, that's the "realistically threatened"  
22 case language, in that case it was a challenge  
23 to an Alabama statute authorizing local  
24 governments to jail individuals prior to their  
25 hospitalization, pursuant to an involuntary

1 commitment order.

2           The plaintiff, in that case, wasn't  
3 currently jailed or committed, but he had  
4 serious mental illness, and had been  
5 involuntarily committed in the past. Court  
6 found standing because they found that he was  
7 realistically threatened by the fact that  
8 this -- this jail time could occur.

9           So, all of those cases suggest --  
10 certainly here, Mr. Heidler has demonstrated --  
11 by everything set out in his briefing -- that  
12 it's at least realistic that a trial court  
13 could deny his stay. That's all he has to  
14 show. And again, going back to the standard  
15 that this is very early motion-to-dismiss  
16 stage, any doubt that the Court has about  
17 whether this harm -- how unrealistic this harm  
18 is needs to be resolved in Mr. Heidley's favor.

19           THE COURT: All right. So the --  
20 the case you said about the jailing -- that the  
21 jailing hadn't occurred, but it was okay to get  
22 a declaratory judgment on that. What -- go  
23 back to that one.

24           MS. KAYEMBE: That was a  
25 constitutional challenge to an Alabama

1 statute -- Lynch vs. Baxley, an 11th Circuit  
2 case --

3 THE COURT: Okay.

4 MS. KAYEMBE: -- from 1984.

5 THE COURT: And that was a  
6 constitutional challenge. Was that a  
7 declaratory judgment action?

8 MS. KAYEMBE: I would have to go  
9 back and check. I don't want to -- I -- off  
10 the top of my head I'm not certain, and I don't  
11 want to mislead, Your Honor. Yes.

12 THE COURT: Okay. Go ahead.

13 MS. KAYEMBE: So just -- now that we  
14 have sort of addressed these broader legal  
15 principles, just, again, speaking to this key  
16 issue, which is the State's purported remedy, a  
17 stay of execution that's conjectural and not  
18 Mr. Heidler's injury, which is made plain -- by  
19 plain language -- of the intersection of these  
20 two statutes.

21 The critical -- several critical  
22 elements here as to why a stay is conjectural.  
23 First, the -- the State hasn't represented that  
24 they would -- could grant a stay in their  
25 motion, and so they're offering it as a remedy,

1 but not conceding that they will agree to a  
2 stay.

3 Second piece -- again, all of this  
4 data is cited in our briefing, but since 2010,  
5 Georgia has scheduled 45 executions. Again,  
6 caveat being in our brief we say 44. That's  
7 because post-dating our brief to say it  
8 scheduled the execution of Mr. Stacey Humphreys  
9 for December of 2025, of this past year.

10 Of those 45 executions, and only one  
11 case was a stay granted by the Habeas Court,  
12 which is the same court Mr. Heidler will be  
13 required to seek a stay in connection with his  
14 incompetency claim. And so I think recent  
15 history teaches that a stay is unlikely for --  
16 for any litigant.

17 And then just a final couple points  
18 on this conjectural nature of a stay issue. As  
19 we just discussed briefly, the federal courts  
20 have made clear that a stay is never available  
21 as a matter of right. And the language from  
22 Barber vs. The Governor of Alabama, is that  
23 even when life or death interests are at stake,  
24 a preliminary injunction or stay of execution  
25 is an extraordinary remedy not available as a

1 matter of right.

2                   And the final piece about the  
3 conjectural nature of a stay here is that the  
4 legal standard for granting a stay of execution  
5 in Georgia is not even clear. There's a couple  
6 of cases where the Georgia Supreme Court has  
7 discussed this. Zant vs. Dick was a 1982 case,  
8 Owens vs. Hill, a 2014 case -- both raised in  
9 our briefing, but in those cases the Court  
10 suggested that.

11                   Like in federal court there might be  
12 some circumstances where the standard for a  
13 stay -- granting a stay is interchangeable with  
14 a preliminary injunction standard. But there  
15 might be some cases where that's not the case,  
16 and they just declined to enumerate what those  
17 circumstances might be or what the standard is,  
18 if it's not a preliminary injunction standard.

19                   So here you have Mr. Heidler facing  
20 the prospect of requesting a stay, State  
21 hasn't -- has yet to represent that they could  
22 agree to one. Then the recent history in  
23 Georgia teaches that they're very rare, courts  
24 typically deny them. And then you have the law  
25 not even being clear as to what he would have

1 to demonstrate in order to receive one. Unless  
2 Your Honor has any further questions about the  
3 subject matter jurisdiction issue, I'll  
4 transition briefly to the 12(b)(6) issue.

5 THE COURT: That's fine. Go ahead.

6 MS. KAYEMBE: And here again, just  
7 beginning at the top level with the standard,  
8 as Your Honor referenced, and earlier today,  
9 this standard, the law favors Mr. Heidler at  
10 this juncture. Specifically, Georgia Transport  
11 has said in GeorgiaCarry.org Incorporated vs.  
12 Atlanta Botanical Garden Incorporated, in 2016,  
13 that a motion to dismiss for failure to state a  
14 claim, upon which relief may be granted, should  
15 not be sustained unless two conditions are met.

16 First, the allegations of the  
17 complaint, disclosed with certainty that the  
18 claimant would not be entitled to relieve under  
19 any state of provable facts asserted in support  
20 thereof. And second, that the claim -- it  
21 could not possibly introduce evidence, within  
22 the framework of the complaint, sufficient to  
23 warrant a grant of relief sought.

24 And undertaking this analysis, as  
25 the Court knows, all the pleadings must be

1 construed to Mr. Heidler's favor. All doubts  
2 resolved in his favor. And sort of what may  
3 arise naturally from this sort of high standard  
4 at this stage, is that many of the cases that  
5 the defendant's cite in their motion were  
6 actually dismissed at later stages of  
7 litigation, not at an early stage like this,  
8 where there's been no factual evidentiary  
9 development.

10               So, for example, Barnhill vs.  
11 Alford, dismissed after a final evidentiary  
12 hearing. Women's Surgical vs. Berry [sic],  
13 dismissed at the summary judgment stage. And  
14 JIG Real Estate, LLC vs. Countrywide Home  
15 Loans, also dismissed at summary judgment.

16               Turning to the core of the State's  
17 arguments here. So the State's core argument  
18 on the 12(b)(6) issue is that the statute must  
19 be presumed constitutional, and accordingly  
20 Mr. Heidler cannot make out a claim that it's  
21 unconstitutional.

22               Leaving aside the circular nature of  
23 this argument, the State's position stretches  
24 the presumption of constitutionality too far.  
25 The Georgia Supreme Court and the United States



1 Supreme Court have been very clear that when we  
2 have a statute whose language is plain, you  
3 cannot resort to the presumption of  
4 constitutionality -- which is a tool of  
5 statutory interpretation, sometimes called "the  
6 canon of constitutional avoidance" -- you can't  
7 resort to that tool if the plain language of  
8 the statute is clear. You don't even get  
9 there.

10 Specifically, Georgia Supreme Court  
11 has said, in *Dominique vs. Ford Motor Co.*  
12 [sic], a 2022 case, that "this tool cannot be  
13 relied upon to avoid a potential constitutional  
14 issue when we can identify only one possible  
15 interpretation of the statute."

16 Similarly, in *Franklin vs. Hill*,  
17 from 1994, the Georgia Supreme Court said that  
18 "where a statute is plain and susceptible, but  
19 one natural and reasonable construction, the  
20 Court has no authority to place a different  
21 construction on it.

22 And finally, similarly, in  
23 *Boumediene vs. Bush*, 2008 case, in the U.S.  
24 Supreme Court, involving an attempt to "suspend  
25 the writ of habeas corpus" as to individuals

1 detained at Guantanamo Bay, the Court there  
2 recognized that there are limits to the  
3 presumption of constitutionality as a tool of  
4 statutory interpretation, and, specifically,  
5 that courts cannot ignore the text of a statute  
6 in order to save it.

7           That's exactly what this Court would  
8 have to do in order to save this statute, is to  
9 ignore the plain language, which creates this  
10 impossible 20-day time frame for litigating  
11 incompetency. And again, as opposing counsel  
12 suggests, the statute doesn't prohibit a  
13 stay -- there's a provision, 17-10-68, I  
14 believe it's "E" -- acknowledging that a stay  
15 could have been entered. But again, nothing  
16 mandates the stay, nothing directly addresses  
17 the stay, nothing dictates what the standard  
18 for granting one is, or when it should be  
19 granted.

20           THE COURT: Why -- and I may have  
21 asked this last time -- I probably did -- why  
22 are they not -- why are you not getting a  
23 competency evaluation done now? What -- is  
24 there some -- like why can't you -- if you get  
25 the competency evaluation, and he's found

1 incompetent, doesn't that put him in a better  
2 position to -- like why do you have to wait  
3 until a warrant to get a competency evaluation  
4 done? That, I don't understand.

5 MS. KAYEMBE: Thank you, Your --  
6 Your Honor. And this is what I spoke about  
7 briefly in the introduction, is that the  
8 problem with the statute is not confined to the  
9 evaluation. There's all of this again -- the  
10 practical realities of litigation occurring  
11 within this 20-day time frame, the requirement  
12 of a court writing a reasoned opinion, and then  
13 the whole appeal process.

14 THE COURT: Yeah. But couldn't you  
15 get an evaluation and then litigate the issue  
16 of the competency at that point, once you have  
17 an evaluation that says he's not competent?

18 MS. KAYEMBE: That is a great  
19 question. I think the Georgia Supreme Court  
20 has suggested that that would be frowned upon  
21 because it would be go -- working around this  
22 statutory mechanism, which O.C.G.A. § 17-10-62  
23 says, "It's the exclusive mechanism for  
24 challenging incompetency in Georgia." The  
25 relevant case for this is Brookins vs. The

1 State [sic] -- I believe it's 2022 -- from the  
2 Georgia Supreme Court, wherein the Court  
3 suggested that the parties establishing a work-  
4 around is -- is not appropriate, where the  
5 legislature has prescribed a certain --

6 THE COURT: So the legislature  
7 essentially said you can't challenge competency  
8 until there's a warrant -- an execution  
9 warrant.

10 MS. KAYEMBE: Yes.

11 THE COURT: Is that what you're  
12 saying?

13 MS. KAYEMBE: Yes. That is what the  
14 statute provides. That's -- O.C.G.A. §  
15 17-10-67 says, "You cannot file until a warrant  
16 issues." And O.C.G.A. § 17-10-62 says that  
17 this is the exclusive mechanism for litigating  
18 a competency order .

19 THE COURT: So you can't even get a  
20 finding of incompetency before the warrant, is  
21 what you're arguing?

22 MS. KAYEMBE: Not that would be  
23 cognizable under the statutory process. I  
24 mean, of course --

25 THE COURT: They would make you do

1 it again?

2 MS. KAYEMBE: Yes. And the Supreme  
3 Court --

4 THE COURT: Sounds weird.

5 MS. KAYEMBE: It does sound weird,  
6 but the Supreme Court -- because competency and  
7 mental condition is an evolving status, that's  
8 why many -- and -- and Mr. Heidler doesn't  
9 contend that, you know, the only constitutional  
10 fix here would be to allow him to file a  
11 pre-warrant. There are other jurisdictions --  
12 that we've detailed in our complaint -- where  
13 more time is provided in another way.

14 You still might be required to wait  
15 until a warrant, but maybe that states warrant  
16 period is 180 days by statute, 91 days by  
17 statute. Maybe there are provisions within the  
18 competency framework in that state, that  
19 provide that the evaluation process is going to  
20 take, you know, 60 days or -- or what have you.

21 Or maybe there is a provision for a  
22 mandatory stay or at least a mandatory stay  
23 upon a threshold showing. And that's what you  
24 have in all these other statutes that the  
25 Georgia statute lacks, which is why there is

1 this issue with the warrant timing, because we  
2 have the being required to wait until a warrant  
3 to file, combined with the shortest warrant  
4 period in the nation.

5 THE COURT: Okay.

6 MS. KAYEMBE: Uh-huh (affirmative).

7 THE COURT: Got it. Thank you.

8 MS. KAYEMBE: And just one final  
9 piece on the -- on the 12(b)(6), before  
10 wrapping up. And that's -- again, opposing  
11 counsel noted, just briefly, that certainly  
12 it's -- it's not impossible to conceive that a  
13 trial court would grant a stay -- particularly  
14 with the compelling evidence Mr. Heidler has to  
15 present -- but the Georgia Supreme Court has  
16 been clear that that's -- when you're judging  
17 the constitutionality of a statute, the  
18 possibility of a constitutional outcome is not  
19 enough to find the statute constitutional.

20 The case we've cited in our  
21 briefing, Gwinnett County School District vs.  
22 Cox, from 2011, that case makes clear that  
23 we're -- a statute allows for both  
24 constitutional and unconstitutional outcomes.  
25 The statute is itself unconstitutional, to the

1 extent that there are not reliable, sufficient  
2 safeguards to prevent those unconstitutional  
3 outcomes. That's exactly what we have here.

4           Again, certainly a court could, in  
5 some universe, grant a stay. I think we've  
6 discussed at length that, in general, stays of  
7 execution are rare and unlikely. However, the  
8 very fact that it's also possible that a court  
9 could deny a stay, and there's not a sufficient  
10 safeguard to prevent that from happening. That  
11 means that the statute is unconstitutional.

12           And therefore because Mr. Heidler  
13 has established that he has standing, under the  
14 Declaratory Judgment Act, and that he can make  
15 out a claim, because Defendant's motion is due  
16 to be dismissed.

17           And, unless Your Honor has  
18 questions, that's all.

19           THE COURT: Thank you. All right.  
20           Response.

21           MS. GRAHAM: Yes, Your Honor. Okay.  
22 Let's talk first here about what the statutes  
23 do say. Yes, they cannot file their challenge  
24 to competency until the execution order is  
25 issued, which is no less than ten, no more than

1 20 days, correct.

2 THE COURT: That's the challenge to  
3 the competency, but does that preclude them  
4 from getting an order declaring him -- or a  
5 recommendation report declaring --

6 MS. GRAHAM: No, absolutely not.

7 THE COURT: They're two different  
8 things.

9 MS. GRAHAM: Right. So the  
10 statute -- the statute specifically states in  
11 there that they can have reports, affidavits,  
12 everything -- like I said -- front-loaded.

13 THE COURT: Ready to go.

14 MS. GRAHAM: Ready to go. You can  
15 file that the minute the execution order  
16 issues. Now, I understand they're saying that  
17 20 days isn't enough time for the trial court  
18 to have a competency hearing, and for it to go  
19 up on appeal. I don't know of any law that  
20 says that their 20 days is not enough -- or ten  
21 days is not enough.

22 I mean, certainly everything does  
23 get pushed, you know, quickly at that time  
24 period, but I'm not aware of it being  
25 unconstitutional. They have -- already have



1 everything there, and they have a hearing, and.

2 THE COURT: Don't they even have  
3 like -- in the U.S. Supreme Court they have  
4 a --

5 MS. GRAHAM: We have emergency --

6 THE COURT: Emergent -- there's a  
7 way to -- yeah.

8 MS. GRAHAM: Everything is done --

9 THE COURT: Expeditious, yeah.

10 MS. GRAHAM: -- expeditiously,  
11 that's on an execution. But, you know, let's  
12 go back to this "they say that it's  
13 conjectural, that they can get a stay." Well,  
14 maybe it is conjectural. But the fact that  
15 they can get a stay is not conjectural, that  
16 avenue is there for them. And until a court  
17 violates his rights by not giving him a stay --  
18 where he needs more time, the -- the injury is  
19 still hypothetical. It -- it is.

20 I mean, there's no other way to put  
21 that, because you're assuming that the trial  
22 court or Butts County Court is not going to  
23 properly consider a stay when one is needed.  
24 That's what they're saying. Yes, stays are  
25 difficult to get at the time of execution.

1 That makes sense, because there's been 20 years  
2 of litigation. It should be difficult to get,  
3 but that does not mean that it's impossible.

4                   It does not mean that it's  
5 conjectural whether or not they will get a  
6 stay. I mean, it -- it's not -- I mean, it is  
7 conjectural, but that -- that does not mean  
8 that that avenue is not open to them. And  
9 that's what this is about, is there an avenue  
10 open to them to have more time. Does the  
11 statute preclude that. Absolutely not. It  
12 doesn't mandate anything about the time period.

13                   And, obviously, if -- if there were  
14 those, they would not have specifically  
15 contemplated a stay in the statute. So, again,  
16 you would have to assume that the trial court  
17 is not going to do its job in order to find  
18 that injury there for subject matter.

19                   Looking at the plain language, I --  
20 I pulled up, they -- I -- when I read their  
21 complaint, and their arguments, I understood  
22 their constitutional challenge with the statute  
23 to be a facial challenge, that nobody, you  
24 know -- that's how I understood it. But  
25 they're saying that it's as applied.

1                   So, looking here, Georgia Supreme  
2 Court precedent, Dominique vs. Ford Motor  
3 Company, which is 314 Georgia 39, it says,  
4 "Ford asked the Court to vote the canon of  
5 constitutional doubt to preclude the O.C.G.A. §  
6 40-8-76 is unconstitutional as applied."

7                   Under that canon of statutory  
8 construction, if a statute is susceptible of  
9 one -- of more than one meaning -- one of which  
10 is constitutional and the other is not -- we  
11 interpret the statute as being consistent with  
12 the Constitution. So, because there is -- and  
13 I get -- I mean, I think the language of the  
14 statute's clear, that, yeah, this is when you  
15 file it, but the statute doesn't say it has to  
16 be done within the 20 days, and it contemplates  
17 a stay. The plain language of the statute  
18 allows for a constitutional reading of it.

19                  And where you do have two different  
20 readings there, then -- and one can be  
21 constitutional, I -- I don't see how that it --  
22 the statute, when read together with everything  
23 else, especially considering that you could go  
24 ahead and already had him evaluated before the  
25 execution order. And -- and he's known for

1 years that the execution order was coming.

2 I understand -- and the State  
3 understands, that competency waxes and wanes,  
4 and perhaps we go ahead and have the competency  
5 evaluation done, and the execution isn't for  
6 another year. Well, then all you have to do is  
7 have them go back and talk to him again.

8 They've already done all of the heavy lifting  
9 beforehand. They have all the records.

10 THE COURT: Uh-huh (affirmative).

11 MS. GRAHAM: I mean, most of their  
12 argument is about the fact that he has these  
13 11,000 pages of records. I could say my  
14 expert -- the State's expert on this issue is  
15 already getting hired, and he's already looked  
16 at those. Now, that's -- I understand that's  
17 not part of it -- for the complaint and  
18 everything -- but I'm saying here, what they  
19 have shown is everybody already knows what's  
20 going on. They all know what the records are.

21 And there's nothing in this record  
22 showing that he couldn't have already been  
23 evaluated. And -- so, again, I don't want  
24 to -- and I'm just repeating myself now.

25 THE COURT: You're fine.

1 MS. GRAHAM: But it all turns,  
2 everything. Subject matter, jurisdiction, and  
3 the -- and on the other issue -- the motion to  
4 dismiss issue, in 12(b)(6) -- is that it all  
5 turns on the notion that that Butts County  
6 Court isn't going to properly do their job and  
7 grant a stay when one is needed.

8 THE COURT: All right. Thank you  
9 very much for the interesting arguments. This  
10 case -- again, this is going to be reviewed up  
11 regardless, more than likely, of what the  
12 result is. But I agree with the State on this  
13 as well. I don't think this is proper for  
14 declaratory judgment action.

15 I think this needs to be litigated  
16 in the actual case itself. The -- it would be  
17 an advisory opinion, the -- his -- his rights.  
18 We have no competency evaluation. We have no  
19 execution warrant. Future violation of the  
20 statute would be based upon speculation.

21 And at this stage I don't see a  
22 constitutional violation. I'm granting the  
23 motion to dismiss. I -- this is not the  
24 appropriate manner to challenge this.

25 And, what else -- what do I need to

1 include in this -- lack of subject matter  
2 jurisdiction, and under 9-11-12(b)(6), failure  
3 to state a claim. Will you prepare the order?

4 MS. GRAHAM: Yes, Your Honor.

5 THE COURT: Can you get it to me  
6 ASAP.

7 MS. GRAHAM: Yes, Your Honor.

8 THE COURT: Okay.

9 MS. GRAHAM: Like within the next  
10 week.

11 THE COURT: That's -- that's fine.

12 MS. GRAHAM: Okay.

13 THE COURT: Because come the end of  
14 February, it's peace out.

15 MS. GRAHAM: Lucky you.

16 THE COURT: All right.

17 MS. GRAHAM: Thank you.

18 MS. ARCENEUX: Can you make sure  
19 that the order is on the record, so it's there  
20 for the purpose of the public proceeding news  
21 as well. The sealed records order?

22 THE COURT: Oh, yes. And I will  
23 sign the -- I have the order to seal here.  
24 Thank you. Is there anything else that I  
25 missed? And the order to seal, was that with

1 respect to mental health records --

2 MS. ARCENEUX: Yes.

3 THE COURT: -- only?

4 MS. ARCENEUX: We haven't given  
5 that to the clerk or anything because we were  
6 waiting for the --

7 THE COURT: Yeah, of course you  
8 were, because you were waiting a year for me,  
9 and I'm very sorry about that. Okay. I have  
10 it here. I will -- you'll have to -- it's in  
11 here somewhere. I will get that signed, and  
12 then you can file the mental health records.  
13 And then you can get -- we can do the order to  
14 seal today, get that filed. And then you need  
15 that to file -- what else do you need to file  
16 those records in -- just the order.

17 MS. ARCENEUX: Yes, we need the  
18 order clerk.

19 THE COURT: Okay. And figure out  
20 how to get that done. And then I -- we can  
21 issue the order granting the motion to dismiss.

22 THE COURT: All right. Thank you--  
23 all. Good luck.

24 (Concluded, 12:43 p.m.)

25

CERTIFICATE

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

STATE OF GEORGIA:  
COUNTY OF DEKALB:

I hereby certify that the foregoing transcript was reported, as stated in the caption, and the questions and answers thereto were reduced to typewriting under my direction; that the foregoing pages represent a true, complete, and correct transcript of the evidence given upon said deposition, and I further certify that I am not of kin or counsel to the parties in the case; am not in the employ of counsel for any of said parties; nor am I in any way interested in the result of said case.



Amelia Bradley  
Certified Court Reporter  
5100-8905-8215-5264



1 DISCLOSURE OF NO CONTRACT

2

3 I, Amelia Bradley, Certified Court  
4 Reporter, do hereby disclose, pursuant to  
5 Article 10.B. of the Rules and Regulations of  
6 the Board of Court Reporting of the Judicial  
7 Council of Georgia, that I am a Georgia  
8 Certified Court Reporter; I was contacted by  
9 the party taking the deposition to provide  
10 court reporting services for this deposition; I  
11 will not be taking this deposition under any  
12 contract that is prohibited by O.C.G.A.  
13 15-14-37(a) and (b) or Article 7.C. of the  
14 Rules and Regulations of the Board; and I am  
15 not disqualified for a relationship of interest  
16 under O.C.G.A. 9-11-28(c).

10

11 There is no contract to provide services  
12 between myself or any person with whom I have a  
13 principal and agency relationship, nor any  
14 attorney at law in this action, party to this  
15 action, or party having a financial interest in  
16 this action. Any and all financial  
17 arrangements beyond my usual and customary  
18 rates have been disclosed and offered to all  
19 parties.

16 This 5th day of March, 2026.

17

18

19

20

21

22

23

24

25



Amelia Bradley  
Certified Court Reporter  
5100-8905-8215-5264