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HOUSE BILL NO. 307

Offered January 13, 2010

Prefiled January 11, 2010

A BILL to amend and reenact §§ 19.2-169.6, 19.2-176, 19.2-182.9, 37.2-809, and 37.2-814 of the Code of Virginia, relating to involuntary temporary detention order; hearing no less than 24 and no more than 72 hours after execution.

Patrons—O'Bannon, Athey, Lingamfelter and Stolle

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 19.2-169.6, 19.2-176, 19.2-182.9, 37.2-809, and 37.2-814 of the Code of Virginia are amended and reenacted as follows:

§ 19.2-169.6. Emergency treatment prior to trial.

A. Any defendant who is not subject to the provisions of § 19.2-169.2 may be hospitalized for psychiatric treatment prior to trial if:

1. The court with jurisdiction over the defendant's case, only after a face-to-face evaluation by an employee or designee of the local community services board or behavioral health authority who is skilled in the assessment and treatment of mental illness and who has completed a certification program approved by the Department as provided in § 37.2-809 finds clear and convincing evidence that the defendant (i) is being properly detained in jail prior to trial; (ii) has mental illness and that there exists a substantial likelihood that, as a result of mental illness, the defendant will, in the near future, cause serious physical harm to himself or others as evidenced by recent behavior causing, attempting, or threatening harm and other relevant information, if any, in the opinion of a qualified mental health professional; and (iii) requires treatment in a hospital rather than the jail in the opinion of a qualified mental health professional; or

2. The person having custody over a defendant who is awaiting trial has reasonable cause to believe that the defendant (i) has mental illness and that there exists a substantial likelihood that, as a result of mental illness, the defendant will, in the near future, cause serious physical harm to himself or others as evidenced by recent behavior causing, attempting, or threatening harm and other relevant information, if any, and (ii) requires treatment in a hospital rather than jail and the person having such custody arranges a face-to-face evaluation by an employee or designee of the local community services board or behavioral health authority who is skilled in the assessment and treatment of mental illness and who has completed a certification program approved by the Department as provided in § 37.2-809 provided a district court judge or a special justice, as defined in § 37.2-100 or, if a judge or special justice is not available, a magistrate, upon the advice of a person skilled in the diagnosis and treatment of mental illness, subsequently issues a temporary detention order for treatment in accordance with the procedures specified in §§ 37.2-809 through 37.2-813. In no event shall the defendant have the right to make application for voluntary admission and treatment as may be otherwise provided in § 37.2-805 or 37.2-814.

If the defendant is committed pursuant to subdivision 1 of this subsection, the attorney for the defendant shall be notified that the court is considering hospitalizing the defendant for psychiatric treatment and shall have the opportunity to challenge the findings of the qualified mental health professional. If the defendant is detained pursuant to subdivision 2 of this subsection, the court having jurisdiction over the defendant's case and the attorney for the defendant shall be given notice prior to the detention pursuant to a temporary detention order or as soon thereafter as is reasonable. Upon detention pursuant to subdivision 2 of this subsection, a hearing shall be held, upon notice to the attorney for the defendant, either (i) before the court having jurisdiction over the defendant's case or (ii) before a district court judge or a special justice, as defined in § 37.2-100, in accordance with the provisions of § 37.2-820, in which case the defendant shall be represented by counsel as specified in § 37.2-814; the hearing shall be held ~~within 48~~ *no less than 24 hours and no more than 72 hours of* after execution of the temporary detention order issued pursuant to subdivision 2 of this subsection to allow the court that hears the case to make the findings, based upon clear and convincing evidence, that are specified in subdivision 1 of this subsection. If the ~~48-hour~~ 72-hour period herein specified terminates on a Saturday, Sunday, or legal holiday, the person may be detained for the same period allowed for detention pursuant to a temporary detention order issued pursuant to §§ 37.2-809 through 37.2-813.

In any case in which the defendant is hospitalized pursuant to this section, the court having jurisdiction over the defendant's case may provide by order that the admitting hospital evaluate the

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59 defendant's competency to stand trial and his mental state at the time of the offense pursuant to
60 §§ 19.2-169.1 and 19.2-169.5.

61 B. A defendant subject to this section shall be treated at a hospital designated by the Commissioner
62 as appropriate for treatment and evaluation of persons under criminal charge. The director of the hospital
63 shall, within 30 days of the defendant's admission, send a report to the court with jurisdiction over the
64 defendant addressing the defendant's continued need for treatment for a mental illness and the continued
65 substantial likelihood that, as a result of mental illness, the defendant will, in the near future, cause
66 serious physical harm to himself or others as evidenced by recent behavior causing, attempting, or
67 threatening such harm and other relevant information, if any, and, if so ordered by the court, the
68 defendant's competency to stand trial, pursuant to subsection D of § 19.2-169.1, and his mental state at
69 the time of the offense, pursuant to subsection D of § 19.2-169.5. Based on this report, the court shall
70 (i) find the defendant incompetent to stand trial pursuant to subsection E of § 19.2-169.1 and proceed
71 accordingly, (ii) order that the defendant be discharged from custody pending trial, (iii) order that the
72 defendant be returned to jail pending trial, or (iv) make other appropriate disposition, including dismissal
73 of charges and release of the defendant.

74 C. A defendant may not be hospitalized longer than 30 days under this section unless the court
75 which has criminal jurisdiction over him or a district court judge or a special justice, as defined in
76 § 37.2-100, holds a hearing at which the defendant shall be represented by an attorney and finds clear
77 and convincing evidence that the defendant continues to (i) have a mental illness and that there
78 continues to exist a substantial likelihood that, as a result of mental illness, the defendant will, in the
79 near future, cause serious physical harm to himself or others as evidenced by recent behavior causing,
80 attempting, or threatening harm and other relevant information, if any, and (ii) be in need of psychiatric
81 treatment in a hospital. Hospitalization may be extended in this manner for periods of 60 days, but in no
82 event may such hospitalization be continued beyond trial, nor shall such hospitalization act to delay trial,
83 so long as the defendant remains competent to stand trial.

84 D. Any health care provider, as defined in § 32.1-127.1:03, or other provider rendering services to a
85 defendant who is the subject of a proceeding under this section, § 19.2-176, or 19.2-177.1, upon request,
86 shall disclose to a magistrate, the court, the defendant's attorney, the defendant's guardian ad litem, the
87 qualified mental health professional, the community service board or behavioral health authority
88 performing the evaluation, preadmission screening, or monitoring duties under these sections, or the
89 sheriff or administrator of the jail any and all information that is necessary and appropriate to enable
90 each of them to perform his duties under these sections. These health care providers and other service
91 providers shall disclose to one another health records and information where necessary to provide care
92 and treatment to the defendant and to monitor that care and treatment. Health records disclosed to a
93 sheriff or administrator of the jail shall be limited to information necessary to protect the sheriff or
94 administrator of the jail and his employees, the defendant, or the public from physical injury or to
95 address the health care needs of the defendant. Information disclosed to a law-enforcement officer shall
96 not be used for any other purpose, disclosed to others, or retained.

97 Any health care provider disclosing records pursuant to this section shall be immune from civil
98 liability for any harm resulting from the disclosure, including any liability under the federal Health
99 Insurance Portability and Accountability Act (42 U.S.C. § 1320d et seq.), as amended, unless the person
100 or provider disclosing such records intended the harm or acted in bad faith.

101 E. Any order entered where a defendant is the subject of proceedings under this section, § 19.2-176,
102 or 19.2-177.1 shall provide for the disclosure of medical records pursuant to subsection D. This
103 subsection shall not preclude any other disclosures as required or permitted by law.

104 § 19.2-176. Determination of insanity after conviction but before sentence; hearing.

105 A. If, after conviction and before sentence of any person, the judge presiding at the trial finds
106 reasonable ground to question such person's mental state, he may order an evaluation of such person's
107 mental state by an employee or designee of the local community services board or behavioral health
108 authority who is skilled in the assessment and treatment of mental illness and who has completed a
109 certification program approved by the Department as provided in § 37.2-809. If the judge, based on the
110 evaluation, and after hearing representations of the defendant's counsel, finds clear and convincing
111 evidence that the defendant (i) is mentally ill, and (ii) requires treatment in a mental hospital rather than
112 the jail, he may order the defendant hospitalized in a facility designated by the Commissioner as
113 appropriate for treatment of persons convicted of crime. The time such person is confined to such
114 hospital shall be deducted from any term for which he may be sentenced to any penal institution,
115 reformatory or elsewhere.

116 B. If it appears from all evidence readily available that the defendant is mentally ill and that there
117 exists a substantial likelihood that, as a result of mental illness, the defendant will, in the near future,
118 cause serious physical harm to himself or others as evidenced by recent behavior causing, attempting, or
119 threatening harm and other relevant information, if any, a temporary order of detention may be issued in
120 accordance with subdivision A 2 of § 19.2-169.6 and a hearing shall be conducted in accordance with

subsections A and C ~~within 48 hours of~~ *no less than 24 hours and no more than 72 hours after* execution of the temporary order of detention, or if the ~~48-hour~~ 72-hour period herein specified terminates on a Saturday, Sunday or legal holiday, such person may be detained for the same period allowed for detention pursuant to an order for temporary detention issued pursuant to §§ 37.2-809 to 37.2-813.

C. A defendant may not be hospitalized longer than ~~thirty~~ 30 days under this section unless the court which has criminal jurisdiction over him, or a court designated by such court, holds a hearing, at which the defendant shall be represented by an attorney, and finds clear and convincing evidence that the defendant continues to be (i) mentally ill and that there continues to exist a substantial likelihood that, as a result of mental illness, the defendant will, in the near future, cause serious physical harm to himself or others as evidenced by recent behavior causing, attempting, or threatening harm and other relevant information, if any, and (ii) in need of psychiatric treatment in a hospital. Hospitalization may be extended in this manner for periods of 180 days, but in no event may such hospitalization be continued beyond the date upon which his sentence would have expired had he received the maximum sentence for the crime charged.

§ 19.2-182.9. Emergency custody of conditionally released acquittee.

When exigent circumstances do not permit compliance with revocation procedures set forth in § 19.2-182.8, any district court judge or a special justice, as defined in § 37.2-100, or a magistrate may issue an emergency custody order, upon the sworn petition of any responsible person or upon his own motion based upon probable cause to believe that an acquittee on conditional release (i) has violated the conditions of his release or is no longer a proper subject for conditional release and (ii) requires inpatient hospitalization. The emergency custody order shall require the acquittee within his judicial district to be taken into custody and transported to a convenient location where a person designated by the community services board or behavioral health authority who is skilled in the diagnosis and treatment of mental illness shall evaluate such acquittee and assess his need for inpatient hospitalization. A law-enforcement officer who, based on his observation or the reliable reports of others, has probable cause to believe that any acquittee on conditional release has violated the conditions of his release and is no longer a proper subject for conditional release and requires emergency evaluation to assess the need for inpatient hospitalization, may take the acquittee into custody and transport him to an appropriate location to assess the need for hospitalization without prior judicial authorization. The evaluation shall be conducted immediately. The acquittee shall remain in custody until a temporary detention order is issued or until he is released, but in no event shall the period of custody exceed four hours. However, upon a finding by a district court judge, special justice as defined in § 37.2-100, or magistrate that good cause exists to grant an extension, the district court judge, special justice, or magistrate shall extend the emergency custody order, or shall issue an order extending the period of emergency custody, one time for an additional period not to exceed two hours. Good cause for an extension includes the need for additional time to allow (a) the community services board to identify a suitable facility in which the person can be temporarily detained pursuant to this section or (b) a medical evaluation of the person to be completed if necessary. If it appears from all evidence readily available (i) that the acquittee has violated the conditions of his release or is no longer a proper subject for conditional release and (ii) that he requires emergency evaluation to assess the need for inpatient hospitalization, the district court judge or a special justice, as defined in § 37.2-100, or magistrate, upon the advice of such person skilled in the diagnosis and treatment of mental illness, may issue a temporary detention order authorizing the executing officer to place the acquittee in an appropriate institution ~~for a period not to exceed 48 hours prior to a hearing and requiring that a hearing be held no less than 24 hours and no more than 72 hours after execution of the temporary detention order.~~ If the ~~48-hour~~ 72-hour period terminates on a Saturday, Sunday, legal holiday, or day on which the court is lawfully closed, the acquittee may be detained until the next day which is not a Saturday, Sunday, legal holiday, or day on which the court is lawfully closed.

The committing court or any district court judge or a special justice, as defined in § 37.2-100, shall have jurisdiction to hear the matter. Prior to the hearing, the acquittee shall be examined by a psychiatrist or licensed clinical psychologist, provided the psychiatrist or clinical psychologist is skilled in the diagnosis of mental illness, who shall certify whether the person is in need of hospitalization. At the hearing the acquittee shall be provided with adequate notice of the hearing, of the right to be present at the hearing, the right to the assistance of counsel in preparation for and during the hearing, and the right to introduce evidence and cross-examine witnesses at the hearing. Following the hearing, if the court determines, based on a preponderance of the evidence presented at the hearing, that the acquittee (i) has violated the conditions of his release or is no longer a proper subject for conditional release and (ii) has mental illness or mental retardation and is in need of inpatient hospitalization, the court shall revoke the acquittee's conditional release and place him in the custody of the Commissioner.

When an acquittee on conditional release pursuant to this chapter is taken into emergency custody,

detained, or hospitalized, such action shall be considered to have been taken pursuant to this section, notwithstanding the fact that his status as an insanity acquittee was not known at the time of custody, detention, or hospitalization. Detention or hospitalization of an acquittee pursuant to provisions of law other than those applicable to insanity acquittees pursuant to this chapter shall not render the detention or hospitalization invalid. If a person's status as an insanity acquittee on conditional release is not recognized at the time of emergency custody or detention, at the time his status as such is verified, the provisions applicable to such persons shall be applied and the court hearing the matter shall notify the committing court of the proceedings.

§ 37.2-809. Involuntary temporary detention; issuance and execution of order.

A. For the purposes of this section:

"Designee of the local community services board" means an examiner designated by the local community services board who (i) is skilled in the assessment and treatment of mental illness, (ii) has completed a certification program approved by the Department, (iii) is able to provide an independent examination of the person, (iv) is not related by blood or marriage to the person being evaluated, (v) has no financial interest in the admission or treatment of the person being evaluated, (vi) has no investment interest in the facility detaining or admitting the person under this article, and (vii) except for employees of state hospitals and of the U.S. Department of Veterans Affairs, is not employed by the facility.

"Employee" means an employee of the local community services board who is skilled in the assessment and treatment of mental illness and has completed a certification program approved by the Department.

"Investment interest" means the ownership or holding of an equity or debt security, including shares of stock in a corporation, interests or units of a partnership, bonds, debentures, notes, or other equity or debt instruments.

B. A magistrate shall issue, upon the sworn petition of any responsible person, treating physician, or upon his own motion and only after an evaluation conducted in-person or by means of a two-way electronic video and audio communication system as authorized in § 37.2-804.1 by an employee or a designee of the local community services board to determine whether the person meets the criteria for temporary detention, a temporary detention order if it appears from all evidence readily available, including any recommendation from a physician or clinical psychologist treating the person, that the person (i) has a mental illness and that there exists a substantial likelihood that, as a result of mental illness, the person will, in the near future, (a) cause serious physical harm to himself or others as evidenced by recent behavior causing, attempting, or threatening harm and other relevant information, if any, or (b) suffer serious harm due to his lack of capacity to protect himself from harm or to provide for his basic human needs, (ii) is in need of hospitalization or treatment, and (iii) is unwilling to volunteer or incapable of volunteering for hospitalization or treatment, except that a temporary detention order for a minor pursuant to § 16.1-340 shall only be issued if the minor meets the criteria for involuntary commitment set forth in § 16.1-345. The magistrate shall also consider the recommendations of any treating or examining physician licensed in Virginia if available either verbally or in writing prior to rendering a decision. Any temporary detention order entered pursuant to this section shall provide for the disclosure of medical records pursuant to § 37.2-804.2. This subsection shall not preclude any other disclosures as required or permitted by law.

C. When considering whether there is probable cause to issue a temporary detention order, the magistrate may, in addition to the petition, consider (i) the recommendations of any treating or examining physician or psychologist licensed in Virginia, if available, (ii) any past actions of the person, (iii) any past mental health treatment of the person, (iv) any relevant hearsay evidence, (v) any medical records available, (vi) any affidavits submitted, if the witness is unavailable and it so states in the affidavit, and (vii) any other information available that the magistrate considers relevant to the determination of whether probable cause exists to issue a temporary detention order.

D. A magistrate may issue a temporary detention order without an emergency custody order proceeding. A magistrate may issue a temporary detention order without a prior evaluation pursuant to subsection B if (i) the person has been personally examined within the previous 72 hours by an employee or a designee of the local community services board or (ii) there is a significant physical, psychological, or medical risk to the person or to others associated with conducting such evaluation.

E. An employee or a designee of the local community services board shall determine the facility of temporary detention for all individuals detained pursuant to this section. The facility of temporary detention shall be one that has been approved pursuant to regulations of the Board. The facility shall be identified on the preadmission screening report and indicated on the temporary detention order. Except as provided in § 37.2-811 for defendants requiring hospitalization in accordance with subdivision A 2 of § 19.2-169.6, the person shall not be detained in a jail or other place of confinement for persons charged with criminal offenses and shall remain in the custody of law enforcement until the person is either detained within a secure facility or custody has been accepted by the appropriate personnel designated by the facility identified in the temporary detention order.

F. Any facility caring for a person placed with it pursuant to a temporary detention order is authorized to provide emergency medical and psychiatric services within its capabilities when the facility determines that the services are in the best interests of the person within its care. The costs incurred as a result of the hearings and by the facility in providing services during the period of temporary detention shall be paid and recovered pursuant to § 37.2-804. The maximum costs reimbursable by the Commonwealth pursuant to this section shall be established by the State Board of Medical Assistance Services based on reasonable criteria. The State Board of Medical Assistance Services shall, by regulation, establish a reasonable rate per day of inpatient care for temporary detention.

G. The employee or the designee of the local community services board who is conducting the evaluation pursuant to this section shall determine, prior to the issuance of the temporary detention order, the insurance status of the person. Where coverage by a third party payor exists, the facility seeking reimbursement under this section shall first seek reimbursement from the third party payor. The Commonwealth shall reimburse the facility only for the balance of costs remaining after the allowances covered by the third party payor have been received.

H. The duration of temporary detention shall be sufficient to allow for completion of the examination required by § 37.2-815, preparation of the preadmission screening report required by § 37.2-816, and initiation of mental health treatment to stabilize the person's psychiatric condition to avoid involuntary commitment where possible, but shall not exceed ~~48~~72 hours prior to a hearing. If the ~~48-hour~~72-hour period herein specified terminates on a Saturday, Sunday, or legal holiday, the person may be detained, as herein provided, until the close of business on the next day that is not a Saturday, Sunday, or legal holiday. The person may be released, pursuant to § 37.2-813, before the 48-hour period herein specified has run.

I. If a temporary detention order is not executed within 24 hours of its issuance, or within a shorter period as is specified in the order, the order shall be void and shall be returned unexecuted to the office of the clerk of the issuing court or, if the office is not open, to any magistrate serving the jurisdiction of the issuing court. Subsequent orders may be issued upon the original petition within 96 hours after the petition is filed. However, a magistrate must again obtain the advice of an employee or a designee of the local community services board prior to issuing a subsequent order upon the original petition. Any petition for which no temporary detention order or other process in connection therewith is served on the subject of the petition within 96 hours after the petition is filed shall be void and shall be returned to the office of the clerk of the issuing court.

J. The chief judge of each general district court shall establish and require that a magistrate, as provided by this section, be available seven days a week, 24 hours a day, for the purpose of performing the duties established by this section. Each community services board shall provide to each general district court and magistrate's office within its service area a list of its employees and designees who are available to perform the evaluations required herein.

K. For purposes of this section a healthcare provider or designee of a local community services board or behavioral health authority shall not be required to encrypt any email containing information or medical records provided to a magistrate unless there is reason to believe that a third party will attempt to intercept the email.

L. The employee or designee of the community services board who is conducting the evaluation pursuant to this section shall, if he recommends that the person should not be subject to a temporary detention order, inform the petitioner and an on-site treating physician of his recommendation.

§ 37.2-814. Commitment hearing for involuntary admission; written explanation; right to counsel; rights of petitioner.

A. The commitment hearing for involuntary admission shall be held after a sufficient period of time has passed to allow for completion of the examination required by § 37.2-815, preparation of the preadmission screening report required by § 37.2-816, and initiation of mental health treatment to stabilize the person's psychiatric condition to avoid involuntary commitment where possible, but *in no event shall the commitment hearing for involuntary admission be held within 24 hours of execution of the temporary detention order issued pursuant to § 37.2-809. The commitment hearing for involuntary admission shall be held within 48 72 hours of the execution of the temporary detention order as provided for in § 37.2-809; however, if the ~~48-hour~~ 72-hour period herein specified terminates on a Saturday, Sunday, legal holiday, or day on which the court is lawfully closed, the person may be detained, as herein provided, until the close of business on the next day that is not a Saturday, Sunday, legal holiday, or day on which the court is lawfully closed.*

B. At the commencement of the commitment hearing, the district court judge or special justice shall inform the person whose involuntary admission is being sought of his right to apply for voluntary admission for inpatient treatment as provided for in § 37.2-805 and shall afford the person an opportunity for voluntary admission. The district court judge or special justice shall advise the person whose involuntary admission is being sought that if the person chooses to be voluntarily admitted

305 pursuant to ~~§ 37.2-805~~, such person will be prohibited from possessing ~~or~~, purchasing, *or transporting* a
306 firearm pursuant to § 18.2-308.1:3. The judge or special justice shall ascertain if the person is then
307 willing and capable of seeking voluntary admission for inpatient treatment. In determining whether a
308 person is capable of consenting to voluntary admission, the judge or special justice may consider
309 evidence regarding the person's past compliance or noncompliance with treatment. If the judge or special
310 justice finds that the person is capable and willingly accepts voluntary admission for inpatient treatment,
311 the judge or special justice shall require him to accept voluntary admission for a minimum period of
312 treatment not to exceed 72 hours. After such minimum period of treatment, the person shall give the
313 facility 48 hours' notice prior to leaving the facility. During this notice period, the person shall not be
314 discharged except as provided in § 37.2-837, 37.2-838, or 37.2-840. The person shall be subject to the
315 transportation provisions as provided in § 37.2-829 and the requirement for preadmission screening by a
316 community services board as provided in ~~§ 37.2-805~~ § 37.2-816.

317 C. If a person is incapable of accepting or unwilling to accept voluntary admission and treatment, the
318 judge or special justice shall inform the person of his right to a commitment hearing and right to
319 counsel. The judge or special justice shall ascertain if the person whose admission is sought is
320 represented by counsel, and, if he is not represented by counsel, the judge or special justice shall
321 appoint an attorney to represent him. However, if the person requests an opportunity to employ counsel,
322 the judge or special justice shall give him a reasonable opportunity to employ counsel at his own
323 expense.

324 D. A written explanation of the involuntary admission process and the statutory protections
325 associated with the process shall be given to the person, and its contents shall be explained by an
326 attorney prior to the commitment hearing. The written explanation shall describe, at a minimum, the
327 person's rights to (i) retain private counsel or be represented by a court-appointed attorney, (ii) present
328 any defenses including independent evaluation and expert testimony or the testimony of other witnesses,
329 (iii) be present during the hearing and testify, (iv) appeal any order for involuntary admission to the
330 circuit court, and (v) have a jury trial on appeal. The judge or special justice shall ascertain whether the
331 person whose involuntary admission is sought has been given the written explanation required herein.

332 E. To the extent possible, during or before the commitment hearing, the attorney for the person
333 whose involuntary admission is sought shall interview his client, the petitioner, the examiner described
334 in § 37.2-815, the community services board staff, and any other material witnesses. He also shall
335 examine all relevant diagnostic and other reports, present evidence and witnesses, if any, on his client's
336 behalf, and otherwise actively represent his client in the proceedings. A health care provider shall
337 disclose or make available all such reports, treatment information, and records concerning his client to
338 the attorney, upon request. The role of the attorney shall be to represent the wishes of his client, to the
339 extent possible.

340 F. The petitioner shall be given adequate notice of the place, date, and time of the commitment
341 hearing. The petitioner shall be entitled to retain counsel at his own expense, to be present during the
342 hearing, and to testify and present evidence. The petitioner shall be encouraged but shall not be required
343 to testify at the hearing, and the person whose involuntary admission is sought shall not be released
344 solely on the basis of the petitioner's failure to attend or testify during the hearing.

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