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STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

STATE OF MINNESOTA,

PLAINTIFF,

V.

TOU THAO,

DEFENDANT.

MEMORANDUM OF LAW IN SUPPORT OF *SPREIGL* EVIDENCE

COURT FILE NO. 27-CR-20-12949

TO: THE HONORABLE PETER A. CAHILL, JUDGE OF DISTRICT COURT, AND MR. MATTHEW G. FRANK, ASSISTANT ATTORNEY GENERAL

INTRODUCTION

On May 25, 2020, Tou Thao ("Mr. Thao" hereinafter) responded to a call for backup from other Minneapolis Police Department ("MPD") Officers to assist in the arrest of George Floyd ("Mr. Floyd" hereinafter). Mr. Thao's role in the arrest was crowd control. Mr. Thao never placed his hands on Mr. Floyd.

During his arrest, Mr. Floyd did not listen to lawful orders from MPD Officers. Mr. Floyd refused to exit the vehicle. Mr. Floyd refused to show his hands. Mr. Floyd placed what appeared to be at least one white pill in his mouth.

On the day of his arrest, Mr. Floyd was taken to a hospital after falling unconscious. He died at the hospital that day. Autopsy records show that at the time of his death Mr. Floyd had fatal levels of fentanyl in his system.

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The State alleges that Mr. Floyd's death was a homicide committed at the hands of Minneapolis Police Department Officers. The State has charged Mr. Thao with two criminal counts: Second Degree Murder in violation of Minn. Stat. § 609.19.12.2(1) with reference to Minn. Stat. § 609.05.1 and Second Degree Manslaughter in violation of Minn. Stat. § 609.205(1) with reference to Minn. Stat. § 609.05.1.

Mr. Thao gave notice of his intent to admit evidence pursuant to Minn. R. Evid. 404(b) and *State v. Spreigl,* 139 N.W.2d 167, 173 (Minn. 1965). Specifically, Mr. Thao intends on submitting evidence at trial that Mr. Floyd was previously arrested almost a year to the day before, by MPD Officers, and during said arrest he ignored lawful orders, refused to exit the vehicle, refused to show his hands, and intentionally overdosed on narcotics, requiring hospitalization.

Based on the clear and convincing nature of Mr. Floyd's actions during his May 2019 arrest, his behavior's relevance and materiality to the question of whether Mr. Thao can be found guilty of Mr. Floyd's death, and the fact that their probative value outweighs any danger of unfair prejudice, Mr. Thao respectfully requests that the Court admit the proffered *Spreigl* evidence.

STATEMENT OF THE FACTS

I. MAY 6, 2019 ARREST OF GEORGE FLOYD.

Jer Yang is a MPD Officer who worked as part of a fourth precinct community response team in May of 2019. His duties included working with confidential informants and working undercover to conduct narcotics and weapons arrests that lead to convictions in state court. See Exhibit 1 at 13.

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On May 6, 2019, MPD Officer Yang was conducting a narcotics investigation. *Id.* Officer Yang was contacted by a Confidential Reliable Informant ("CRI") who told him that an unlicensed burgundy Ford Explorer was to deliver around 200-300 pills of Oxycodone to the area of Olson Memorial Highway and Morgan Avenue North in Minneapolis within the next 30 minutes. *Id.* The CRI identified the driver of the Ford Explorer as a person named "Mark" and described him as a Black male with medium build. *Id.* Officer Yang then relayed the information provided by the CRI to other MPD Officers in the area and instructed them to make the arrest. *Id.*

Around 30 to 45 minutes later, a burgundy unlicensed Ford Explorer was seen driving northbound on Morgan Avenue North towards Olson Memorial Highway. *Id* at 12. The Ford Explorer was driven by a Black male matching the description given by the CRI. *Id.* Officers stopped the Ford Explore and positively identified the driver as Mark Anthony Hicks (DOB: [redacted]). *Id.* The Ford Explorer had a front seat passenger identified as George Perry Floyd (DOB: 10/14/1973) ("Mr. Floyd" hereinafter). *Id.* Body worn camera ("BWC") footage clearly shows the passenger to be Mr. Floyd. *See* Exhibit 2; and Exhibit 3. Mr. Floyd also identifies himself on camera. *See* Exhibit 2 at 7:00; and Exhibit 3 at 5:48, 6:58.

MPD Officers approached the car. Mr. Hicks was asked to exit the vehicle. Mr. Hicks exited without incident. MPD Officer Alexandra Dubay wrote that "[Mr. Hicks] was cooperative with me." *See* Exhibit 1 at 10.

When MPD Officers approached the vehicle, Mr. Floyd announced that he "was just shot." *See* Exhibit 2 at 1:25. Officers asked Mr. Floyd to exit the vehicle. Mr. Floyd refused. MPD officers gave Mr. Floyd lawful orders to put his hands where they could see them at least five times. *See* Exhibit 2 starting at 1:30; and Exhibit 4 at 0:45. Mr. Floyd refused. *See* Exhibit 2. Officer Creighton described Mr. Floyd as "moving all around and acting extremely nervous and would not

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listen to my commands." *See* Exhibit 1 at 8; *see also* Exhibit 2 and Exhibit 3. While resisting arrest, Mr. Floyd "put something in his mouth and was attempting to eat them". *See* Exhibit 1 at 8. Officers immediately told him to "spit what he had in his mouth out, but had already ate them." *Id.* Specifically, MPD Officers told Mr. Floyd to "Open your mouth. Spit out what you got. Spit out what you've got! I'm gonna taze you. Spit it out". See Exhibit 2 at 2:10; and Exhibit 4 at 0:59. Mr. Floyd did not follow the command. MPD Officer Dubay noted in her report that she "saw a round yellow pill on the lap of the passenger. I asked him what it was, and he put it in his mouth." *See* Exhibit 1 at 10; Exhibit 3 at 1:28.

With Mr. Floyd still refusing to listen to commands to exit the vehicle, the MPD officers were left with no other choice but to physically remove Mr. Floyd. *See* Exhibit 4 at 1:05. When Mr. Floyd was removed from the passenger seat, a pile of white pills – later identified as Oxycodone – was found on the seat. *See* Exhibit 1 at 8; Exhibit 4 at 1:40. Mr. Floyd began to cry once handcuffed. *See* Exhibit 2; and Exhibit 3. When MPD Officers performed a legal pat-down search of Mr. Floyd, they found a napkin hidden in his stomach area that contained more Oxycodone pills. *See* Exhibit 1 at 8; Exhibit 3; Exhibit 4 at 2:27. Officers also recovered a large amount of cash on Mr. Floyd. *See* Exhibit 1 at 8. As Mr. Floyd was walked to the squad car, "(2) Oxycodin pills fell out of his pant leg to the ground." *Id; See also* Exhibit 3; and Exhibit 4 at 2:48. Mr. Floyd got into the squad car without incident or without informing MPD Officers of allege claustrophobia. *See* Exhibit 2; Exhibit 3; and Exhibit 4.

When MPD Officers performed a legal search of the car incident to arrest, they found a brown pouch on Mr. Floyd's seat. *See* Exhibit 1 at 8; Exhibit 2 at 5:49; and Exhibit 4 at 1:30. Inside the pouch were "several packs of pills and powder cocaine." *See* Exhibit 1 at 8; and Exhibit 2 at 6:04. The pouch also contained Mr. Floyd's birth certificate and court paperwork for Mr.

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Floyd. *See* Exhibit 1 at 8. After the Ford Explorer was brough back to the fourth precinct, MPD Officers "recovered five (5) Oxycodin pills on and underneath the passenger seat where [Mr.] Floyd was sitting". *See* Exhibit 1 at 9.

Mr. Floyd was found to have the following in his control:

- 17.96 grams of power cocaine;
- A package containing 78 Oxycodone pills;
- A paper towel encasing 38 Oxycodone pills;
- 3.1 grams of crack cocaine;
- 5 loose Oxycodone pills;
- A package containing 197 Oxycodone pills;
- "Equipment, measuring devices, and tools" within the brown pouch that also contained cocaine and pills;
- A bottle of cough syrup (Promethzaine);
- $594.00 in cash.

See Exhibit 1 at 17-22.

Both Mr. Hicks and Mr. Floyd were arrested and taken to the fourth precinct for further investigation. *Id* at 14. After Mr. Hicks was read his *Miranda* rights, Mr. Hicks stated that Mr. Floyd "was his friend and he knew he had those pills on him." *Id* at 10.

Multiple officers noted in their reports that Mr. Floyd appeared to be under the influence of narcotics after arriving to the fourth precinct. *See* Exhibit 1 at 14; and Proposed Exhibit 7. When asked, Mr. Floyd confirmed he had taken some pills. *See* Exhibit 5. Police camera footage of Mr. Floyd's questioning at the fourth precinct shows a very confused, irritable, and distressed man suffering the effects of narcotics. *See* Proposed Exhibit 7. BWC footage shows that Mr. Floyd is unintelligible, and his thought process is difficult to follow. *Id.*

Officer Dubay exited the room when it became apparent that Mr. Floyd was under the influence of pills and could not clearly converse. *See* Proposed Exhibit 7 at 5:33. Officer Yang enters the room to speak to Mr. Floyd about his current medical state. *See* Proposed Exhibit 7 at 7:53. Mr. Floyd admitted he was "high". *See* Exhibit 5 at 5. Mr. Floyd stated that he took around

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seven or eight pills. *Id.* Mr. Floyd told Officer Yang that when he was being arrested in the vehicle he "ate one pill", just as MPD Officers had observed. *See* Exhibit 5 at 8.

Officer Yang observed that Mr. Floyd had white residue around his mouth. *See* Exhibit 5. Officer Yang then left the room to get medical personnel. *See* Proposed Exhibit 7 at 14:20. Medical personnel arrive. *See* Proposed Exhibit 7 at 33:25. Mr. Floyd confirmed to medical personnel that he took "Percocet" (aka Oxycodone). *See* Exhibit 5 at 12. Mr. Floyd told medical personnel that he took one pill when the police showed up. *Id.* at 13. Medical personnel told Mr. Floyd that his blood pressure was so high that he was "in danger of having a stroke or heart attack". *Id.* at 15-16. After assessing Mr. Floyd, medical personnel transported him to the hospital due to his high vital signs. *See* Exhibit 1 at 14; and Exhibit 5.

Officer Yang wrote in his report that he "will submit this case to the Hennepin County Attorneys office for charging considerations for FLOYD". *See* Exhibit 1 at 14. However, Mr. Floyd was not charged criminally for the amount of narcotics he possessed. *See* Exhibit 6. Mr. Floyd's actions on May 6, 2019 would qualify – at minimum – for a criminal charge of Third-Degree Controlled Substance in violation of Minn. Stat. § 152.023 subd. 2(a)(1). If he was charged, Mr. Floyd would have been facing a prison term of up to 20 years. Minn. Stat. § 152.023 subd. 3(a).

II. MAY 25, 2020 ARREST OF GEORGE FLOYD.

On May 25, 2020, at approximately 8:08 p.m., Minneapolis Police Department (a.k.a. "MPD") Officers Thomas Lane and J.A. Kueng ("Officer Lane" and "Officer Kueng" hereinafter) arrived at the Cup Foods located on 3759 Chicago Avenue in Minneapolis, Hennepin County, Minnesota to respond to a 911 call. The call stated that a man bought merchandise with counterfeit bills. Upon arrival, store personnel informed the two officers that the man was inside a parked car

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around the corner. Officer Lane and Officer Kueng approached the car and identified the man as Mr. Floyd.

MPD Officers gave Mr. Floyd a lawful order to exit the vehicle. He refused. MPD Officers gave Mr. Floyd a lawful order to show his hands. He refused. While continuing to refuse to exit the vehicle, Mr. Floyd turned away from the officer. When Mr. Floyd turned his head back, a small white object shaped like a pill could be seen in his mouth. *See State v. Lane* (27-CR-20-12951) Memorandum Supporting Motion To Dismiss Exhibits 2 and 3. Mr. Floyd told officers he had just been shot. *Id.* With no other choice, MPD Officers physically removed Mr. Floyd from the vehicle and handcuffed him.

When the officers walked Mr. Floyd to the squad car to effect the lawful arrest, Mr. Floyd continued to resist both passively (by sitting on the ground) and actively (by stiffening up and refusing to enter the squad car). Mr. Thao and MPD Officer Chauvin then arrived in their squad car as backup for Officer Lane and Officer Kueng to assist with the arrest. Mr. Floyd continued to resist by pushing his body outside the squad car until he was forcibly placed inside. Mr. Floyd persisted to struggle inside the squad car and ultimately forced himself outside of the passenger side of the squad car using his legs.

Mr. Floyd continued to refuse to comply with lawful orders. Mr. Floyd refused to enter the squad car and could not be physically placed in the squad car by MPD Officers. While he continued to resist, Mr. Floyd was placed in a prone position by Officer Chauvin and secured using an neck restraint approved by Minneapolis Police Department Policy and trained to officers in the Minneapolis Police Academy. Officer Lane and Officer Kueng assisted by placing themselves on top of Mr. Floyd's midsection and feet respectively. Mr. Floyd continued to resist by moving his legs, arms, and torso.

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Mr. Thao called the medical personnel and told them to expedite their response to the scene by elevating the code. Officer Thao then immediately turned his attention to crowd control. Officer Thao kept his back to Mr. Floyd and the three other officers for the majority of the remainder of the arrest. When Officer Thao turned his back to Mr. Floyd and the three other officers for the last time, Mr. Floyd was alive and breathing.

During his arrest, Mr. Floyd had foam around his mouth. *See State v. Lane* (27-CR-20-12951) Memorandum Supporting Motion To Dismiss Exhibits 2 and 3. Mr. Floyd eventually lost consciousness. Emergency medical personnel arrived. Mr. Floyd was placed on a stretcher and taken to Hennepin County Medical Center. Later in the day, Mr. Floyd was pronounced dead. Records from the Hennepin County Medical Examiner's Officer show that Mr. Floyd had a fatal level of fentanyl in his system when he died.

ARGUMENT

Evidence concerning Mr. Floyd's commission of another crime is admissible *Spreigl* evidence. *Spreigl*, 139 N.W.2d 167. Evidence of previous bad acts "is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Minn. R. Evid. 404(b)(1). It is well settled, however, that such evidence may be admitted "to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident," or common scheme or plan. *State v. Ross*, 732 N.W.2d 274, 282 (Minn. 2007); *Spreigl*, 139 N.W.2d at 167; Minn. R. Evid. 404(b). The Court has wide discretion to admit *Spreigl* evidence. *State v. Heath*, 685 N.W.2d 48, 58 (Minn. Ct. App. 2004) (citing *State v. Spaeth*, 552 N.W.2d 187, 193 (Minn. 1996)).

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The Minnesota Supreme Court and Rules of Evidence permit a party to use *Spreigl* evidence to show that a pertinent character trait of an actor when five conditions are satisfied:

1. The [party] must give notice of its intent to admit the evidence;
2. The [party] must clearly indicate what the evidence will be offered to prove;
3. There must be clear and convincing evidence that the [actor] participated in the prior act;
4. The evidence must be relevant and material to the [party's] case; and
5. The probative value of the evidence must not be outweighed by its potential prejudice to the [actor].

Minn. R. Evid. 404(b); Minn. R. Evid. 404 Cmt. ("Rule 404(a)(2) continues the existing practice which permits the admission of a pertinent character trait of the victim to be offered by the accused in a criminal case").

Under these factors, the Court should admit the *Spreigl* evidence pursuant to Rule 404(b) and established precedent.

I. MR. THAO PROVIDED NOTICE OF INTENT TO ADMIT *SPREIGL* EVIDENCE.

In the present case, the first factor is met. Mr. Thao provided both the court and opposing counsel with timely notice clearly articulating his intent to admit *Spreigl* evidence through its Notice of Intent To Use *Spreigl* Evidence filing on October 16, 2020.

II. MR. THAO HAS CLEARLY INDICATED THE PURPOSE OF THE PROFFERED EVIDENCE.

The Defense specifies the purpose for introducing the evidence is to prove intent, absence of mistake, and common scheme or plan. *See* Minn. R. Evid. 404(b); *Ross,* 732 N.W.2d at 282.

III. EVIDENCE THAT DEFENDANT COMMITTED THE *SPREIGL* ACT IS CLEAR AND CONVINCING.

Spreigl evidence is clear and convincing when "it is highly probable that the facts sought to be admitted are truthful." *State v. Ness,* 707 N.W.2d 676, 686 (Minn. 2006) (citing *State v. Kennedy,* 585 N.W.2d 385, 389 (Minn. 1998)). The standard is lower than proof beyond a

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reasonable doubt. *Kennedy,* 585 N.W.2d at 389. It is not necessary that to prove the occurrence of an actual crime, only that Mr. Floyd engaged in a wrong or bad act. *See State v. McLeod,* 705 N.W.2d 776, 787 (Minn. 2005) (finding *Spreigl* evidence may be admissible when there was clear and convincing evidence of a "wrong" or "act" under Rule 404(b)). The court will often look to the details provided and the credibility of the witness' testimony in making this determination. *See Ness,* 707 N.W.2d at 686.

Under this prong of the analysis, the task of the trial judge is to assess the quality of the proffered evidence. However, high quality evidence, including a certified copy of a conviction, is not always available. Clear and convincing evidence can be provided by a single witness. *See State v. Oates,* 611 N.W.2d 580, 585 (Minn. Ct. App. 2000). The Minnesota Supreme Court concluded that a victim's *Spreigl* testimony need not be "corroborated in order to meet the clear and convincing standard." *Kennedy,* 585 N.W.2d at 389-90.

In this case, Mr. Floyd's arrest was witnessed and documented by at least three Minneapolis Police Department Officers. Each of the officers (Officer Dubay, Officer Yang, and Officer Creighton) wrote detailed reports establishing the probable cause stop, arrest, and medical intervention. Body worn camera footage clearly shows Mr. Floyd's face. BWC and police reports also document that Mr. Floyd had numerous loose pills on his person and in his possession. Footage additionally shows the brown pouch that was found at the foot of Mr. Floyd's passenger seat with his personal documents and drugs inside. Footage from Mr. Floyd's subsequent questioning show Mr. Floyd admitting in his own words to swallowing seven to eight pills and being "high". Footage from Mr. Hick's questioning shows Mr. Hicks identifying the passenger of his car as Mr. Floyd and stating that Mr. Floyd knew he had drugs in his own possession.

Clear and convincing evidence supports the offered incidents.

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IV. EVIDENCE OF DEFENDANT'S PRIOR *SPREIGL* ACT IS RELEVANT AND MATERIAL TO THE STATE'S CASE.

Evidence is relevant so long as it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401.

The cause of Mr. Floyd's death is the heart of the *State v. Thao* case. The State argues that Mr. Thao along with three other MPD Officers caused the death of Mr. Floyd when former MPD Officer Chauvin placed Mr. Floyd in a legal neck restraint. However, Mr. Floyd had a fatal amount of fentanyl in his system at the time of his death.

Here, the *Spreigl* act shows Mr. Floyd's intent, absence of mistake, and common scheme or plan to swallow narcotics when confronted by police and the possibility of an arrest. *See* Minn. R. Evid. 404(b). "*Spreigl* evidence is relevant and material when there is a sufficiently close relationship between the charged offense and the *Spreigl* offense in terms of time, place, or modus operandi." *State v. Gomez*, 721 N.W.2d 871, 878 (Minn. 2006) (citing *Kennedy*, 585 N.W.2d at 390).

In both Mr. Floyd's May 2019 arrest and May 2020 arrest he refused to listen to MPD Officer commands to exit a vehicle, refused to listen to MPD Officer commands to show his hands, became distressed and cried once handcuffed, and ingested dangerous levels of narcotics once confronted by police. The prior arrest goes to Mr. Floyd's intent, absence of mistake, and common scheme or plan to ingest narcotics during a lawful arrest. If not admissible, Defense would not be able to make the case that Mr. Floyd's fatal amount of fentanyl at the time of his death was not an accident, but intentional. A showing of such would negate Mr. Thao's guilt. Thus, the question of Mr. Floyd's intentional drug use is the epitome of relevant and material to the case of *State v.*

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Thao. The *Spreigl* act is offered for a valid purpose and is sufficiently related to the charged offense, thus it should be admitted by the Court.

A. The *Spreigl* Act Is Offered For A Valid Purpose.

To decide how probative *Spreigl* evidence would be, a district court must first assess how the Defense intends to use the evidence. The court identifies the disputed issues that the *Spreigl* evidence will support, and then how the evidence relates to those disputed issues. *Ness*, 707 N.W.2d at 686.

1. Intent

Evidence of Mr. Floyd's prior arrest and resulting hospitalization is relevant and material to prove his consumption of fentanyl on the day of his death was intentional. Intent is "a state of mind in which an act is done consciously, with purpose." *Ness*, 707 N.W.2d at 687 (internal citations omitted). The State alleges that Mr. Thao aided in the Second-Degree Murder of Mr. Floyd. However, if events showed that Mr. Floyd intentionally ingested a fatal amount of narcotics, his death could be classified as an accident or a suicide, there would be no criminal culpability. Thus, if Mr. Floyd's death were not a homicide, but the result of an accidental overdose from intentionally consuming narcotics or a suicide, Mr. Thao's charges would be dropped or a jury would find him not guilty.

The offered act will show that Mr. Floyd intentionally consumed a fatal amount of fentanyl on the date of his May 2020 and death. That Mr. Floyd intentionally swallowed at least one pill containing fentanyl during his arrest, just as he intentionally swallowed narcotic pills on the date of his May 2019 arrest. That his death was not and could not be a homicide.

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2. Absence of Mistake or Accident

Evidence of other acts is admissible to establish Mr. Floyd's swallowing of pills during the May 2020 arrest actually occurred or to refute any potential State witnesses who may testify that Mr. Floyd would never intentionally consume narcotics, specifically swallowing illegal pills when confronted by police. *See generally State v. Wermerskirchen,* 497 N.W.2d 235, 241-42 (Minn. 1993)."Where . . . the defendant denies that [the crime] occurred, and claims fabrication or mistake, the district court may admit *Spreigl* evidence if it 'is satisfied that the other crime is sufficiently relevant to the charged crime.'" *State v. Rucker,* 752 N.W.2d 538, 549-50 (Minn. Ct. App. 2008) (quoting *Wermerskirchen,* 497 N.W.2d at 242-43). Other bad acts "may legitimately tend to show awareness [and] knowledge . . . and thus . . . negate the appearance of inadvertence or ignorance." Henry W. McCarr & Jack S. Nordby, *Minnesota Practice-Criminal Law and Procedure* § 32.19 (3d. ed. 2009). The offered *Spreigl* acts put Mr. Floyd's conduct and levels of fentanyl on the day of his death in a proper and relevant context. *State v. Berry,* 484 N.W.2d 14, 18 (Minn. 1992).

In the *Spreigl* act, Mr. Floyd refused to listen to lawful orders from MPD Officers, instead he delayed arrest and swallowed illegal narcotics to the point where he would later have to be taken to a hospital. Mr. Floyd's May 2019 actions confirmed to him that if he swallowed the illegal narcotics he was carrying on him, he would suffer symptoms serious enough to need medical attention and avoid a lawful arrest or detention. Therefore, Mr. Floyd's fatal level of fentanyl on the day of his death was not from accidentally consuming it, but intentionally or unmistakably taking his own supply of illegal narcotics.

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3. Common Scheme or Plan

Evidence of Mr. Floyd's May 2019 arrest is relevant and material in proving that when confronted by police, Mr. Floyd employed a common scheme. Common scheme evidence is used to corroborate evidence of the current offense because of its similarity with the prior act. *Ness*, 707 N.W.2d at 687-88. Common scheme evidence helps to show identity, show that the offense actually occurred, or refute the actor's contention that a witness is mistaken or fabricating the offense. *Id* at 688. The *Spreigl* evidence must be markedly similar to the current offense. *See Ness*, 707 N.W.2d at 689. Courts do not, however, require that the offenses be "signature" offenses before admitting the evidence. *See State v. Johnson*, 568 N.W.2d 426, 434 (Minn. 1997).

The offered act will show that Mr. Floyd acts in a common scheme when confronted by police. That he refuses to exit the vehicle despite being given a lawful order. That he refuses to show his hands despite being given lawful orders. That he tells MPD Officers that he had just been shot. That Mr. Floyd carries illegal narcotics on him. And when confronted by police, he swallows his narcotics. Mr. Floyd's actions are nearly identical across his 2019 and 2020 arrests when confronted by police.

The prior act cannot and will not be offered to show a propensity to commit bad acts, *but* can be and will be offered to refute any potential witness testimony that Mr. Floyd could not and would not intentionally ingest drugs when confronted by police.

B. The *Spreigl* Act And Current Charges Are Sufficiently Related In Time, Location, And *Modus Operandi.*

The "general rule" is that "*Spreigl* evidence need not be identical in every way to the charged crime, but must instead be sufficiently or *substantially similar* to the charged offense-determined by time, place and modus operandi." *Ness*, 707 N.W.2d at 688 (quoting *Kennedy*, 585 N.W.2d at 391) (emphasis in *Ness*). Where *Spreigl* evidence is offered under the common scheme

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or plan exception, however, the prior incident and the charged incident must bear "a *marked similarity* in modus operandi." *Id.* at 667-68 (quoting *State v. Forsman,* 260 N.W.2d 160, 166 (Minn. 1977)) (emphasis in *Ness*).

The strength of one aspect of relevancy may compensate for the lack of another. *See State v. Washington*, 693 N.W.2d 195, 202 (Minn. 2005) ("[A] district court, when confronted with an arguably stale *Spreigl* incident, should employ a balancing process as to time, place, and modus operandi: the more distant the *Spreigl* act is in terms of time, the greater the similarities as to place and modus operandi must be to retain relevance."). Each element of relevancy, analyzed under either of the above standards, shows sufficient similarity between Defendant's prior act and the current charges.

1. Time

There is no "bright-line rule for determining when a prior bad act has lost its relevance on the basis of remoteness." *See Ness,* 707 N.W.2d at 688 (citing *Washington,* 693 N.W.2d at 201). Minnesota courts "have never held that there must be a close temporal relationship between the charged offense and the other crimes." *Wermerskirchen,* 497 N.W.2d at 242 n.3 (upholding the admission of prior incidents of sexual abuse by the defendant against his two nieces that had occurred seventeen and thirteen years prior). The Supreme Court has held *Spreigl* evidence as old as nineteen years is admissible. *Washington,* 693 N.W.2d at 201–02 (discussing cases). The "ultimate issue is not the temporal relationship but relevance." *Rucker,* 752 N.W.2d at 549 (quoting *Wermerskirchen,* 497 N.W.2d at 242 n.3). "[E]vidence of other crimes, including subsequent ones, may be admitted for a proper purpose." *State v. Lynard,* 294 N.W.2d 322, 323 (Minn. 1980).

Here, Mr. Floyd was arrested almost a year to the date before he was arrested on May 25, 2020. Mr. Floyd's 2019 arrest fits squarely within the time constraints of precedent.

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2. Location

Minnesota courts have not firmly established what degree of geographical proximity must exist between prior acts and the charged offense. *See State v. Bartylla*, 755 N.W.2d 8, 21-22 (Minn. 2008) (affirming admission of *Spreigl* evidence where prior acts were committed in a different county from the charged offense); *Rucker*, 752 N.W.2d at 550 (finding prior acts occurring in Minneapolis apartment "geographically close or identical" to acts occurring in other locations in and outside Hennepin County); *Clark*, 738 N.W.2d at 346 (characterizing acts occurring in a home in Minneapolis and in an apartment in St. Paul as "relatively close in terms of place, notwithstanding [the defendant's] assertion to the contrary"). *Spreigl* evidence may be admitted "notwithstanding a lack of closeness in time or place if the relevance of the evidence is otherwise clear." *State v. Rainer*, 411 N.W.2d 490, 497 (Minn. 1987).

Here, both arrests occurred within the city limits of Minneapolis. Thus, they are geographically proximate.

3. *Modus Operandi*

Courts have "never required absolute similarity" between the facts of the *Spreigl* incidents and the charged offense to establish relevancy. *State v. DeWald*, 464 N.W.2d 500, 503 (Minn. 1991); *see Bartylla*, 755 N.W.2d at 21 (holding burglary with no sexual assault admissible for charges of rape and murder because of similarities in entering the home of the victim, lack of theft motive, and manner of severe beatings). The closer the offered act is to the crime charged, the greater the likelihood that the offered act is relevant. *See Rainer*, 411 N.W.2d at 497. *Spreigl* evidence must have a "'*marked similarity* in modus operandi to the charged offense'" to be admissible. *Ness*, 707 N.W.2d at 688 (quoting *Forsman*, 260 N.W.2d at 166) (emphasis in *Ness*).

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As explained *supra,* the *Spreigl* act and the incidents underlying the charged offenses are almost identical in terms of modus operandi. Mr. Floyd acts in the same way in each incident: he refuses to listen to MPD Officers' lawful commands to exit a vehicle, refuses to listen to MPD Officers' lawful commands to show his hands, becomes extremely irritable, resists arrest, and ingests dangerous levels of narcotics when confronted with the possibility of arrest.

V. THE PROBATIVE VALUE OF THE *SPREIGL* EVIDENCE SUBSTANTIALLY OUTWEIGHS THE POTENTIAL FOR UNFAIR PREJUDICE.

For other-crimes evidence to be admissible, the probative value must outweigh the potential for unfair prejudice. *Kennedy,* 585 N.W.2d at 391-92; *DeWald,* 464 N.W.2d at 503. Although necessity is no longer an independent requirement, it is a proper consideration in determining the probative value of the evidence. *See Ness*, 707 N.W.2d at 689-90. "The district court has broad discretion in determining if the probative value of the Spreigl evidence is substantially outweighed by the danger of unfair prejudice." *State v. Reckinger,* 603 N.W.2d 331, 334 (Minn. Ct. App. 1999).

In determining admissibility, the trial court should engage in a balancing of factors, such as "the relevance or probative value of the evidence, the … *need* for the evidence, and the danger that the evidence will be used by the jury for an improper purpose, or that the evidence will create unfair *prejudice* pursuant to Minn. R. Evid. 403." *Gomez*, 721 N.W.2d at 879 (quoting *State v. Bolte,* 530 N.W.2d 191, 197 (Minn. 1995) (emphasis in *Gomez*). "Because virtually all evidence that a party offers in support of the party's case will likely prejudice the opponent's case to some degree, the concern expressed through [R]ule 404(b) is that the prejudice not be *unfair*." *State v. Smith*, 749 N.W.2d 88, 95 (Minn. Ct. App. 2008) (emphasis added). "Unfair prejudice under [R]ule 403 is not merely damaging evidence, even severely damaging evidence; rather, unfair prejudice is evidence that persuades by illegitimate means, giving one party an unfair advantage." *State v.*

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Schulz, 691 N.W.2d 474, 478 (Minn. 2005). "Even highly damaging evidence is nonetheless admissible when it is relevant and highly probative of a material issue of fact." *Id.*

Here, the evidence of Mr. Floyd's May 2019 arrest is not unfairly prejudicial. First, Mr. Floyd is not on trial, Mr. Thao is. Secondly, the evidence of a prior arrest clearly showing that the actions of Mr. Floyd engaged in during his May 2020 arrest were the same actions he engaged in during his May 2019 arrest. Those same actions resulted in Mr. Floyd's hospitalization for an overdose of illegal narcotics during the May 2019 arrest. During his May 2020 arrest Mr. Floyd was also experiencing overdose levels of illegal narcotics.

Additionally, Mr. Floyd's prior arrest is admissible under Minn. R. Evid. 404A(2) as a pertinent character trait. Specifically, to rebut any evidence or testimony brought by the State to show Mr. Floyd's peacefulness, shock when encountering MPD, or ability to abide to lawful orders.

CONCLUSION

The clear and convincing evidence of Mr. Floyd's prior acts bears a marked relevance to the events underlying the charged offense and is therefore highly probative of Mr. Floyd's intent, absence of mistake or accident, and common scheme or plan during his arrest. Mr. Thao has demonstrated a compelling need for admission of the *Spreigl* evidence. Any prejudicial effect upon Mr. Floyd is offset by Defendant's Constitutional rights to produce a complete defense and the highly probative nature of Defendant's prior acts. Therefore, Mr. Thao respectfully requests that the court admit the proffered *Spreigl* evidence.

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Respectfully submitted,

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