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DISTRICT II

Case No. 2020AP001808 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ERIC D. BOURGEOIS,

Defendant-Appellant.

Appeal of Final Order Entered October 26, 2020 Denying
Motion for Postconviction Relief, the Honorable Laura Lau
Presiding, in Waukesha County Circuit Court Case No. 16-
CF-929

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT

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ISSUE PRESENTED FOR REVIEW

Did “exigent circumstances” exist to support the forcible and warrantless police entry into Bourgeois’ locked hotel room and a seizure of a firearm, which led to his subsequent arrest and prosecution for threatening an officer and stealing the gun?

Following an evidentiary hearing (R. 101), Circuit Judge Dreyfus ruled that the police entry was justified under the “exigent circumstances” exception to the warrant requirement. (A. App 103-115).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Appellant does not request oral argument because, consistent with Wis. Stat. (Rule) § 809.22(2)(b), the written arguments can fully develop the theories and legal authorities on each side so that oral argument would be of marginal value.

Publication is permitted under Wis. Stat. (Rule) § 809.23.

STATEMENT OF THE CASE

Eric D. Bourgeois was convicted of two Class H felonies: threatening a law enforcement officer (Count 1) and theft of movable property (Count 3). On October 2, 2019 the court withheld imposition of a sentence and placed defendant on probation for four years (with 90 days condition time stayed) as to Count 1 and ordered a \$294.30 forfeiture on Count 3. (R. 114).

Count 1 had charged that on July 12, 2016 Bourgeois threatened to harm a police officer, Jason Steinbrenner, when Steinbrenner arrested him and placed him in handcuffs at the duplex where Bourgeois lived in the upper unit. Steinbrenner had arrested Bourgeois for stealing a firearm from the tenant who lived downstairs. Police had previously seized that pistol

based on a warrantless entry into the hotel room where Bourgeois had been staying. Count 3 charged Bourgeois with theft of that firearm. (R.2, 13).

Prior to trial the defense sought to suppress any evidence that constituted “the fruits” of the warrantless entry, and seizure of the firearm. (R. 24, 25, 27). The defense argued that the forcible, warrantless hotel room entry was not supported by probable cause and exigent circumstances. Judge Dreyfus held an evidentiary motion hearing on October 19, 2017 (R. 101) and denied the motion in an oral ruling on December 14, 2017. (R. 102; A. App. 103-115).

The trial was conducted before Circuit Judge Laura Lau. (R. 112, 113). Bourgeois’ motion for postconviction relief requested, in part, that Judge Lau rule that exigent circumstances had not been proven. (R. 76). Judge Lau, however, declined to reconsider the motion to suppress or Judge Dreyfus’ ruling, and denied Bourgeois’ postconviction relief motion (R. 81; A. App. 101-102).

STATEMENT OF MOTION TO SUPPRESS HEARING FACTS¹

On July 12, 2016 the West Milwaukee Police Department (WMPD) was contacted by the Mukwonago Police Department to help locate Eric Bourgeois. (R. 101: 6; A. App. 104). WMPD was asked “to locate, stop, hold and advise if [it] found him, and [a] stolen gun.” (R. 101:6). WMPD was advised that Bourgeois might be suffering from PTSD and depression for which he on medication and receiving treatment at the Veteran’s Administration Center in West Milwaukee. (R. 101: 7; A. App. 105). WMPD was

¹Record references in parentheses relate to the transcript of the motion to suppress hearing on October 19, 2017 (denoted as “R. 101”) and the findings of fact in Judge Dreyfus’ oral ruling on the motion to suppress (R. 102) on December 14, 2017 (denoted as “A. App.”).

aware that a Best Western hotel was located across the street from the V.A. Center and that individuals with treatment appointments often will stay at that hotel. (R. 101: 7; A. App. 105).

WMPD confirmed that Bourgeois was a V.A. Center patient, but that he did not have an immediate appointment in the next day or two, and instead his next appointment was approximately two weeks later. (R. 101: 8; A. App. 103). WMPD also confirmed that Bourgeois was staying at the Best Western in room 205. (R. 101: 8; A. App. 105-106).

Several WMPD police officers then went to the hotel and obtained a key card from a person in charge “to attempt to gain access” to room 205. (R. 101: 6; A. App. 103). After officers obtained the key card and went down a hallway, they observed a “Do Not Disturb” sign on the door to room 205 and that the room was quiet. (R. 101: 21). But the key card did not work or allow them to open the door. (R. 101: 9; A. App. 106). Officers then began knocking on the door to alert Bourgeois that they were there. But they did not get a response and they could not hear anything. (R. 101: 9-10; A. App. 107).

WMPD officers then obtained a master key. (R. 101: 10; A. App. 107) and were able to open the door slightly, but it could not be opened fully because a chain lock kept it from opening beyond a few inches. (R. 101: 10; A. App. 107). Looking in, officers could see a fully-clothed individual, who they believed to be Bourgeois, in the darkened room lying on top of the bed. (R. 101: 10; A. App. 107). When they called to him, he did not respond. (R. 101: 10; A. App. 107). After officers called out to Bourgeois a few times to come talk to them, Bourgeois got out of bed and walked to the door where officers saw that he was unarmed. (R. 101: 23). WMPD Lieutenant Vanderlinden observed that at this point Bourgeois “really hadn’t done anything in [his] presence that would sort

of alarm [him].” (Id.) Bourgeois eventually came to the door. (R. 101: 11; A. App. 107).

While talking with him, officers asked if they could come in, but Bourgeois indicated that he was not going to let them in. He then he walked back into the room and did not respond further. (R. 101: 12; A. App. 108).

At this point in time, officers decided to enter the room forcibly by breaking the chain. (R. 101: 12; A. App. 108). When they did, there was some struggle with Bourgeois, but they soon handcuffed him. (R. 101: 12; A. App. 108). Bourgeois made threats to harm the officers and made a remark about “Dallas,” where there had been recent police shootings. (R. 101: 13; A. App. 108). While getting Bourgeois in custody, they were able to see a gun partially under the sheets or covers, which they seized, along with his belongings, which included a duffle bag with two knives and medications that were prescribed for Bourgeois. (R. 101: 14-15; A. App. 108).

Because Bourgeois also threatened to harm himself, officers transported him to the V.A. Center, across the street, but the center would not accept him. (R. 101: 17; A. App. 109). They then transported him to the Milwaukee County mental health center where he was admitted. (R. 101: 17; A. App. 109).

Before the police forced entry into the hotel room, Bourgeois did not do anything overt (A. App. 109) to threaten the police or to harm himself. (A. App. 109) and he made it clear that he just was not going to talk to them and was not going to release the chain lock. (A. App. 109). Officers had did not attempted to obtain a warrant authorizing them to enter Bourgeois’ hotel room or to search his belongings.

STATEMENT OF TRIAL FACTS²

On July 10, 2016 SC reported a situation that was concerning to her to the Mukwonago Police Department (MPD). She stated that she heard from Bourgeois' family that they had lost contact with Eric and that he had made suicidal statements in the past, so the family was concerned. (R. 112: 112-113, 124). There was no information about how long Eric had been out of contact with his family or about when he had last made suicidal statements. The information did not include any claim that Eric had made suicidal statements recently.

SC and Bourgeois were both Army Veterans and had served in Iraq and Afghanistan, and they lived in a duplex's lower and upper units, respectively, in Mukwonago. This was a convenient living arrangement because it permitted Eric and SC to share child-care responsibilities by watching each other's kids (Id. at 107).

SC stated that Bourgeois had been diagnosed with Post Traumatic Stress Disorder (PTSD) and had received treatment at the VA Medical Center in Milwaukee. (Like Bourgeois, SC suffered from PTSD and anxiety, and she too had prescription drugs to treat her conditions.)³

²Record references in parentheses relate to the transcript of the trial on July 30, 2019 (denoted as "R. 112")

³ SC testified:

In July of 2016 were you prescribed any medication?

A Yes.

Q Do you remember what those were?

A Clonazepam. There was Ofloxacin. There was another one. I can't remember the name of it. And Trazodone. These medications are to help with my anxiety, PTSD and my sleeping disorder.

Q Okay. Were you also prescribed a narcotic painkiller?

A Yes. I had earlier that year.

Q What was that?

SC owned firearms and was very familiar with them. She even slept with a .9mm pistol in her bed as a force of habit after leaving the military.⁴ (Ironically, this was exactly where the police eventually found SC's firearm when it was in Bourgeois' possession: on his bed at the Best Western hotel across the street from the VA Center.)

MPD officers responded to SC's call by going to the duplex to do a "welfare check." There, officers talked with Bourgeois, and they observed nothing to indicate that he was suicidal or that he fit criteria for a Chapter 51 commitment. (Id. at 115). Bourgeois came out on his balcony, spoke with the officers, and advised them that he was "fine," that he "didn't need help," and that he "wasn't going to hurt himself." (Id. at 174). Officers did not ask him if he had any weapons. Bourgeois then called a cab and left, indicating that

A I had Percocet or -- no, hydrocodone. And I had Dilaudid. (Id. at 110).

⁴ She testified:

I had a 20-gauge shotgun, I had a .410 shotgun, I had a 20 -- two 22s, and I had one called a Crickett 22. It is for kids to use. As well as my Ruger 22, my 38 X 6 rifle, my 1911 .45 pistol, my Magnum Research] pistol as well as my Springfield concealed carry pistol that I carry, which is also a 9 millimeter". (Id. at 110)

At one point, due to there was a pedophile in the area, for safety reasons me and him discussed about him having my shotgun upstairs for a little bit, but that was taken out of his residence and back downstairs into my residence." (Id. at 111)

[M]y concealed carry pistol, I kept that underneath -- in between the mattresses underneath where I slept.

Q Okay. Why did you keep it there?

A Just in case there was any intruders. Tactical training. I had two small children. It was just -- just force of habit for in the military you are used to having your firearm close to you. And that's what I always did. (Id. at 111)

he planned to see his counselor in Milwaukee at the VA Medical Center. (Id. at 116, 174-175).

Later, at about approximately 4:00 p.m. that day, SC reported to the MPD that after the defendant had left in the cab, she discovered that her 9mm pistol was missing from her belongings. She then went upstairs and entered Bourgeois' residence and found her shotgun. SC reported that she believed that Bourgeois had taken the pistol and might have taken her cell phone and her prescription medicines, without her permission. (Id. at 117). (She did not provide any information, however, to indicate what location Bourgeois had likely taken the missing items to, or that she had done an exhaustive search to see if the items had been hidden somewhere on the duplex premises. Nor did she provide information as to any behavior patterns that suggested that Bourgeois would likely have transported them to any particular location away from the duplex, or that he would have kept them in close reach, wherever he had gone.)

After tracing where Bourgeois had traveled in the cab, MPD officers learned from the West Milwaukee Police Department (WMPD) that he had not checked into the VA Medical Center but had been dropped off at the Best Western Hotel which was located directly across the street. MPD therefore asked WMPD to locate Bourgeois.

About a day and a half later, on July 12, 2016, at approximately 1:46 a.m., WMPD officers checked with the Best Western to see if the defendant had checked in and they learned that he had. (Id. at 149).

(The activities of WMPD officers at the Best Western hotel, leading to Bourgeois' arrest and seizure of SC's gun were described above.).

WMPD notified MPD of Bourgeois' arrest, but MPD advised that it would not accept custody of Bourgeois because it only wanted SC's firearm back. So WMPD officers took

Bourgeois, while he continued to make threatening statements towards them to the Milwaukee County Mental Health Center (MCMHC) for an emergency detention. (R. 112: 151). After a psychiatrist at the MCMHC concluded that Bourgeois should not be admitted, WMPD officers then gave Bourgeois a ride back to his residence in Mukwonago.

But later, MPD officers, who included Officer Steinbrenner, were again called to the duplex by SC because Bourgeois had been verbally abusive towards her after WMPD officers had released him. This time, when officers found Bourgeois at the duplex, they decided to arrest him for theft of SC's firearm. (There was no evidence presented that they had planned to arrest him for any prior sort of harsh language he had previously used towards officers.) Steinbrenner and two other officers grabbed Bourgeois' arm and wrestled with him so that he could be handcuffed, and they then held him to initiate a Ch. 51 emergency mental health detention (Id. at 162, 178, 195).

While Officer Steinbrenner assisted in Bourgeois' arrest and handcuffed him, Bourgeois was boisterous and argumentative, just as he had been in the prior police encounter at the hotel, and he banged his head against a glass storm door. Bourgeois complained about his arrest, stating "This was all bullshit." (Id. at 178). When officers took Bourgeois to the driveway, he continued to yell, curse, and was boisterous, and he stated to Steinbrenner that Dallas was nothing and he was "going to kill them all." (Id.)⁵

⁵ Officer Steinbrenner testified:

Q Were you threatened by Mr. Bourgeois's words?

A *Not immediately*, because he was in custody. I didn't feel -- *I know that he was not going to be able to do anything to harm us at that time* as he had been handcuffed. In the back of my mind I wondered what happened after he had been released, if he would try to perpetuate some type of retaliation against us.

Steinbrenner nonetheless continued to talk with Bourgeois and calmed him down. Bourgeois became cooperative and apologized for his abusive statements and the statement he made about Dallas. He stated it was out of line and that he went overboard. Bourgeois told Steinbrenner that he would never do anything to kill police and he was wrong for saying that.⁶

ARGUMENT

I. STANDARD OF REVIEW.

This court reviews the denial of a motion to suppress under a two-prong analysis. *State v. Felix*, 2012 WI 36, ¶22, 339 Wis. 2d 670, 811 N.W.2d 775. First, this Court will review the circuit court's findings of historical fact and will uphold them unless they are clearly erroneous. Second, this

(Id. at 179).

I also know people with mental health issues perpetuate with violent acts as well, so *I don't know exactly what was behind Mr. Bourgeois' statements, if there was some truth to that or, as you were saying, just spouting off*

(Id. at 188).

⁶ Officer Steinbrenner testified:

Q After a while he calmed down. Right?

A He did.

Q Even apologized. Did he not?

A He did.

Q He said he was out of line and he went overboard?

A He did.

Q He indicated he would never do anything to kill the police?

A Correct.

(Id. at 190).

Court will review the application of constitutional principles to those facts *de novo*. *State v. Eason*, 2001 WI 98, ¶9, 245 Wis. 2d 206, 629 N.W.2d 625.

II. THE FORCIBLE, WARRANTLESS POLICE ENTRY INTO BOURGEOIS' HOTEL ROOM, WHICH LED TO HIS ARREST AND A POLICE SEIZURE OF THE FIREARM, EXCEEDED THE FEDERAL AND STATE CONSTITUTIONAL PROTECTIONS AGAINST UNREASONABLE ARRESTS, SEARCHES AND SEIZURES.

Bourgeois' appeal goes to the basic constitutional proposition that warrantless searches and seizures are the exception and not the rule under the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution.⁷ The presumption of unreasonableness that attaches to warrantless searches and seizures flows, in part, from the Framers' trust that the important decision, of whether there are good reasons for government agents to invade one's privacy, should reside, in the main, only after objective inquiry by the judiciary. For these reasons, warrantless searches or seizures inside a home or hotel room are "presumptively unreasonable." *Welch v. Wisconsin*. 466 U.S. 740, 749 (1984).

This warrant requirement is the buffer that should have protected Bourgeois from zealous West Milwaukee Police officers.

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the

⁷This brief will refer, for brevity, to the federal and state protections against warrantless police entries as "Fourth Amendment" protections. Trial counsel's motion to suppress (R. 24) and supporting briefs (R. 27), cited both the federal and state constitutional provisions as grounds for suppression of the Bourgeois' arrest and the seizures of evidence from his hotel room.

support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the oft competitive enterprise of ferreting out crime The right of officers to thrust themselves into a home is ... a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance.

Johnson v. United States, 333 U.S. 10, 13-14 (1948).

It is indisputable that Fourth Amendment protections extended to the privacy of a Bourgeois' hotel room, just as they would protect any private residence, so that the warrant requirement generally applied. *Hoffa v. United States*, 385 U.S. 293, 301 (1966) ("A hotel room can clearly be the object of Fourth Amendment protection as much as a home or an office."); *United States v. Jeffers*, 342 U.S. 48, 51-52 (1951) (unlawful hotel room entry); *United States v. Johnson*, 333 U.S. 10 1948) (unlawful hotel room entry and subsequent arrest).

Defense counsel argued that the forcible, warrantless hotel room entry was not supported by probable cause or by the "exigent circumstances" exception to the Fourth Amendment's warrant requirement, and that the hotel room entry and seizures tainted the collected evidence, and Bourgeois' subsequent arrest based on that evidence.

Judge Dreyfus did not specifically rule on whether the police lacked probable cause, but he impliedly made such a finding, stating:

Certainly, the information that they had was that -- one, that he was suffering from mental health issues, PTSD, potentially depression, that he had drugs, that though may be appropriate to treat the conditions, can also be subject to abuse. ... And most importantly, that [he] may have had a stolen firearm which creates a very real risk of danger, both to him, as well as given the law enforcement. ... [U]ltimately, they found the firearm in fact where it had apparently, been in the bed with Mr. Bourgeois, where he had been lying when the police first had contact with him....

(R. 101: 10-11).

The court went on to rule that exigent circumstances justified the police to enter without first obtaining a search warrant because there was the *potential* that Bourgeois would harm himself or the police (Id. at 11-12):

[G]iven the information of an individual having what may be defined as a mental health issue, having access to drugs and having access to a firearm is a recipe for disaster. And as I said, anything that they would have done, even if they -- in order to obtain a search warrant which would have taken some time, be -- would have certainly, allowed for Mr. Bourgeois to have done any number of things, including potentially, harm them, potentially harm himself. And there would have been no time for them to have addressed it. I'm satisfied that there were exigent circumstances to protect Mr. Bourgeois from harm and as well as themselves, that if they did not in -- not do anything immediately, it would result in very real *potential harm* occurring.

(Emphasis added.)

The exigent circumstances finding was not justified or supported by the evidence or the relevant law. While there are exceptions to this warrant requirement, they are "jealously and carefully drawn" and "the burden rests with those seeking exemption to prove that the exigencies made that course imperative." *State v. Boggess*, 115 Wis. 2d 443, 449, 340 N.W.2d 516 (1983) (citations omitted).

The nature of the exigent circumstances exception to the warrant requirement has been more precisely spelled out in *Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2537 (2019). The exception is directly tied a compelling law enforcement need to act immediately which overrides the option of obtaining a search warrant. In *Mitchell* the Court emphasized how that compelling need to act must be so urgent that the time needed to obtain a search warrant would prevent effective law enforcement action, if delayed. When emergency assistance is at stake, a warrantless search is permissible when "there is compelling need for official action and no time to secure a warrant." 139 S. Ct. at 2534 (internal citation omitted).

Recently, this Court discussed this point:

[T]he final factor enunciated in *Mitchell* . . . is whether law enforcement ‘could not have reasonably judged that a warrant application would interfere with other pressing needs or duties.’ See *Mitchell*, 139 S. Ct. at 2539. . . . Richards’ severe injuries, safety needs at the accident scene, and the tight window of time before Richards was taken away by helicopter did not allow law enforcement to both obtain a search warrant and meet “other pressing needs or duties.”

State v. Richards, 2020 WI App 48, ¶¶45-46, 48, 393 Wis. 2d 772, 792, 948 N.W.2d 359, 369.

These points in *Mitchell* and *Richards* reinforce the argument that Bourgeois’ trial counsel (and now appellate counsel) have made. There was no injured party for the police to deal with at the Best Western. There were no apparent and urgent safety needs (indeed they did not know whether he had taken a firearm to the hotel). There was no likelihood that Bourgeois was about to disappear from the hotel.

It is beyond dispute that Judge Dreyfus based his decision to deny the motion to suppress on the *emergency assistance* test. But his other findings completely undercut his reasoning. That is because he explicitly found that there was no evidence of an *immediate* need to render assistance to Bourgeois:

Now, it's clear that at least in terms of their presence, he didn't do anything overt. And the -- At least in terms of their initial contact at the door, didn't -- There's no testimony that he threatened the police or even if he necessarily threatened harm to himself at that time. But that he just simply wasn't going to talk to them and wasn't going to release the chain. And as I understand it, in fact also, not that he wasn't going to release the chain but also, then didn't do anything to close the door and proceeded to turn around and walk -- just walk back into the bedroom at which point as indicated, they forcibly entered the room and grabbed him.

(R. 101: 7).

Exigent circumstances under the objective “emergency assistance” test requires the court to determine whether evidence showed that “a reasonable person would have

believed that: (1) there was an *immediate* need to provide aid or assistance to a person due to actual or threatened physical injury; and (2) that *immediate* entry into an area in which a person has a reasonable expectation of privacy was necessary in order to provide that aid or assistance.” *State v. Boggess*, 115 Wis. 2d 443, 450-52, 340 N.W.2d 516 (1983). (Emphasis added.).

Nothing in the facts presented to Judge Dreyfus indicated an immediate need to assist Bourgeois (who calmly came to the hotel room door after being awakened) because of actual or threatened injury, especially because nearly two days had passed after SC’s first vague concerns arose. Moreover, nothing was presented to justify an immediate entry because the police had no information arising from police observations at the hotel that Bourgeois needed assistance. The vague information from SC to the police that Bourgeois suffered from PTSD (ironically, just as she did) and that he might be in possession of a firearm (just as she was) did not make the situation more risky or dangerous, much less emergent.

The only other piece of information, which the prosecution previously argued to tip the scales towards an emergency assistance exception, was another vague reference that Bourgeois (at some unknown time in the past without any claim of currency or recency) had expressed suicidal thoughts. Again, this supplied no element of immediacy to the mix. The fact that WMPD officers believed that Bourgeois had previously discussed suicide in some (unknown) fashion, was not an objectively reasonable basis to conclude that there was an immediate need to protect him from himself, or (as even a further stretch) to protect themselves from him by entering and immobilizing him.

It is important to recognize that there is no “history of suicidal ideations” exception to the warrant requirement. The

exigent circumstances exception requires that the self-harm be exigent. A sizeable segment of the United States population has considered suicide and articulated suicidal ideations. Yet people who struggle with suicide and depression, and who are not consistent with their medication, do not give up all rights to Fourth Amendment protection; the government still needs to secure a warrant unless the risk of harm to self is imminent or immediate.

Judge Dreyfus was presented with three, limited facts about what officers knew before they forcibly entered – that Bourgeois had a PTSD diagnosis (without any description of any of his PTSD-related behaviors), that he might possibly be in possession of a pistol (although other weapons he had taken were still in his unit in the duplex), and that at some unknown time in the past he had expressed suicidal thoughts (without any suggestion that he had ever attempted to act on those ideations).

The closest comparable case to Bourgeois' is easily distinguished. In *State v. Horngren*, 2000 WI App 177, 238 Wis. 2d 347, 355, 617 N.W.2d 508, 512 officers were responding to a suicide threat. There, the critical information was that Horngren had made multiple, previous suicide attempts – unlike Bourgeois who had only expressed some ideations. Indeed, Horngren had been mentally committed in the past; no such claim was made about Bourgeois. (Rather, MPD officers on July 10 had concluded afterwards that he was “fine” and they observed no basis to commit him. Further it was subsequently established that the MHMHC did not find Bourgeois to be a proper subject for a Chapter 51 commitment.) Also, the police in *Horngren* did not know if Horngren was alone; here, police knew that Bourgeois was alone and was not a risk to others in his room. And Horngren had not made his interest in maintaining his privacy clear – his door was unlocked and open; but Bourgeois had

deadbolted and chain-locked his door for privacy and had refused, but not in any threatening or aggressive manner, to open the door to allow officers in.

On the other hand, the fact that the police were conducting an ongoing theft investigation in Bourgeois' case, was not present in *Horngren*. That fact, however, makes it even more apparent that the emergency assistance basis to support the exigent circumstance exception does not apply in Bourgeois' case. Here, the police wanted to enter Bourgeois' room hotel so they could find the alleged stolen firearm, which separates Bourgeois' case even further from *Horngren*, where the Court emphasized: "[T]he police were acting as community caretakers when they entered Horngren's apartment. . . . [T]he police entered the apartment with the motivation to render aid, not to collect evidence." *State v. Horngren*, 2000 WI App 177, 238 Wis. 2d 347, 355-56, 617 N.W.2d 508, 512.

Here, the police could easily have sought a search warrant while they remained posted in the hallway. See, *State v. Vorburger*, 2002 WI 105, 255 Wis. 2d 537, 549, 648 N.W.2d 829, 834 (deputies positioned themselves outside room to wait for a search warrant that was obtained in about 5 hours). Indeed, search warrants to seize evidence and suspects in hotel and motel rooms is a relatively common police activity. See, e.g., *State v. Richards*, 201 Wis. 2d 845, 847, 549 N.W.2d 218, 219 (1996); *State v. Kerr*, 181 Wis. 2d 372, 375, 511 N.W.2d 586, 587 (1994).

The entry and search of Bourgeois' hotel room took place in the early morning hours while Bourgeois and hotel residents were sleeping. Police could see him in bed alone in his dark and quiet room. There was no indication that Bourgeois or any other suspect was likely or able to flee. Bourgeois did not make any threats, nor did he exhibit any impending or imminent risk of harm to himself, the officers,

or others before the officers forcibly entered the room and arrested him. In fact, before forcing entry into his room, officers did not feel alarmed by Bourgeois in any way. Bourgeois' refusal to allow officers into his hotel room was not sufficient for officers to believe there was a threat to the safety of anyone.

The forcible police entry and attendant arrest, search and seizure did not pass the emergency assistance test to excuse the omission of a judicially approved warrant.

III. THE REMEDY ON REMAND

Because exigent circumstances did not exist to excuse the failure of West Milwaukee officer to obtain a search warrant, Judge Dreyfus' ruling on the motion to suppress should be overturned, Bourgeois' convictions should be vacated, and the circuit court should be directed on remand to suppress all evidence derived from the warrantless entry, arrest, search and seizure. See, e.g., *State v. Stevens*, 213 Wis. 2d 324, 337, 570 N.W.2d 593, 598 (Ct. App. 1997); *State v. Kiper*, 193 Wis. 2d 69, 75, 532 N.W.2d 698, 701 (1995); *State v. Anderson*, 149 Wis. 2d 663, 683, 439 N.W.2d 840, 848 (Ct. App. 1989).

CONCLUSION

Based on the foregoing, Eric D. Bourgeois, by undersigned counsel, respectfully requests that this court reverse the prior decision on the motion to suppress, and on remand direct that the motion be granted, and that all fruits of the illegal entry and arrest and seizures be excluded from evidence, if there is a new trial on either or both counts.

Dated January 18, 2021.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13-point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 4,638 words.

Dated January 18, 2021.

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**CERTIFICATE OF COMPLIANCE
WITH RULE 809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

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