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STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

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

State of Minnesota,

Plaintiff,

v.

Derek Michael Chauvin,

Defendant.

**STATE'S SUPPLEMENTAL MEMORANDUM OPPOSING MOTION TO ADMIT *SPREIGL* EVIDENCE**

TO: The Honorable Peter Cahill, Judge of District Court, and counsel for Defendant, Eric J. Nelson, Halberg Criminal Defense, 7900 Xerxes Avenue South, Suite 1700, Bloomington, MN 55431.

## INTRODUCTION

This Court denied Defendant's motion to admit evidence under Rule 404(b) of George Floyd's prior arrest on May 6, 2019. *See* Order on *Spreigl* Mots. (Jan. 26, 2021). That decision was correct, and nothing has changed that should lead this Court to do anything but abide by it.

Defendant asks the Court to reopen that decision, based on a pill that was found on the back seat of the squad car into which police tried to place Mr. Floyd on May 25, 2020. Defendant strains to explain why evidence of Mr. Floyd's prior 2019 arrest should be admitted, since Mr. Floyd is not on trial. Nonetheless, Defendant offers three theories: (1) to show that Mr. Floyd possessed an intent to resist arrest; (2) to show that Mr. Floyd possessed a modus operandi of swallowing narcotics; and (3) to show that, when Mr. Floyd went to the hospital in 2019, he had or knew he had hypertension, and that he was at risk for a stroke or a heart attack. None of these reasons provide a basis for reconsidering the Court's prior decision to exclude the evidence under Rule 404(b).

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The first theory remains as irrelevant today as it was when this Court issued its January order. Mr. Floyd's subjective intent has no bearing on whether Defendant's use of force was reasonable. The second theory is also meritless: The 2019 arrest is different in key ways from the 2020 incident. The new fact that a pill was found in the back seat of the squad car does not change that analysis. At most, this new fact merely suggests that Mr. Floyd had a small amount of narcotics on his person. It does not show a "marked similarity" between the 2020 incident and the 2019 arrest, nor does it allow the jury to conclude that Mr. Floyd possessed a modus operandi of swallowing narcotics. *State v. Ness*, 707 N.W.2d 676, 688 (Minn. 2006). Instead, the two incidents are simply of the same "generic" type, which does not provide a sufficient basis for admission under Rule 404(b). *State v. Shannon*, 583 N.W.2d 579, 585 (Minn. 1998).

If anything, the newly-discovered pill makes evidence of the 2019 arrest even less necessary to Defendant's case: The pill allows Defendant to present contemporaneous physical evidence—in addition to toxicological expert testimony—suggesting that Mr. Floyd possessed and consumed narcotics on May 25, 2020. There is thus no need for Defendant to introduce highly inflammatory, confusing, and speculative evidence about a year-old incident which occurred under fundamentally different circumstances.

Finally, Defendant's third basis for admitting the prior act evidence is similarly misleading. Mr. Floyd's hypertension is reflected throughout his medical records and in the autopsy report (as noted by the reference to Mr. Floyd's history of hypertension)—none of which requires showing the jury unfairly prejudicial footage of Mr. Floyd being arrested for an unrelated crime. That Defendant aggressively emphasizes this particular evidence of Mr. Floyd's hypertension shows Defendant's true goal: to smear Mr. Floyd's character and brand him as a criminal.

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## ARGUMENT

### I. George Floyd's Subjective Intent Is Irrelevant.

Defendant's first reason for introducing the May 6, 2019 arrest fails for multiple reasons. In this filing, the State highlights the most glaring defect in Defendant's argument: Whether Mr. Floyd possessed an intent to resist the police on May 25, 2020 is entirely irrelevant to the offenses charged in the Complaint.

As the State's initial memorandum explained, and as the Court acknowledged at the March 18 hearing, none of the elements of the charged offenses or Defendant's affirmative defense turn on the victim's subjective intent. *See* State's Response Opposing Defendants' Mots. to Admit *Spreigl* Evid. 14-17 (Nov. 16, 2020). Instead, whether Defendant's use of force was reasonable depends *only* on how a reasonable officer would have acted under the circumstances. *See* Minn. Stat. § 609.06, subd. 1(1). Mr. Floyd's inner motivations on May 25, 2020 are immaterial. What matters is whether Defendant's use of force was a reasonable response to Mr. Floyd's objective acts.

Additionally, Defendant's effort to litigate Mr. Floyd's subjective intent is entirely unlike the topic that one of the State's experts—Dr. Sarah Vinson, M.D.—will testify to. Dr. Vinson is a forensic psychiatrist. She will not testify about Mr. Floyd's intent. Instead, Dr. Vinson's expert testimony will offer alternative explanations countering Defendant's characterizations of George Floyd's behaviors for medical causation purposes, and will help the jury in determining the cause of Mr. Floyd's death.

Defendant seems to be arguing that Mr. Floyd's behavior demonstrated that he died of some combination of a drug overdose, a fatal cardiac arrhythmia, and excited delirium. To prove that Defendant substantially caused Mr. Floyd's death, the State will offer various expert

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testimony. For instance, a cardiologist will testify that Mr. Floyd's behavior beside the squad car did not reflect the symptoms of a fatal cardiac arrhythmia. The State's emergency room physician will similarly explain that Mr. Floyd's behavior did not reflect the symptoms of excited delirium. Dr. Vinson's medical testimony is of a similar piece. She will describe the typical signs and symptoms of excited delirium, anxiety, fear responses to traumatic events, and panic attacks, including during police encounters. Expert Report of Dr. Sarah Y. Vinson 11-12. By demonstrating that Mr. Floyd's behavior is consistent with anxiety, Dr. Vinson's testimony will thus make it less probable that Mr. Floyd's behavior reflected that he died of another medical cause and make it more likely that Defendant's actions caused Mr. Floyd's death. *See* Minn. R. Evid. 401; Mem. of Law in Opp. to Defendant's Mots. *In Limine* 19 (Mar. 4, 2021). [1]

In contrast, Defendant seeks to introduce the 2019 arrest to flyspeck the minutia of Mr. Floyd's subjective intent—*i.e.* whether he was truly afraid of the officers in 2020 or just malingering. That inquiry has no bearing on whether Defendant's use of force was reasonable or on what caused Mr. Floyd's death. [2]

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[1] Additionally, Dr. Vinson's expert testimony will help the jury make sense of other evidence, including police policy that officers using force must consider whether a suspect's non-compliance is resisting arrest as opposed to a behavioral crisis. *See* Bates 009188; *see also* Minn. R. Evid. 702.

At the March 18 hearing, the State also noted that Dr. Vinson's expert testimony could potentially rebut any accusation by Defendant that Mr. Floyd intentionally resisted arrest. To be clear, the State does not believe that Mr. Floyd's internal motivations are relevant in this case—at all. The State agrees with the Court that Defendant should be excluded from arguing about Mr. Floyd's motivations on May 25, 2020. And so long as Defendant cannot ascribe intent to Mr. Floyd's behavior, including assertions that Mr. Floyd was resisting arrest, the State agrees with the Court that Dr. Vinson's expert testimony would not be independently relevant on that basis.

[2] Defendant presents mutually incompatible, alternative theories for Mr. Floyd's behavior, suggesting that his behavior (1) indicated medical distress, and (2) that, based on the 2019 offense, Mr. Floyd was really malingering. Because Dr. Vinson's testimony establishes medical causation, and because her general testimony is not specific to Mr. Floyd, her testimony does not open the

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## II. The 2019 Arrest Does Not Suggest Mr. Floyd Swallowed A Pill In 2020, But It Would Be Cumulative And Would Confuse The Jury.

There is no dispute that there were narcotics in Mr. Floyd's blood when he died. What is in dispute is whether Defendant's actions—compressing Mr. Floyd while he held him prone on the pavement for more than nine minutes—was a substantial factor causing Mr. Floyd's death. Or whether the narcotics constituted an intervening cause. The most relevant evidence to resolving that dispute are the toxicology results and medical experts who can provide objective, scientific analysis of why Mr. Floyd died.

In addition to Mr. Floyd's post-mortem toxicology results, Defendant now has contemporaneous evidence to argue that Mr. Floyd swallowed drugs on May 25, 2020: The pill with Mr. Floyd's saliva on it. In light of that other evidence, highly speculative evidence of Mr. Floyd's 2019 arrest is entirely unnecessary to the defense. *See State v. Berry*, 484 N.W.2d 14, 17 (Minn. 1992) ("Only if the other evidence is weak or inadequate, and the *Spreigl* evidence is needed as support for the state's burden of proof, should the trial court admit the *Spreigl* evidence."); *Ness*, 707 N.W.2d at 690. The Court should thus continue to exclude that prior arrest as unfairly prejudicial, cumulative, and confusing.

Furthermore, as this Court previously held, Mr. Floyd's 2019 arrest simply sheds no light on when or how he consumed drugs nearly a year later. The new discovery of a pill in the squad car does not change anything. At most, this new pill suggests that Mr. Floyd may have had some small amount of narcotics on his person around the time of his death. But even with that new fact, the 2019 arrest and the 2020 incident differ considerably, and are (at best) generic offenses of the same type. *Ness*, 707 N.W.2d at 688 (holding that two incidents must bear a "marked similarity");

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door to Defendant's second (and irrelevant) theory, namely that Mr. Floyd was pretending to be in distress.

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*Shannon*, 583 N.W.2d at 585 ("[I]f the prior crime is simply of the same generic type as the charged offense, it ordinarily should be excluded."). Indeed, Defendant continues to claim the two incidents are similar largely based on the allegation that Mr. Floyd swallowed a pill while in custody. But a party introducing Rule 404(b) evidence cannot assume the fact that he seeks to prove. With that impermissible bootstrapping removed, the 2019 arrest is not even marginally relevant to what happened on May 25, 2020.

1. Under Rule 404(b), evidence of a prior bad act is not admissible to show the victim's "character . . . in order to show action in conformity therewith." Minn. R. Evid. 404(b)(1). Rather, prior bad 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. This longstanding rule prevents prior bad act evidence from being 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." *Id*. Because Rule 404(b) evidence may be misused, this Court should exclude evidence unless it is "necessary" for one side to make its case. *Berry*, 484 N.W.2d at 17. Otherwise, the evidence's prejudicial nature outweighs any marginal probative value. *See Ness*, 707 N.W.2d at 690 ("[C]ourts should address the need for *Spreigl* evidence in the context of balancing the probative value of the evidence against its potential for unfair prejudice.").

The same strict standards against admitting prior bad act evidence apply equally to evidence presented about a victim or a defendant. *See State v. Hokanson*, 821 N.W.2d 340, 351 (Minn. 2012); *State v. Richardson*, 670 N.W.2d 267, 280 (Minn. 2003); *State v. Johnson*, 568 N.W.2d 426, 433 (Minn. 1997) ("The foundational requirements for reverse *Spreigl* evidence are the same as for *Spreigl* evidence."); *State v. Robinson*, 536 N.W.2d 1, 2 (Minn. 1995). For good

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reason. The underlying concerns are the same. Just as a prior bad act of the defendant might encourage the jury to conclude a "defendant is a proper candidate for punishment" based on his past, *Ness* 707 N.W.2d at 685, "[l]earning of the victim's bad character could lead the jury to think that the victim merely 'got what he deserved.' " 1 McCormick On Evidence § 193 (Robert P. Mosteller, ed., 8th ed., 2020 update).

The Minnesota Supreme Court has suggested that district courts possess somewhat more leeway to admit other-act evidence demonstrating that an alternative perpetrator committed a crime. *See Richardson*, 670 N.W.2d at 280; *cf. Robinson*, 536 N.W.2d at 2. But in *Richardson*, that Court explained why: Unlike evidence about a victim or a defendant, evidence about an alternative perpetrator will not "arous[e] the jury in ways that would be harmful to the third person." *Id*. at 280 (internal quotation marks omitted). But evidence about a victim *could* inflame the jury regarding the victim and encourage jurors to acquit the Defendant based on the prior act.[3]

2. Under any standard, Mr. Floyd's 2019 arrest bears little to any similarity to the 2020 incident, and fails the most basic test for Rule 404(b) evidence. Instead, at most the incidents are merely "of the same generic type"—they both involved drugs, police, and vehicles—which does not constitute a common plan or scheme. *Shannon*, 583 N.W.2d at 585.

For starters, Defendant's comparison still begins from a failed premise: that Mr. Floyd swallowed a pill in both incidents. But Defendant cannot bootstrap the very fact that he seeks to

[3] To be sure, *United States v. Jones*, No. 14-CR-148 DWF/LIB, 2015 WL 927357 (D. Minn. Mar. 4, 2015), reached a contrary result based on an interpretation of the Federal Rules of Evidence and is not binding here. But many of the cases upon which *Jones* relies do not apply a lenient 404(b) analysis to the prior bad acts of a victim. Instead, those cases tend to apply a lenient analysis to evidence of an alternative perpetrator's prior bad act or the act of some other third-party. *See, e.g.*, *United States v. Battle*, 774 F.3d 504, 513 (8th Cir. 2014) (assuming without deciding that a more lenient 404(b) analysis applies to an alternative perpetrator).

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prove—that Mr. Floyd allegedly swallowed a pill on May 25, 2020—into a marker of similarity between the two events. *See* State's Response Opposing Defendants' Mots. to Admit *Spreigl* Evid. 9-10 (Nov. 16, 2020). Instead, the two incidents must be similar (*e.g.*, a robber used a similar method on two separate occasions) irrespective of whatever fact a party hopes to establish by the comparison (*e.g.*, the accused committed the latter robbery). *See id*.

And in all material respects, the 2019 and 2020 incidents remain different and are at most generic incidents involving drugs—even with the recent discovery of a single pill in the back of the squad car. In May 2019, police were responding to information from a confidential informant about illegal narcotics activity. Here, Mr. 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 Mr. Floyd, including Oxycodone pills, Promethazine syrup, powder cocaine, and rock cocaine. Here, at most, Defendant can now present evidence suggesting that Mr. Floyd had a single pill on or near his immediate person. Moreover, that pill recovered from the back of the squad car is an entirely different substance, namely methamphetamine. Nothing about these two incidents suggests a "marked similarity." *Ness*, 707 N.W.2d at 688. And Defendant again suggests that the incidents are somehow similar because Mr. Floyd became upset and, in both instances, mentioned his mother. This simply indicates that Mr. Floyd grew agitated when the police escalated a situation; it does not suggest a plan to ingest drugs when confronted by police.[4]

[4] Defense counsel has also suggested that a sealed transcript of an interview may provide some additional basis to introduce the 2019 arrest under Rule 404(b). To the extent defense counsel believes the interview demonstrates Mr. Floyd had consumed drugs of unusual deadly composition in May 2020, that fact would not make the 2019 arrest any more relevant—particularly given that the drugs in question are entirely distinct substances with different physiological effects.

Similarly, Defendant has observed that two additional white pills (along with two packets of suboxone, a medicine used to treat opioid abuse) were also found in the center console of the SUV in which Mr. Floyd had been sitting. *See* Bates 044569. There is no evidence that Mr. Floyd

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Thus, stripped of the false premise that Mr. Floyd swallowed a pill on both occasions, Defendant can point to nothing that is meaningfully similar between the May 2019 and May 2020 incidents, beyond vague and generic comparisons. In the March 16 hearing, this Court correctly rejected Defendant's paper-thin arguments that the one-time 2019 incident shows evidence of a habit. It should similarly reject Defendant's theory that Mr. Floyd had a scheme to swallow pills.

3. Finally, even if Mr. Floyd's actions during the May 2019 arrest are marginally relevant to whether Mr. Floyd swallowed a pill, the Court should exclude evidence of the arrest as unduly prejudicial, cumulative, and confusing. Whatever the minimal probative value of the 2019 arrest (and there is none), that arrest is simply not "necessary"—in any meaningful way—to a full and effective defense. *Berry*, 484 N.W.2d at 17.

Indeed, Defendant can point to toxicology reports and expert testimony, which are both more probative of what killed Mr. Floyd and lack any prejudice. And to the extent that Defendant wishes to argue that Mr. Floyd swallowed a pill moments before his death, Defendant has no need to present the 2019 arrest. Instead, Defendant can now point to far more direct evidence suggesting that occurred: the existence of a pill with Mr. Floyd's saliva on it in the back of the squad car.[5] There is thus no need to provide the jury unfairly prejudicial video of an arrest based on a highly speculative theory of marginal probative value.

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possessed these two pills, and they were of different composition than the single pill found in the squad car. In any event, those additional two pills do not make the 2019 and 2020 incidents meaningfully similar.

[5] The presence of Mr. Floyd's saliva only speaks to the disputed fact: whether Mr. Floyd actually swallowed a pill in 2020. The saliva is not evidence of a common scheme or plan, separate from the disputed fact. To continue the analogy of a defendant on trial for robbery, Mr. Floyd's saliva is akin to DNA evidence placing the defendant at the scene of the crime, not evidence of similarity between the defendant's prior robberies and the alleged offense.

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## III. The 2019 Arrest Is Not Relevant To What Caused George Floyd's Death In 2020.

Grasping for any remaining ground to present the video of the 2019 arrest to the jury, Defendant also argues that records from when Mr. Floyd was medically treated after his arrest could shed light on whether Mr. Floyd knew he had hypertension—which Defendant claims contributed to Mr. Floyd's death. Incredibly, it seems Defendant seeks to admit the entire video of the 2019 arrest on this basis, not just evidence of Mr. Floyd's post-arrest conversation with a paramedic who informed Mr. Floyd that his hypertension could cause a heart attack or a stroke. This attempt to bootstrap irrelevant and prejudicial footage of the arrest to the conversation with the paramedic is plainly improper. And Defendant is simply wrong that Mr. Floyd's subsequent conversation with the paramedic is at all relevant.

*First*, whether Mr. Floyd knew he had hypertension is immaterial and not in dispute. Indeed, it is similarly immaterial whether Mr. Floyd knew that ingesting drugs might pose a danger to his health. With respect to causation, all that matters is whether Defendant's actions substantially contributed to Mr. Floyd's death. Mr. Floyd's own knowledge and intent are, once again, irrelevant.

*Second*, there is no need for this particular piece of medical evidence. Defendant can present copious other evidence of Mr. Floyd's hypertension, both closer in time to his death and unrelated to an arrest. For instance, Mr. Floyd was treated at a hospital on February 16, 2020 for dental pain. At that time, Mr. Floyd possessed elevated blood pressure almost identical to his blood pressure on May 6, 2019, acknowledged that he was supposed to take blood pressure medication, but admitted he had not done so in the past month. *See* Bates 006910, 006917, 006928.

*Third*, Defendant cannot credibly claim that the May 6, 2019 incident somehow demonstrates that Mr. Floyd's hypertension interacted with his drug use. Mr. Floyd's blood

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pressure was functionally the same on February 16, 2020 (when there was no evidence that Mr. Floyd ingested drugs) as on May 6, 2019 (when he did). And this makes sense: Hypertension is a chronic, long term condition.

*Fourth*, the fact that a paramedic warned Mr. Floyd that his hypertension might cause a heart attack or stroke is irrelevant to the cause of Mr. Floyd's death on May 25, 2020. There is no suggestion in this case that a heart attack or stroke caused Mr. Floyd's death—in fact, the autopsy disproves any such suggestion. There was no damage to Mr. Floyd's brain, as would be visible had he experienced a stroke, and Defendant's own expert does not advance the notion of a stroke as part of the defense's theory of medical causation. There is also no evidence of a heart attack—in medical terms, a myocardial infarction. As demonstrated in Dr. Fowler's report, the defense is advancing a theory that Mr. Floyd potentially suffered from a fatal arrythmia, which culminated in cardiopulmonary arrest. The State will obviously present evidence disproving this theory but the key point is that neither party suggests that Mr. Floyd sustained a heart attack. Accordingly, evidence that a paramedic warned Mr. Floyd that he could suffer from a heart attack would only confuse the jury and is not probative regarding the theories that either party intends to present regarding causation.

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## CONCLUSION

There is a reason that Defendant repeatedly attempts to introduce Mr. Floyd's prior arrest: Because it paints Mr. Floyd in a negative light. That inflammatory, unfairly prejudicial material has no place in this trial, which concerns Defendant's use of force for several minutes against Mr. Floyd. As the Court has previously ruled, the evidence should remain excluded from trial.

Dated: March 18, 2021

Respectfully submitted,

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**/s/ Matthew Frank**
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