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STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

v.

Derek Michael Chauvin,

J. Alexander Kueng,

Thomas Kiernan Lane,

Tou Thao,

Defendants.

STATE'S RESPONSE OPPOSING DEFENDANTS' MOTIONS TO ADMIT *SPREIGL* EVIDENCE

Court File No.: 27-CR-20-12646

Court File No.: 27-CR-20-12953

Court File No.: 27-CR-20-12951

Court File No.: 27-CR-20-12949

TO: The Honorable Peter Cahill, Judge of District Court, and counsel for Defendants; Eric J. Nelson, Halberg Criminal Defense, 7900 Xerxes Avenue South, Suite 1700, Bloomington, MN 55431; Robert Paule, 920 Second Avenue South, Suite 975, Minneapolis, MN 55402; Earl Gray, 1st Bank Building, 332 Minnesota Street, Suite W1610, St. Paul, MN 55101; Thomas Plunkett, U.S. Bank Center, 101 East Fifth Street, Suite 1500, St. Paul, MN 55101.

INTRODUCTION

Defendants Thomas Kiernan Lane and Tou Thao have filed motions seeking to introduce unfairly prejudicial and largely irrelevant evidence regarding George Floyd's May 6, 2019 arrest under Minnesota Rule of Evidence 404. Defendants Derek Chauvin and J. Alexander Kueng have joined Lane's motion. This Court held at the September 11, 2020 hearing that the evidence Defendants intend to offer regarding the May 2019 incident is inadmissible. That decision was correct. This Court should therefore deny Defendants' renewed motions to admit this evidence.

None of Defendants' ill-fitting theories changes the obvious: Defendants seek to introduce the May 6, 2019 incident to have the jury decide this case based on Floyd's past. That

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is improper. Under Minnesota Rule of Evidence 404(b), evidence of a person's prior crimes, wrongs, or acts "is not admissible to prove the character of a person in order to show action in conformity therewith." Minn. R. Evid. 404(b)(1). Here, Defendants offer this evidence to impugn Floyd's character, and to suggest that Floyd acted in conformity with his alleged propensity to commit crimes or ingest drugs when he died on May 25, 2020. Under Rule 404(b) and Minnesota Supreme Court precedent, the evidence is inadmissible for that purpose.

Defendants' other arguments for admitting the May 2019 incident into evidence fare no better. The May 2019 incident cannot support an inference that Floyd possessed a common plan or scheme to swallow drugs or resist when confronted by law enforcement. The hallmark of a common plan or scheme—marked similarities between two acts that suggest a *modus operandi*—is entirely absent. In May 2019, police found sizable quantities of drugs in the car where Floyd was a passenger. Here, by contrast, there is no evidence of a sizeable quantity of drugs anywhere. The Minnesota Supreme Court has cautioned that two acts "of the same generic type" do not constitute a *modus operandi*. *State v. Shannon*, 583 N.W.2d 579, 585 (Minn. 1998). But a generic similarity is all Defendants can show here. That is not enough.

Faced with the significant differences between the May 6, 2019 incident and this case, Defendants fall back on the theory that the contested fact they hope to prove—the alleged presence of a pill in Floyd's mouth when confronted by Defendants on May 25, 2020—suggests that the two incidents are similar. That theory is circular and wrong. Defendants cannot presume the presence of a pill in Floyd's mouth and then bootstrap that into a marker of similarity between the two events. That legal theory, if accepted, would permit a party to infer the truth of the contested fact from the mere allegation of its existence. That is not the law. And that result is especially untenable here, where Defendants' assertion that Floyd swallowed a pill

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when confronted by Defendants on May 25, 2020 is purely speculative and lacks a factual foundation. Evidence of prior acts cannot be admitted without the "necessary foundation" connecting the two incidents, and that foundation is absent here. *State v. Stephani*, 369 N.W.2d 540, 546 (Minn. App. 2004).

Defendants' legal theory therefore does not support their request to admit this evidence now. At most, their legal theory *might* support the conclusion that this Court should deny the motions now and revisit the issue at trial. At that point, the Court can determine based on the evidence whether there is any non-speculative basis for concluding that Floyd ingested a pill when confronted by Defendants, and can then properly evaluate whether the May 2019 and May 2020 incidents were markedly similar. Until then, there is no basis for granting the motions.

In short, based on the present record, the May 2019 incident is unfairly prejudicial and has the capacity to "persuade by illegitimate means." *State v. Townsend*, 546 N.W.2d 292, 296 (Minn. 1996) (internal quotation marks omitted). Defendants' motions should be denied.

STATEMENT OF FACTS

The following statement of facts is drawn from the exhibits attached to Defendant Thomas Lane's Memorandum Supporting Motion to Admit Floyd May 6, 2019 Incident and Defendant Tou Thao's Memorandum of Law in Support of *Spreigl* Evidence. With respect to the events of May 25, 2020, the State incorporates by reference the statements of facts from its oppositions to Defendants' motions to dismiss the complaint for lack of probable cause.

1. On May 6, 2019, the Minneapolis Police Department received a tip that an unlicensed burgundy Ford Explorer, driven by a man named "Mark," was transporting Oxycodone pills. Exhibit 1 to Thao Mot., at 6, 11. At approximately 5 p.m., Officers Alexandra Dubay and Scott

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Creighton stopped a car matching that description. Exhibit 3, 16:57:30-45.[1] Officer Dubay approached the driver's side door and asked the driver, Mark Anthony Hicks, whether he had "anything on [him]." Exhibit 3, 16:57:50-16:58:05; *see* Exhibit 1 to Thao Mot., at 8. When Hicks answered "no," she instructed him to put his hands on his head and step out of the car. Hicks complied. Exhibit 3, 16:58:03-12.

At the same time, Officer Creighton approached the passenger's side, where George Floyd was sitting in the front passenger's seat. Exhibit 1, at 16:57:45-57; Exhibit 1 to Thao Mot., at 6. He asked Floyd to undo his seatbelt. While unbuckling his seatbelt, Floyd responded: "Don't shoot me, man. Please, I don't wanna get shot." Exhibit 1, at 16:57:56-16:58:09. Officer Dubay then spotted a pill on Floyd's lap. Exhibit 1 to Thao Mot., at 8. She told Floyd: "Don't move that pill. . . . Keep your hands up." Floyd, however, put the pill in his mouth. Exhibit 3, at 16:58:16-22; Exhibit 1 to Thao Mot., at 8. Officer Dubay began yelling at Floyd to "spit it out," while Officer Creighton simultaneously screamed for Floyd to "keep your hands where I can fucking see 'em." Exhibit 1, at 16:58:22-30. Floyd asked: "Are you gonna shoot me?" He then placed his hands in the air, then on his head. Exhibit 1, at 16:58:27-32.

Officer Creighton continued to yell at Floyd, telling Floyd: "I'm not going to shoot you." He then yelled at Floyd to put his "hands on the dash." Exhibit 1, at 16:58:32-39. Seconds later, Officer Creighton unholstered his gun, and began gesturing at Floyd with his gun while once again telling Floyd to put his hands on the dashboard. Exhibit 1, at 16:58:40-42. Floyd repeatedly begged the officers not to shoot him. Exhibit 1, at 16:58:34-50.

By this point, Sergeant Steven Mosey and Officer Joel Doran had arrived on the scene. *See* Exhibit 1 to Thao Mot., at 14. When they pulled up and saw that Officer Creighton had

[1] Unless otherwise specified, all Exhibits cited in this brief refer to the Exhibits filed with Defendant Lane's motion.

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unholstered his gun, Sergeant Mosey observed that he did not "trust [Officer Creighton] with his gun out," "especially" because "his finger's probably on the trigger." Exhibit 5, at 16:58:34-38. Sergeant Mosey and Officer Doran quickly exited their car, and Officer Doran jogged to the passenger's side, where Officer Creighton was yelling at Floyd and had his gun drawn. Exhibit 5, at 16:58:39-45. Sergeant Mosey told Officer Creighton to "holster" his gun and said: "I got him." Sergeant Mosey then approached the driver's side door. Exhibit 5, at 16:58:44-49.

When Sergeant Mosey reached the car, Floyd had his hands on the dashboard, as Officer Creighton had instructed. Sergeant Mosey pointed a Taser at Floyd and yelled: "Put your hands on top of your head!" Exhibit 5, at 16:58:49-54. Floyd immediately complied. Exhibit 5, at 16:58:54-16:59:00. Sergeant Mosey then commanded Floyd to open his mouth and "spit out what you've got," warning Floyd that he was going to Tase him. Exhibit 5, at 16:58:56-16:59:00. Sergeant Mosey accused Floyd of "eating all kinds of stuff," but Floyd explained that it was just "one yellow pill." Exhibit 5, at 16:59:02-14. At the same time, Officers Creighton and Doran opened the passenger's side door and instructed Floyd to step out of the car. Exhibit 1, at 16:59:00-10. Officers Creighton and Doran then handcuffed Floyd's arms behind his back, telling him to "relax." Exhibit 1, at 16:59:05-24. Floyd told the officers that he was upset because "I got beat up and everything before, man." Exhibit 5, at 16:59:20-22. He also apologized repeatedly. Exhibit 1, at 16:59:26-32. While Officers Creighton and Doran handcuffed Floyd, Sergeant Mosey observed several pills on Floyd's seat. Exhibit 5, at 16:59:13-15.

Officers Creighton and Doran pinned Floyd against the Ford Explorer and patted him down. Floyd was upset during the pat-down, crying and asking the officers to help him. Sergeant Mosey responded: "Dude, act like a man," and "Dude, quit crying and grow up."

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Exhibit 5, at 17:00:35-39, 17:01:54-56. Officer Creighton located cash and pills, but did not find any weapons. Exhibit 1, at 16:59:40-17:02:03; *see* Exhibit 1 to Thao Mot., at 15-20. Officer Creighton then walked Floyd a few feet to the squad car and asked him to get inside. Officer Creighton acknowledged that the backseat was tight for someone as big as Floyd, and instructed Floyd to "slide in." Exhibit 1, at 17:02:15-20. Floyd, his hands still cuffed behind his back, used his legs to push himself into the car, and Officer Creighton closed the door. Exhibit 1, at 17:02:17-20.

2. The officers interviewed Floyd at the station. During the interview, Floyd was slurring and mumbling his speech, "speaking out of context," and having trouble "comprehend[ing]" the officers' questions. Exhibit 1 to Thao Mot., at 12. Floyd admitted that he had taken several Percocet that day. Exhibit 7 to Thao Mot., at 12. Based on this, the officers asked medical personnel to assess Floyd. Exhibit 1 to Thao Mot., at 12. Medical personnel decided to send Floyd to the hospital for monitoring. Exhibit 7 to Thao Mot., at 23.

The officers recovered the following items from the scene: (1) $594 and 38 Oxycodone pills on Floyd's person; (2) 5 loose Oxycodone pills from the area immediately surrounding the passenger seat; (3) Promethazine syrup; and (4) a small brown bag on the passenger's seat. Inside that brown bag, they found: (5) a large number of Oxycodone pills; (6) 17.96 grams of powder cocaine; (7) 3.10 grams of rock cocaine; (8) measuring devices and tools; and (9) Floyd's Texas ID, birth certificate, and other paperwork. *See* Exhibit 1 to Thao Mot., at 14-25.

Floyd was not charged in connection with this incident. Exhibit 6 to Thao Mot., at 1.

ARGUMENT

Under Minnesota Rule of Evidence 404(b), evidence of a person's other crimes, wrongs, or acts—commonly known as *Spreigl* evidence—"is not admissible to prove the character of a

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person in order to show action in conformity therewith." Minn. R. Evid. 404(b)(1). *Spreigl* evidence "shall not be admitted" unless (1) the party offering the evidence provides notice; (2) the party offering the evidence states the "specific purpose(s) for which the evidence will be offered"; (3) clear and convincing evidence proves that the individual committed the other act; (4) the party offering the evidence shows that the evidence "is relevant to an identified material issue other than conduct conforming with a character trait"; and (5) "the probative value of the evidence is not outweighed by its potential for unfair prejudice." Minn. R. Evid. 404(b)(2).

Here, Defendants' motion to introduce evidence regarding Floyd's May 2019 arrest fails at least three of Rule 404(b)'s requirements. *First*, there is no proper purpose for the evidence. Defendants' transparent reason for offering this evidence is to impugn Floyd's character, and to suggest that Floyd had a propensity to commit crimes or ingest drugs. *Second*, the evidence is not relevant to any material issue in this case. *Third*, whatever probative value the evidence may have is significantly outweighed by the danger for unfair prejudice. As this Court has already done once before, it should deny Defendants' motion to admit the evidence Defendants have offered here.[2]

I. DEFENDANTS SEEK TO ADMIT EVIDENCE OF FLOYD'S MAY 6, 2019 ARREST FOR AN IMPROPER PURPOSE.

"[T]he overarching concern over the admission of *Spreigl* evidence is that it might be used for an improper purpose, such as suggesting that the defendant has a propensity to commit the crime or that the defendant is a proper candidate for punishment for his or her past acts." *State v. Ness*, 707 N.W.2d 676, 685 (Minn. 2006) (internal quotation marks omitted).

[2] Although the State objects to the admission of evidence regarding the May 2019 incident under Rule 404(b), the State reserves the right to seek the admission of other evidence related to this incident—such as medical records in connection with Floyd's hospitalization, *see supra* p. 6—under other provisions of the Minnesota Rules of Evidence.

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Accordingly, under Rule 404(b), evidence of a victim's other acts is not admissible to show the victim's "character . . . in order to show action in conformity therewith." Minn. R. Evid. 404(b)(1). Rather, other act evidence is admissible "only for limited, specific purposes"—namely, to show "motive, intent, knowledge, identity, absence of mistake or accident, or a common scheme or plan." *Ness*, 707 N.W.2d at 685. Critically, in evaluating such evidence, this Court cannot take the movants' "stated purposes for the admission of other-acts evidence at face value." *Id.* at 686. It must "look to the real purpose for which the evidence is offered." *Id*. (internal quotation marks omitted).

Here, the "real purpose" for which Defendants offer evidence of Floyd's May 2019 arrest is clear: Defendants seek to admit this evidence in order to attack Floyd's character, and to suggest that Floyd had a propensity to commit crimes or should be punished for his prior actions. As counsel for Defendant Kueng explained on behalf of Defendants at the September 11 hearing, Defendants view the May 2019 incident as evidence that Floyd was an "experienced drug dealer[]." Transcript of Omnibus Hearing, at 104 (Sept. 11, 2020). That is impermissible. *Cf. State v. Harris*, 521 N.W.2d 348, 353 (Minn. 1994) (rejecting evidence as prejudicial, irrelevant, and inflammatory where "the jury was left with an indelible portrait of [the defendant] as a sexual deviant"). Indeed, allowing this evidence to be admitted risks "lead[ing] the jury to think that [Floyd] merely 'got what he deserved' and to acquit for that reason." 1 *McCormick On Evidence* § 193 (Robert P. Mosteller, ed., 8th ed., 2020 update); *see Ness*, 707 N.W.2d at 685.

This Court has already concluded that similar evidence is inadmissible for this very reason. Two Defendants previously attempted to make Floyd's character an issue in these proceedings by introducing evidence of Floyd's prior and unrelated Texas aggravated robbery conviction. They sought to show that Floyd "had a clear propensity for violence." Transcript of

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Omnibus Hearing, at 102; *see* Notice of Additional Evidence, *State v. Kueng*, No. 27-CR-20-12953 (Aug. 27, 2020); Notice of Motions, *State v. Chauvin*, No. 27-CR-20-12646 (Aug. 28, 2020). This Court denied those requests. *See* Transcript of Omnibus Hearing, at 102, 106. It should do the same here.

Nonetheless, Defendants attempt to identify several other purposes for which they intend to offer this evidence. They argue that the May 2019 incident is part of a "common scheme or plan," and that it proves Floyd's state of mind during the May 25, 2020 encounter with Defendants that ultimately lead to his death. Their arguments, however, do not pass muster under Rule 404(b).

A. Evidence of the May 2019 Incident Cannot Show a "Common Scheme or Plan" Because It Is Not Markedly Similar to This Case.

Defendants argue that the May 2019 incident is admissible to prove that Floyd had a common scheme or plan to swallow pills and resist arrest when confronted by police. *See* Thao Mot. 14, 17; Lane Mot. 7-8. But the evidence is not admissible on that ground. Although *Spreigl* evidence can be admissible if it shares a "marked similarity in *modus operandi* to the charged offense," *Ness*, 707 N.W.2d at 687-688, acts "of the same generic type" do not satisfy that requirement, *Shannon*, 583 N.W.2d at 585. The May 2019 incident is not markedly similar to this case. At best, it is an act "of the same generic type" as the May 2020 incident. *Id.*

First, with respect to Defendants' argument that Floyd had a *modus operandi* of swallowing pills, Defendants' comparison starts from a failed premise: that Floyd swallowed a pill in both incidents. But the Defendants cannot bootstrap the very fact that they seek to prove—that Floyd allegedly possessed and swallowed a pill on May 25, 2020—into a marker of similarity between the two events. *See* Thao Mot. 11 (claiming similarity because, in both incidents, Floyd "ingested dangerous levels of narcotics once confronted by police"); Lane Mot.

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7 (alleging that both incidents involved pills). That is because "the disputed fact" a party seeks to prove with *Spreigl* evidence cannot also show that the two incidents are alike. *State v. Rossberg*, 851 N.W.2d 609, 615 (Minn. 2014) ("[T]he district court must identify the precise *disputed fact* to which the *Spreigl* evidence would be relevant." (emphasis added; internal quotation marks omitted)).

A simple example illustrates why: Prosecutors have long used *Spreigl* evidence to prove that a defendant committed one crime based on marked similarities to a previous offense. *See, e.g.*, *State v. Eling*, 355 N.W.2d 286, 292 (Minn. 1984); *State v. Hudson*, 281 N.W.2d 870, 873 (Minn. 1979). The verified resemblances between the crimes are what make the crimes markedly similar. The evidence of the defendant's prior act is then offered to prove that it was the defendant—and not someone else—who committed the crime at issue in the case. A defendant might, for example, use similar, unique language in committing two robberies, and the prosecution might then use the prior robbery to prove that the defendant committed the robbery at issue in the present case. *See Eling*, 355 N.W.2d at 292 (affirming finding of a *modus operandi* where the robber used the term "Class A drugs," which "was an anachronism"). Critically, however, the mere fact that the prosecution *alleges* that the defendant committed the robbery for which he is being tried is not itself a similarity between the prior robbery and the present case. The prosecution's allegation is the disputed fact that the *Spreigl* evidence is offered to prove, and so cannot be used in order to prove that the two acts are "markedly similar."

The same logic applies here. Defendants seek to prove that Floyd took a pill during his encounter with police in this case. They cannot use their unproven allegation that Floyd took a pill during his encounter with police in May 2020 to show similarity to the prior incident and, in a circular fashion, use the prior incident to then show the pill existed in the later one.

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Indeed, the only thing Defendants have cited in support of the unfounded claim that Floyd took a pill when confronted by police in May 2020 is a single, fuzzy still frame from Lane's body-worn camera. *See, e.g.*, Chauvin Mot. to Dismiss 2. But from the start of his interaction with Defendants fifteen seconds earlier, Floyd was speaking normally, with no indication that he had any drugs in his mouth. Defendants also have not identified any evidence suggesting that there were drugs in the vehicle, or that those drugs would have been within reach when Floyd was confronted by police.[3] Defendants' allegation, in other words, rests on pure speculation and lacks the "proper foundation." *State v. Flores*, 595 N.W.2d 860, 868 (Minn. 1999); *cf. State v. Curtis*, 905 N.W.2d 609, 616 (Minn. 2018) (explaining that *Spreigl* "evidence must still be admissible under the ordinary rules of evidence"); *State v. Swaney*, 787 N.W.2d 541, 557 (Minn. 2010) (requiring defendants seeking to "introduce reverse-*Spreigl* evidence" about an alternative perpetrator to "first meet" a "threshold requirement of connecting the alternative perpetrator to the commission of the crime"); *State v. Jones*, 678 N.W.2d 1, 16 (Minn. 2004) (same, and explaining that this requirement "avoids the use of bare suspicion" based on the alternative perpetrator's "past differences with the" victim (internal quotation marks omitted)).

Thus, to the extent Defendants rely on this allegation to establish marked similarity and to show that Floyd had a *modus operandi* of swallowing pills when confronted by police officers, this Court should deny Defendants' motion to admit this evidence prior to trial. In the event that Defendants identify at trial a non-speculative foundation for their assertion that Floyd ingested pills when confronted by police in May 2020, the Court can revisit the issue at that time.

[3] Indeed, the far more likely explanation is that the "white spot" in the single still frame from the body-worn camera footage was spittle or chewing gum.

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Defendants' other arguments for treating the incidents as markedly similar likewise carry little weight. The actual, known facts demonstrate that these two incidents are markedly different. In May 2019, police were responding to information from a confidential informant about illegal narcotics activity. Exhibit 1 to Thao Mot., at 6, 11. Here, Floyd was accused of using a fake $20 bill to buy cigarettes. In May 2019, the police found substantial quantities of narcotics on and near Floyd, including Oxycodone pills, Promethazine syrup, powder cocaine, and rock cocaine. *See id.* at 14-25. Here, Defendants have not identified any evidence that Floyd was holding any drugs on his person—or that there were drugs in the vehicle that were close enough for him to swallow—when Lane and Kueng first approached Floyd's vehicle. That is a strong reason to treat these incidents as distinct and of limited relevance in establishing that Floyd swallowed a pill in May 2020 when Defendants confronted him in his vehicle.

The few similarities that do exist between the incidents, moreover, are not probative of whether Floyd had a common scheme or plan to ingest pills when confronted by police. In both incidents, police encountered Floyd in a car. That, of course, is true of many individuals, and cannot in itself establish a common scheme or plan to ingest drugs. In both encounters, the police escalated the situation early by drawing a weapon on Floyd. Floyd was rattled and upset after having a gun drawn on him in May 2019, just as he was in May 2020, and just as most people would be. That might be probative of Floyd's reaction to being threatened with a gun by police, but it is not probative of whether he commonly ingests pills during police encounters.

At most, then, these similarities show that the incidents are "of the same generic type." *Shannon*, 583 N.W.2d at 585. That general comparison, however, is not enough to render the incidents "markedly similar," as is necessary for the prior incident to be admitted under Rule 404(b). *See id.*; *State v. Montgomery*, 707 N.W.2d 392, 397-398 (Minn. App. 2005) (concluding

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that prior drug possession convictions were not similar to charge of selling drugs); *State v. Opsahl*, No. A08-0886, 2009 WL 2366055, at *2, *4 (Minn. App. Aug. 4, 2009) (evidence of prior possession of "fuel, foil, scales, coffee, a torch, and pseudoephedrine pills" to use and manufacture methamphetamines could not provide evidence of common scheme or plan in subsequent trial for stealing a chemical precursor to methamphetamine); *cf. State v. Johnson*, No. A15-0913, 2016 WL 952991, at *3 (Minn. App. Mar. 14, 2016) (finding a common scheme or plan where, across three incidents, defendant possessed substantial quantities of cash, multiple baggies, and 16.295 grams, 95.8 grams, and 381.7 grams of marijuana, respectively).

Second, Defendants claim that the May 2019 incident shows Floyd's *modus operandi* to resist arrest when confronted by law enforcement. *See* Thao Mot. 14, 16-17; Lane Mot. 7-8. Like their first theory, this argument also founders on the "marked similarity" requirement.

As a threshold matter, the body-camera footage from the May 2019 does not show that Floyd resisted arrest, let alone by clear and convincing evidence. *See* Minn. R. Evid. 404(b)(2) (requiring clear and convincing evidence that the victim committed the act); *see also* Thao Mot. 17. Indeed, the May 2019 footage shows Floyd largely trying to comply with contradictory commands after having a gun pulled on him. When one officer—weapon drawn—yells at Floyd to put his hands on the dash, Floyd moves to do so. Another officer with his Taser trained on Floyd commands him to put his hands on his head. Floyd, meanwhile, appears to be confused about how to comply with these dueling instructions. Once Floyd exits the car, he does not physically resist. Indeed, Defendants admit as much. *See* Thao Mot. 4 ("Mr. Floyd got into the squad car without incident or without informing MPD Officers of allege [sic] claustrophobia.").

The remaining similarities Defendants identify again prove meaningless. For instance, in both May 2019 and May 2020, Floyd begged law enforcement not to shoot him and, in 2020,

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Floyd told them he had been shot previously. Defendants suggest these statements imply Floyd sought to deceive the officers into thinking he had recently "just been shot." *Id*. at 14. But that is not what Floyd said, and neither statement proves a *modus operandi* to deceive. They show that Floyd was worried about his interactions with armed officers, not that he was trying to resist law enforcement. Similarly, the fact that Floyd mentioned his mother in both incidents does not by itself make the incidents markedly similar. *See* Lane Mot. at 8.

Minnesota courts have refused to find a *modus operandi* sufficient to establish a common scheme or plan in cases with far greater similarities than this one. *See, e.g.*, *State v. Clark*, 738 N.W.2d 316, 346 (Minn. 2007) (holding no similar *modus operandi* where "(1) both acts involved the use of a gun to threaten [rape] victims; (2) both acts occurred in the victims' bedrooms; and (3) both acts involved vaginal penetration or attempted vaginal penetration."); *State v. Krueger*, No. A07-1235, 2009 WL 1586662, at *4 (Minn. App. June 9, 2009) (rejecting common scheme or plan where "both acts involved vaginal penetration of a minor").

In any event, even if the May 2019 incident showed that Floyd had a *modus operandi* of resisting arrest when confronted by law enforcement, it is hard to see how that could be probative of whether Defendants committed the charged offenses. *See infra* pp. 15-16 (discussing relevance). Whether an officer's use of force is "reasonable" turns on the objective facts known to the officer at the time of the incident. *See* Minn. Stat. § 609.06, subd. 1(1) (authorizing "reasonable force"); *Graham v. Connor*, 490 U.S. 386, 397 (1989) (holding that whether use of force is reasonable is an objective inquiry). Here, because Defendants did not know about the May 2019 incident at the time of Floyd's death, the May 2019 incident has no bearing on their use-of-force calculus in May 2020. And to the extent that Defendants offer evidence of the May 2019 incident to establish that Floyd was resisting arrest in May 2020, it is

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hard to see how that evidence could add anything to the existing, comprehensive body-camera footage of the May 2020 incident.

In short, because Defendants have not established that the May 2019 incident is markedly similar to this case, the May 2019 incident is not proper evidence of a common scheme or plan under Rule 404(b). This Court should not admit this evidence.

B. Floyd's State of Mind on May 25, 2020 Is Irrelevant.

Defendants' other stated purposes for admitting the May 2019 incident do not fare any better. Defendants cite two additional purposes for which this evidence is purportedly admissible: (1) to show that George Floyd intentionally ingested drugs on May 25, 2020, and that Floyd did not ingest those drugs by mistake; and (2) as proof that Floyd was not actually scared and distressed during his encounter with the officers on the day he died. Thao Mot. 12-13; Lane Mot. 8. At bottom, both of these purposes involve Floyd's state of mind on May 25, 2020. But Floyd's state of mind is legally irrelevant. The evidence is therefore inadmissible for these purposes.

First, whether Floyd intentionally or mistakenly ingested narcotics on May 25, 2020 is immaterial to the charges against Defendants. *See* Lane Mot. 8. Defendants—not George Floyd—are on trial, and so only their state of mind is relevant to this case.

At trial, the jury will decide whether one or more of the Defendants committed second-degree murder, *see* Minn. Stat. § 609.19, subd. 2(1), and second-degree manslaughter, *see id*. § 609.205(1), and whether the other Defendants aided and abetted those actions, *see id*. § 609.05, subd. 1. To prove second-degree murder, the prosecution must show, among other things, that one or more of the Defendants intentionally inflicted bodily harm on Floyd. *See* Order & Mem. Op. on Def. Mots. to Dismiss for Lack of Probable Cause 37. To prove second-degree

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manslaughter, the prosecution must show, among other things, that one or more of the Defendants acted with objective gross negligence and subjective recklessness. *See id*. at 67-68. To prove that a Defendant aided and abetted either of these crimes, the prosecution must show that the Defendant had knowledge of the underlying crime and intentionally aided in that crime. *See id*. at 100. Critically, Floyd's state of mind at the time he ingested narcotics is not an element of any of these charged offenses. *See* Minn. Stat. § 609.19, subd. 2(1); *id*. § 609.205(1); *id*. § 609.05, subd. 1. Nor is the victim's state of mind relevant to the Defendants' defense that their use of force was reasonable: Floyd's state of mind at the time he ingested narcotics has no bearing on whether Defendants used an objectively reasonable level of force during the encounter itself, as Defendants would not have known Floyd's state of mind when he ingested narcotics. *See supra* p. 14.

Moreover, with respect to causation, Defendants' criminal liability hinges on whether Defendants' actions were a "substantial factor" in bringing about Floyd's death—not whether Floyd purposefully or accidentally swallowed a pill. *See State v. Torkelson*, 404 N.W.2d 352, 357 (Minn. App. 1987). To the extent Defendants will argue that their actions were not a "substantial factor" in causing Floyd's death because drugs were the sole cause of death, Floyd's intent is irrelevant. There is no dispute that drugs were found in Floyd's system, and whether Floyd intentionally ingested the drugs or did so by accident has no bearing on whether they were a "superseding cause" such that they "br[oke] the chain of causation set in operation by defendant's" action. *State v. Smith*, 119 N.W.2d 838, 846 (Minn. 1962) (internal quotation marks omitted).

Second, Defendants seek to introduce evidence of the May 2019 arrest to claim that Floyd was not actually "startled, shaken, upset, scared," and unaware of "what was going on"

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when the Defendants confronted him a year later. Lane Mot. 8 (citing State Brief in Response to Mot. to Dismiss pp. 3-5). Floyd's actions in May 2019 have no bearing on his state of mind in May 2020. And Floyd's subjective intent is once again irrelevant in any event. Insofar as Defendants seek to pursue an affirmative defense that they used reasonable force, that inquiry considers only the objective circumstances before the Defendant at the time of the crime—not the victim's state of mind. *See* Minn. Stat. § 609.06, subd. 1(1); *Graham*, 490 U.S. at 397.

II. THE POTENTIAL FOR UNFAIR PREJUDICE FAR OUTWEIGHS THE PURPORTED PROBATIVE VALUE OF THE EVIDENCE.

Even if the evidence Defendants have offered regarding the May 2019 incident were marginally relevant (it is not), the "unfair prejudice" associated with admitting this evidence "outweigh[s]" any "probative value" it might have. Minn. R. Evid. 404(b)(2).

Rule 404(b) requires courts to exclude *Spreigl* evidence when the prejudicial effect of that evidence may unfairly prejudice and unduly influence a jury. Typically, for most other types of relevant evidence, a court will only exclude the evidence when its prejudicial effect "*substantially* outweigh[s]" any probative value the evidence has. Minn. R. Evid. 403 (emphasis added). By contrast, Rule 404(b) mandates the exclusion of *Spreigl* evidence when unfair prejudice merely outweighs its probative value. *See* 11 Peter N. Thompson, *Minnesota Prac., Evidence* § 404.06 (4th ed. 2020 update) (noting that Rule 404(b) requires courts to exclude evidence more frequently than Rule 403). This higher bar for admission reflects the unique dangers posed by *Spreigl* evidence. For at least four reasons, the prejudice of introducing the May 2019 incident substantially outweighs any minimal probative value the evidence has.

First, evidence of the May 2019 incident is not probative of any material issue in this case. The evidence does not implicate Defendants' state of mind, and Defendants have offered no reason to believe that any of the Defendants knew about the May 2019 incident at the time of

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Floyd's death in May 2020. Moreover, for the reasons explained above, the evidence does not support Defendants' causation defense. *See supra* p. 16. Many of the facts related to the May 2019 arrest, such as the quantity of narcotics Floyd had in his possession or control in 2019, have nothing whatsoever to do with this case. Similarly, any implication based on the May 2019 incident that Floyd may have been dealing drugs has no bearing on this case. *See supra* pp. 15-16.

Indeed, the only remotely plausible reason for which the Defendants seek to introduce this evidence—to show that a white spot in a single still frame of the May 2020 body-camera video is a pill, *see, e.g.*, Chauvin Mot. to Dismiss 2; Lane Reply in Supp. of Mot. to Dismiss 3—is only minimally relevant to whether Defendants' actions were a substantial factor in Floyd's death. The chain of circumstantial inferences is a long one. The jury would need to find: (1) that Floyd actually had a *modus operandi* of swallowing pills; (2) that a white spot on a body-camera video was indeed a pill Floyd swallowed; (3) that a single pill swallowed at the initial moment of the encounter with police could have caused Floyd to lose consciousness approximately 15 minutes later, even though Floyd remained lucid until he was restrained face-down on the ground by Defendants; (4) that the pill, and not the actions of Defendants, caused Floyd to lose consciousness while Defendants pressed him face-down into the pavement; and (5) that taking the pill constituted a "superseding, intervening cause" that broke the chain of causation between Chauvin's actions and Floyd's death. *Smith*, 119 N.W.2d at 846. That attenuated chain of inferences reduces the potential relevance of the evidence. And the lack of similarity between the May 2019 and May 2020 incidents reduces the potential relevance of the evidence even further, as it makes the connection between Floyd's alleged *modus operandi* and the white spot

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in a single still frame of the body-camera footage even more tenuous. *See Ness*, 707 N.W.2d at 689; *supra* pp. 9-14.

Second, the May 2019 arrest likely will invite jurors to improperly inject their own views about illegal drugs and those who use them into their assessment of whether Defendants are guilty. As Defendants themselves admit, the point of admitting the May 2019 incident is to paint Floyd as an "experienced drug dealer[]." Transcript of Omnibus Hearing, at 104; *see also* Lane Reply in Support of Mot. to Dismiss 8 (alleging that Floyd was an "addict, a distributor of drugs, and evident danger to the community"). That attempt to stain Floyd's character with propensity evidence is unfairly prejudicial. And it has little relevance to this case. Every Minnesotan deserves the law's protection. That is true no matter whether the victim of a crime may have used drugs.

Third, Defendants possess other means of establishing their defenses. When balancing the probative value against the prejudicial effect of *Spreigl* evidence, the court should not permit the parties to present prejudicial evidence to the jury if the defendants possess another means to prove their case. *See Ness*, 707 N.W.2d at 690. Here, Defendants and the prosecution may offer medical evidence that speaks to Floyd's cause of death, and they may offer testimony from expert witnesses. Defendants' reasonable use of force defense, meanwhile, hinges on objective facts captured in the body-camera videos of the May 2020 incident. That evidence is far less prejudicial and surely more relevant than evidence of an unrelated interaction between the victim and different law enforcement officers a year earlier under fundamentally different circumstances, and of which Defendants had no knowledge at the time of Floyd's death.

Fourth, the evidence does not become any less prejudicial just because Defendants, and not the prosecution, have offered it. *See* Thao Mot. 18. The standards governing the State's or

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the defense's use of other bad act evidence are exactly the same: The evidence must pass the *Spreigl* test incorporated in Rule 404(b)(2). *See State v. Johnson*, 568 N.W.2d 426, 433 (Minn. 1997). Prejudice factors into that inquiry no matter which side seeks to introduce evidence of a prior bad act. *See, e.g.*, *State v. Gutierrez*, 667 N.W.2d 426, 437-438 (Minn. 2003) (rejecting defendant's reverse-*Spreigl* evidence because of its prejudicial effect). And for good reason: Victims also deserve the law's protection. To suggest that prejudice somehow does not matter when it impacts the State's case would undermine the State's ability to pursue justice for all.

In short, the danger of unfair prejudice outweighs the probative value of the evidence Defendants have offered regarding the May 2019 incident. The Court should therefore deny the admission of this evidence before trial commences. That said, if the Court determines otherwise, it should at very least defer a ruling on Defendants' motions until after they present their case-in-chief, at which point the Court can better assess whether this evidence is necessary to Defendants' case. *See State v. DeWald*, 464 N.W.2d 500, 504 (Minn. 1991) (encouraging district courts to delay ruling to admit *Spreigl* evidence "when there is a high risk of potential prejudice"). If the Court defers a ruling on Defendants' motions until trial, it should preclude Defendants from making reference to this evidence in their opening statement or any other part of their case-in-chief until the Court has made a final ruling on the admissibility of this evidence.

III. DEFENDANTS' REMAINING ARGUMENTS FOR ADMITTING EVIDENCE OF THE MAY 2019 INCIDENT ARE UNPERSUASIVE.

Defendants offer several other reasons in passing for why the Court should admit the evidence they have offered regarding the May 2019 incident. None has merit.

First, Lane argues that the decision in *Napue v. Illinois*, 360 U.S. 264 (1959), requires the evidence to be admitted. Lane Mot. 5-6. But *Napue* has nothing to do with this case. In *Napue*, a witness serving a sentence for the same murder as the accused falsely testified that "he had

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received no promise of consideration in return for his testimony." 360 U.S. at 265. But the prosecutor "had in fact promised him consideration" and "did nothing to correct the witness' false testimony." *Id*. The U.S. Supreme Court held that "the failure of the prosecutor to correct the testimony of the witness which he knew to be false denied petitioner due process of law." *Id*.

To state *Napue*'s facts is to show *Napue*'s inapplicability here. The State has not offered false witness testimony. Lane nonetheless claims that the jury may draw "false inferences" about Floyd without the May 2019 body-camera evidence. Lane Mot. 6. Lane, however, does not identify what "false inferences" the jury might draw from that evidence. And his attempt to correct those "false inferences" amounts to nothing more than an attempt to denigrate Floyd's character with propensity evidence—something that Rule 404(b) forbids. Lane's argument also proves too much. It would require the court to admit evidence regarding the victim, no matter how prejudicial or cumulative, whenever the evidence of the crime itself does not tell the full story about the victim's character. That is not the law of evidence, and for good reason.

Second, the May 6, 2019 incident is not admissible "as evidence of habit." *See* Lane Mot. 9. A "habit describes 'one's regular response to a repeated specific situation.'" Minn. R. Evid. 406 comment (quoting C. McCormick, *Evidence* § 195 (2d ed. 1972)). By definition, a lone incident cannot provide evidence of how a person acts in *repeated* situations. *See Hammer v. Invs. Life Ins. Co. of N. Am.*, 473 N.W.2d 884, 891 (Minn. App. 1991) (affirming district court ruling that "only one instance of prior conduct" does not constitute a habit).

Nor do Defendants concretely identify *what* habitual behavior they claim Floyd engaged in during his encounter with police in May 2020, nor what stimuli triggered that alleged habit. *See* McCormick, *supra*, § 195 (8th ed.) ("[A] person may be in the habit of bounding down a certain stairway two or three steps at a time, of patronizing a particular pub after each day's

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work, or of driving his automobile without using a seatbelt."). Instead, Defendants offer generalizations about Floyd's disposition, such as his drug use and "how he behaved." *See* Lane Mot. 9. That is exactly the type of prejudicial character evidence courts typically exclude. *See* McCormick, *supra*, § 195 (8th ed.) (defining character evidence as "a generalized description of a person's disposition, or of the disposition in respect to a general trait, such as honesty, *temperance* or *peacefulness*, that usually is regarded as meriting approval or disapproval" (emphasis added)).

Third, the May 2019 incident is not admissible for the purpose of proving that Floyd has a propensity for physical violence. *See* Lane Mot. 7; Thao Mot. 18; *see also* Minn. R. Evid. 404(a)(2) (permitting defendants to introduce "pertinent trait of character of the victim"). Under Rule 405, a party can prove a person's character using either (a) testimony about a person's reputation or in the form of an opinion; or (b) "specific instances of that person's conduct," but only where evidence of "character or a trait of character of a person is an essential element of a charge, claim, or defense." Minn. R. Evid. 405. Here, neither shoe fits. The 2019 arrest is not "testimony as to reputation" or "testimony in the form of an opinion." Minn. R. Evid. 405(a). And the May 2019 incident is not relevant to an essential element of the charges, or to Defendants' affirmative defense that their use of force was objectively reasonable. *See supra* pp. 15-16. After all, Defendants have not suggested that they were aware of the May 2019 incident when they encountered Floyd in May 2020. So this incident cannot factor into whether Defendants were reasonably justified in their use of force. *See State v. Penkaty*, 708 N.W.2d 185, 202 (Minn. 2006); *State v. Bland*, 337 N.W.2d 378, 382 (Minn. 1983). In any event, even if a propensity for violence were somehow legally relevant, the 2019 footage does not show Floyd

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physically resisting or attacking the officers in any way and so cannot show a propensity for violence. *See supra* pp. 3-6. The incident therefore cannot be admitted on that basis.[4]

CONCLUSION

For the foregoing reasons, Defendants' motions to introduce evidence of the May 6, 2019 incident involving George Floyd should be denied.

Dated: November 16, 2020

Respectfully submitted,

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[4] Defendants also suggest that they might use the May 2019 incident to rebut any evidence the State offers regarding Floyd's reputation for peacefulness. *See* Minn. R. Evid. 405(a); Thao Mot. 18. But the State has not indicated that it will present evidence regarding Floyd's character for peacefulness. Unless it does so, the May 2019 incident cannot be admitted on that basis.