

JOINDER, CONSPIRACY, AND RACKETEERING: CHARGING ISSUES ARISING IN THE PROSECUTION OF STAGED-ACCIDENT INSURANCE SCHEMES

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INTRODUCTION

For most people, the mention of organized crime conjures up thoughts of criminal enterprises portrayed in films like *The Godfather* and *Casino*. In films, Hollywood screenwriters can clearly define for the audience the scope and structure of the organizations and the roles of the organizations' members. Unfortunately, it is much easier for screenwriters to dream up an organized structure for a fictional criminal enterprise than it is for investigators to discern any such structure for a real criminal enterprise. A prosecutor who is unable to explain to a jury the scope and structure of any such enterprise faces an uphill battle in prosecuting the members of said enterprise. Frequently, investigations result in findings that tend to show connections between crimes and defendants; however, the investigators are often unable to provide any coherent explanation as to the overall scope and structure of a clearly-defined criminal enterprise carrying out those crimes.

While the discussion here applies to all forms of organized crime, for the sake of clarity and brevity, this Article will discuss these issues as they relate to one particular form of criminal organization: staged-accident insurance fraud rings. Long gone are the days when the Las Vegas Strip was lined with mob-controlled casinos. Nevertheless, organized crime is far from dead in Nevada. There is no shortage of criminal enterprises organized for the purposes of carrying out offenses such as drug trafficking, human trafficking, and sex trafficking. Since those trafficking organizations are well covered by the media and are not strangers to articles appearing in legal journals, this Article will instead focus on the lesser-discussed and little-known, yet surprisingly prevalent, staged automobile accident insurance fraud rings.

Prosecutors are often confronted with difficult questions as to the manner in which the members of such organizations should be criminally charged for their unlawful acts. Should all members of a criminal organization be charged for all of the crimes committed by its members throughout the duration of the organization's existence, regardless of whether the individual being charged was a member of the organization when some of those crimes were committed? Is each member criminally culpable for only those crimes committed by the organization during his or her time with the organization? Should each member be charged only for crimes in which he or she personally participated?

This Article will provide a thorough discussion of charging issues that arise in the prosecution of members of criminal organizations. Specifically, it will focus on issues that are related to joinder of charges or offenses, joinder of defendants, multiple conspiracies, coconspirator vicarious liability, and racketeering conspiracies, with an emphasis on relevant Nevada law. A thorough analysis of applicable law and relevant issues will provide attorneys in Nevada with a framework for charging organized crime cases. This Article will also provide guidance for jurisdictions with laws similar to Nevada's. As discussed below in greater detail, Nevada's racketeering laws are based on federal laws, as well as

on legislation from Arizona and Illinois. As explained in greater detail below, where the Nevada laws were based on federal laws, Nevada courts confronted with statutory interpretation issues regarding Nevada racketeering statutes can logically look to the federal courts' interpretation of federal racketeering statutes; where the Nevada laws were based on other sources, the federal courts' interpretation of federal racketeering statutes may have little bearing on the interpretation of state racketeering statutes.

This Article will begin by providing a general overview of staged-accident insurance fraud. It will also provide a detailed description of an infamous staged-accident ring that operated in Southern California in the 1990s. This Article will then use that particular ring—and hypothetical variations of it—to help illustrate and discuss the charging issues that arise in these types of cases. Finally, it will discuss statutory and case law on joinder of offenses, joinder of defendants, multiple conspiracies, coconspirator vicarious liability, and racketeering conspiracies, with a specific emphasis on establishing the manner in which such crimes can be charged.

I. STAGED AUTOMOBILE ACCIDENT INSURANCE FRAUD

A. Overview and Examples

For nearly a century, individuals have been staging automobile accidents for the purpose of submitting fraudulent insurance claims.¹ The nature of the schemes varies. In its most benign form, acquaintances simply agree to crash their own vehicles into each other and report the incident to their insurers as an accident. Other schemes, however, are far more repugnant. In 2014, David Stevens was arrested for allegedly extorting seniors out of money by staging automobile accidents in Southern California and demanding that they pay for bogus repairs.² In 2015, a pregnant woman staged an accident with the assistance of her husband and a friend. The woman was reported to have used pillows to protect her unborn child when she intentionally rammed her vehicle into another.³

This Article focuses on schemes far more complex than those mentioned above; these schemes are carried out by oddball criminal organizations that often include greedy attorneys, crooked health care providers, con artists, and financially desperate individuals. For example, in 2013, after a three-year inves-

¹ See generally KEN DORNSTEIN, ACCIDENTALLY, ON PURPOSE: THE MAKING OF A PERSONAL INJURY UNDERWORLD IN AMERICA (1996).

² Jason Kandel et al., *Man Extorts Drivers in "Staged Accident" Scheme: Police*, NBC SO. CAL. (Jan. 30, 2014, 2:23 AM), <http://www.nbclosangeles.com/news/local/Man-Stages-Bogus-Crashes-Extorts-Drivers-242676961.html> [https://perma.cc/27VD-ZE6T].

³ Eamonn Duff, *Ghenoua Fadel Avoids Jail After Staging Crash While Pregnant in Insurance Scam*, SYDNEY MORNING HERALD (Nov. 18, 2015, 2:45 PM), <http://www.smh.com.au/nsw/ghenoua-fadel-avoids-jail-after-staging-crash-while-pregnant-in-insurance-scam-20151117-gl1k5d.html> [https://perma.cc/C2ER-BVD5].

tigation, the U.S. Attorney's Office for the Southern District of Florida announced that thirty-three defendants had been charged with carrying out a complex insurance fraud scheme (over the three-year investigation, a total of ninety-two defendants have been charged in this insurance fraud ring).⁴ Those defendants staged numerous automobile accidents, and through twenty-one complicit chiropractic clinics, the defendants billed insurers for unnecessary medical treatment and for treatment that was simply never provided.⁵ The investigation was nick named "Operation Sledgehammer" because investigators observed participants in the scheme using sledgehammers to further damage the vehicles in the staged accidents in efforts to maximize ill-gotten insurance payouts.⁶

B. *The Miller Ring*

One of the most, if not *the* most, infamous staged-accident rings operated in Southern California in the 1990s. Had one staged accident not gone awry, that ring might still be operating today. This is the ring ("the Miller Ring") that will be referenced throughout this Article. A 1997 opinion from the California Court of Appeal provides a detailed description of the ring and the accident that led to its downfall.⁷

On June 17, 1992, in Los Angeles, California, a tractor trailer loaded with cars jackknifed on Interstate 5, causing the load of cars to fall over onto the back of a smaller vehicle traveling nearby.⁸ Luis Perez, a passenger in the rear seat of the smaller vehicle, was killed as a result.⁹ At first, it appeared that Perez was the victim of a tragic accident.¹⁰ Further investigation revealed that Perez inadvertently orchestrated his own demise.¹¹

Earlier that day, Perez offered his neighbor \$300 to help stage an automobile accident.¹² The neighbor agreed and accompanied Perez to meet with several other individuals, including Juan Carlos Amaya, who also joined the

⁴ Press Release, U.S. Att'y Office, S. Dist. Fla., Thirty-three Defendants Charged in Staged Automobile Accident Scheme (May 16, 2013), <http://www.justice.gov/usao-sdfl/pr/thirty-three-defendants-charged-staged-automobile-accident-scheme> [https://perma.cc/D2EE-J3JU].

⁵ *Id.*

⁶ Paula McMahon, *South Florida Insurance Fraud: Feds Charge 92 over \$20 Million in Claims*, HUFFINGTON POST (July 17, 2013), http://www.huffingtonpost.com/2013/05/17/south-florida-insurance-fraud_n_3289964.html [https://perma.cc/EJ9S-NTHQ].

⁷ *People v. Shamis*, 68 Cal. Rptr. 2d 388 (1997).

⁸ *Id.* at 391.

⁹ *Id.*

¹⁰ See DORNSTEIN, *supra* note 1, at 1–2.

¹¹ *Id.* at 4. Initially, Perez was driving the car that was crushed; however, following a failed staging attempt that had left him shaken, Perez pulled over and traded positions with a passenger in the back seat, where Perez thought he would be in a safer position. He was seated in that back seat when he was crushed to death. *Id.*

¹² *Shamis*, 68 Cal. Rptr. 2d. at 391.

scheme.¹³ Amaya drove one car with two passengers, while Perez rode in a separate car with three other individuals.¹⁴ Amaya drove ahead of the tractor-trailer.¹⁵ After the individual driving the car containing Perez maneuvered between the tractor-trailer and Amaya's car, Amaya intentionally stepped on his brakes, giving the driver of Perez's vehicle an excuse to brake.¹⁶ The tractor-trailer then jackknifed, ultimately resulting in the tractor-trailer's load of cars crushing Perez to death; the scheme ended in tragedy instead of with the expected insurance payout.¹⁷

Had Perez survived, the scheme would have likely succeeded, with insurance and law-enforcement investigators concluding that the driver of the big-rig was following too closely behind Perez's vehicle. Perez's death, however, led to a rare and entirely unanticipated investigative outcome—it led investigators to the scheme's orchestrators.¹⁸

According to the case documents,¹⁹ Elena Shamis was the office administrator for Los Angeles personal injury attorney Gary Paul Miller.²⁰ In 1989 or 1990, Shamis met a man named Filemon Santiago, who offered to refer automobile accidents to Miller's office.²¹ Shamis agreed to pay Santiago approximately four to five thousand dollars per accident he referred.²² During a subse-

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ DORNSTEIN, *supra* note 1, at 2 (“At the coroner’s office, investigators from the California Highway Patrol (CHP) found a business card for a local personal injury law firm in Perez’s pockets. The card was colored money-green with a red bulls-eye beneath the acronym A.I.M.—Aid to Injured Motorists. At the center of the bulls-eye was a cartoonish rendering of a wrecked car with a body lying along side. Designed to look like a credit card, the solicitation came with a letter indicating that the cardholder had an ‘account’ with a certain attorney whose name and toll-free 1-800 number were printed on the back. Also recovered from Perez’s wallet was a business card from a different law firm listing the name of an office administrator who had been arrested a few months earlier on charges of trading in fake accident cases.”).

¹⁹ All references to Shamis relate to Shamis’s mere *alleged*—as opposed to actual— involvement because Shamis was ultimately acquitted of all criminal charges against her. See CRIMINAL CASE SUMMARY, ELENA SHAMIS, CASE NO. XCNBA116066-02, SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES (disposition date Mar. 2, 1999) (on file with author) [hereinafter ELENA SHAMIS, CASE NO. XCNBA116066-02]. Nevertheless, because Shamis was the named party in the opinion detailing the Miller Ring, her alleged involvement is detailed herein. *Shamis*, 68 Cal. Rptr. 2d at 388. As explained in greater detail below, former attorney Gary Paul Miller and the others mentioned herein were not as fortunate as Shamis. *E.g.*, CRIMINAL CASE SUMMARY, JUAN CARLOS AMAYA, CASE NO. XCNBA116066-01, SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES (disposition date Aug. 10, 1998) (on file with author) [hereinafter JUAN CARLOS AMAYA, CASE NO. XCNBA116066-01].

²⁰ *Shamis*, 68 Cal. Rptr. 2d at 389.

²¹ *Id.*

²² *Id.*

quent meeting, Santiago told Shamis that he would need money to buy insurance for the accident participants.²³ On an average week, Santiago referred three to four accidents—the majority of which were staged—to Miller’s office.²⁴ Later, Shamis and Miller told Santiago to refer more cases involving accidents that occurred on the freeway.²⁵ Santiago arranged a number of such accidents, including the one resulting in Perez’s death.²⁶ The day after Perez’s death, Miller advised Santiago to leave the country.²⁷

Fast-forward to 1996 when California Department of Insurance investigator Shawn Ferris, tasked with investigating staged accidents, interviewed a man named Randy Harris.²⁸ Harris informed Ferris that, from the late 1980s to 1992, he staged automobile accidents and then referred them to Miller’s office.²⁹ In late 1991 or 1992, Harris, Santiago, Shamis, and Miller met at Miller’s office.³⁰ At that meeting, it was determined that Harris and Santiago should work together when staging accidents because, when they worked separately, their accidents involved “all Hispanics or all Blacks,” a fact that often raised suspicions with the insurance companies.³¹

Ultimately, Shamis was acquitted on all charges filed against her.³² A number of other individuals, however, were convicted of crimes in relation to their roles in the ring. Notably, Amaya pled guilty to several crimes, including vehicular manslaughter.³³ Santiago pled guilty to insurance fraud and manslaughter charges.³⁴ Miller was convicted of a number of charges, including involuntary manslaughter, and was sentenced to serve six years in prison.³⁵ In 1999, facing disciplinary action from the State Bar of California, Miller voluntarily resigned from the practice of law, bringing his twenty-one-plus-year legal career to an embarrassing end.³⁶

These facts reveal multiple participants staging numerous accidents over a period of several years. Such scenarios raise the complex issues discussed be-

²³ *Id.* at 390.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 390–91.

²⁷ *Id.* at 391.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 391–92.

³² ELENA SHAMIS, CASE NO. XCNBA116066-02, *supra* note 19.

³³ JUAN CARLOS AMAYA, CASE NO. XCNBA116066-01, *supra* note 19.

³⁴ DORNSTEIN, *supra* note 1, at 447 n.6.

³⁵ *Attorney Facing Charges in Death of Accident Stager Resigns*, CAL. BAR J., July 1999, <http://archive.calbar.ca.gov/calbar/2cbj/99jul/page27-1.htm> [<https://perma.cc/6NZZ-TEY9>]. Miller was initially charged with second-degree murder; pursuant to plea negotiations, that charge was reduced to involuntary manslaughter. *Id.*

³⁶ *Id.*

low that prosecutors must consider when charging crimes stemming from those staged accidents.

II. SUBSTANTIVE CRIMINAL OFFENSES STEMMING FROM STAGED-ACCIDENT INSURANCE SCHEMES

For the purposes of this Article, reference to “substantive offenses” denotes crimes that can be the underlying objectives of traditional conspiracies and/or racketeering conspiracy, i.e., crimes that can be the underlying objectives of such conspiracies. In the context of staged-accident insurance fraud, such crimes may include, among others, insurance fraud, theft, obtaining money by false pretenses, battery with a deadly weapon, and on rare occasions, murder. Because the objective of staged-accident insurance-fraud rings is defrauding insurers for insurance payouts, it is apparent how a ring’s participants could be charged with insurance fraud,³⁷ theft,³⁸ and/or obtaining money by false pre-

³⁷ Nevada Revised Statute § 686A.2815(1)(a)–(h) (2015) provides:

1. “Insurance fraud” means knowingly and willfully:

- a. Presenting or causing to be presented any statement to an insurer, a reinsurer, a producer, a broker or any agent thereof, if the person who presents or causes the presentation of the statement knows that the statement conceals or omits facts, or contains false or misleading information concerning any fact material to an application for the issuance of a policy of insurance.
- b. Presenting or causing to be presented any statement as a part of, or in support of, a claim for payment or other benefits under a policy of insurance, if the person who presents or causes the presentation of the statement knows that the statement conceals or omits facts, or contains false or misleading information concerning any fact material to that claim.
- c. Assisting, abetting, soliciting or conspiring with another person to present or cause to be presented any statement to an insurer, a reinsurer, a producer, a broker or any agent thereof, if the person who assists, abets, solicits or conspires knows that the statement conceals or omits facts, or contains false or misleading information concerning any fact material to an application for the issuance of a policy of insurance or a claim for payment or other benefits under such a policy.
- d. Acting or failing to act with the intent of defrauding or deceiving an insurer, a reinsurer, a producer, a broker or any agent thereof, to obtain a policy of insurance or any proceeds or other benefits under such a policy.
- e. As a practitioner, an insurer or any agent thereof, acting to assist, conspire with or urge another person to commit any act or omission specified in this section through deceit, misrepresentation or other fraudulent means.
- f. Accepting any proceeds or other benefits under a policy of insurance, if the person who accepts the proceeds or other benefits knows that the proceeds or other benefits are derived from any act or omission specified in this section.
- g. Employing a person to procure clients, patients or other persons who obtain services or benefits under a policy of insurance for the purpose of engaging in any act or omission specified in this section, except that such insurance fraud does not include contact or communication by an insurer or an agent or representative of the insurer with a client, patient or other person if the contact or communication is made for a lawful purpose, including, without limitation, communication by an insurer with a holder of a policy of insurance issued by the insurer or with a claimant concerning the settlement of any claims against the policy.
- h. Participating in, aiding, abetting, conspiring to commit, soliciting another person to commit, or permitting an employee or agent to commit any act or omission specified in this section.

³⁸ “[A] person commits theft if, without lawful authority, the person knowingly: . . . [o]btains real, personal or intangible property or the services of another person by a material

tenses.³⁹ The charges of battery with a deadly weapon and murder, however, warrant further discussion.

“‘Battery’ means any willful and unlawful use of force or violence upon the person of another.”⁴⁰ If a battery is committed with the use of a deadly weapon, the treatment of such an offense is elevated from a misdemeanor to a felony.⁴¹ “A deadly weapon is ‘[a]ny weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death.’”⁴²

While the Nevada Supreme Court has not directly addressed the issue, in *Bustamante v. Evans* (an unpublished opinion), the Ninth Circuit Court of Appeals held that, under California law, one who uses his or her vehicle to intentionally strike the vehicle of another (presumably, with one or more persons in the vehicle of another) uses his or her vehicle as a deadly weapon.⁴³ The Nevada Supreme Court, in an unpublished opinion of its own, approvingly cited *Bustamante* in support of its conclusion that a vehicle used to directly strike the person of another constitutes a deadly weapon.⁴⁴ While these opinions are not controlling authority, they are persuasive.

Given those opinions, as well as the inherent dangers presented by vehicles operated by unpredictable drivers, it is logical to conclude that the Nevada Supreme Court will ultimately hold that a vehicle used to intentionally strike another vehicle containing one or more individuals constitutes a deadly weapon. Should the Nevada Supreme Court require additional evidence that a vehicle used to stage an accident was used as a deadly weapon, such evidence will often be readily available. For example, staged-accident rings often stage accidents on freeways, where vehicles typically travel at higher speeds, thus increasing the risk of death. This is done in an effort to avoid surveillance cameras and maximize damage to the vehicle (thus maximizing any insurance payout). Additionally, law enforcement may discover evidence that the participants knew of the high risk of their behavior: for example, old tires or sandbags stuffed in the trunk of the vehicle that was rear ended in order to cushion the blow of the accident.⁴⁵ Further, staged-accident rings often target commercial vehicles because they are generally insured with high policy limits; such vehi-

misrepresentation with intent to deprive that person of the property or services.” NEV. REV. STAT. § 205.0832(1)(c) (2015).

³⁹ “A person who knowingly and designedly by any false pretense obtains from any other person any . . . money . . . or other valuable thing . . . with the intent to cheat or defraud the other person” commits the crime of obtaining money by false pretenses. *Id.* § 205.380(1).

⁴⁰ *Id.* § 200.481(1)(a).

⁴¹ *Id.* § 200.481(2)(a), (e).

⁴² *Gray v. State*, No. 61987, 2014 WL 4922871, at *1 (Nev. Sept. 29, 2014) (quoting NEV. REV. STAT. § 193.165(6)(b)).

⁴³ *Bustamante v. Evans*, 140 F. App’x 655, 656 (9th Cir. 2005).

⁴⁴ *Gray*, 2014 WL 4922871, at *2.

⁴⁵ DORNSTEIN, *supra* note 1, at 8.

cles are often larger than noncommercial vehicles and pose a greater risk to those involved in, or in the vicinity of, the accident.⁴⁶

This same evidence of risk supports a charge of murder, should someone die in a staged accident. Nevada law defines murder as “the unlawful killing of a human being: [] [w]ith malice aforethought, either express or implied”⁴⁷ “Express malice is that deliberate intention . . . to take away the life of a fellow creature . . . manifested by external circumstances capable of proof.”⁴⁸ Malice is implied “when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.”⁴⁹

First-degree murder includes the killing of another in circumstances not applicable to deaths caused by staged-accident rings.⁵⁰ Second-degree murder includes all other murders.⁵¹ As explained below, those staging accidents run the risk of a second-degree murder conviction, should someone die as a result of any such accident.

“Malice aforethought may be inferred from the intentional use of a deadly weapon in a deadly and dangerous manner.”⁵² “Malice can be present in the absence of an express intent to kill and ‘as applied to murder does not necessarily import ill will toward the victim, but signifies general malignant recklessness of others’ lives and safety or disregard of social duty.”⁵³ A jury could reasonably find that those who stage automobile accidents display a recklessness or disregard of a social duty.

A California Court of Appeal has ruled that implied malice that supports second degree murder charges could be found in a case where the defendants killed three people while engaging in an illegal street race.⁵⁴ To support that finding, the court noted: (1) the defendants’ knowledge of the residential nature of the neighborhood where the accident took place; (2) the excessive speeds at which the defendants had been driving—fifty to sixty miles per hour over the speed limit; (3) the defendants’ knowledge of the four-way stop sign they had run just prior to the accident; (4) reckless driving of one of the defendants on two prior occasions on the day of the accident; (5) the modifications made to the defendants’ vehicles in order to provide them with more power and speed;

⁴⁶ *Id.* at 298 (“[O]nly in Los Angeles could [staged accidents] become so common that a regular notice in the local automobile club and in insurance magazines offered checklists of ‘staged accident warning signs’ (car in front slams on brakes; older car; more than two passengers); and warnings on ‘who’s likely to be a target’ (women, older people, commercial vehicles) . . .”).

⁴⁷ NEV. REV. STAT. § 200.010(1) (2015).

⁴⁸ *Id.* § 200.020(1).

⁴⁹ *Id.* § 200.020(2).

⁵⁰ *Id.* § 200.030(1).

⁵¹ *Id.* § 200.030(2).

⁵² *Moser v. State*, 544 P.2d 424, 426 (Nev. 1975).

⁵³ *Keys v. State*, 766 P.2d 270, 271 (Nev. 1988) (quoting *Thedford v. Sheriff*, 476 P.2d 25, 27 (Nev. 1970)).

⁵⁴ *See generally* *People v. Canizalez*, 128 Cal. Rptr. 3d 565 (2011).

and (6) the defendants' complete disregard for the lives of the victims immediately after the accident took place.⁵⁵

The California Court of Appeal's sound analysis notes several factors that can be used to support second-degree murder charges when a vehicle is used in a reckless manner. Some of those same factors (e.g., the defendants' rate of speed, the defendants' prior conduct, and the defendants' conduct following the accident) can be used to justify a second-degree murder charge for a death resulting from a staged-accident. As explained in the above discussion relating to the battery with a deadly weapon charge, staged-accident investigations often reveal evidence of the participants' general malignant recklessness toward others' lives and safety or disregard of social duty.⁵⁶

Any such criminal culpability is not limited to the driver(s) of the car(s) used to stage the accident. All principals are criminally culpable for the crimes stemming from staged accidents.⁵⁷ Nevada law defines the term "principals" as follows:

⁵⁵ *Id.* at 575–77. The defendants made no effort to assist the woman and two children who burned to death in their vehicle. *Id.* at 576. Additionally, defendant Canizalez's actions following the accident were described as follows:

Canizalez was heard saying, "[L]ook at his car. [I] crashed [my] car. [My] car is fucked up," and, "I don't give a fuck about those kids. I give a fuck—look at my car. I don't give a fuck about those kids."

Id.

⁵⁶ In his book *Accidentally, on Purpose: The Making of a Personal Injury Underworld in America*, author Ken Dornstein explains: "The squat cars are often stuffed with anyone who happens to be around at the time of the planning; squat passengers either do not mind or are not fully aware of the danger." DORNSTEIN, *supra* note 1, at 3. This fact can best be illustrated by Dornstein's description of events preceding Perez's death:

[Santiago's] crashes did not always go as planned. In the Perez staging alone, [Santiago's] recruits had attempted three times to get the Pontiac rear-ended by a truck. On the first attempt, José Perez himself had been the driver of the Pontiac. On the second attempt, the targeted truck managed to skid to a stop before making contact. Ruben Garcia, a backseat passenger in that attempt, was so shaken by the experience that he swore off staged accidents for good. Angel Hernandez had also been a backseat passenger on the second attempt; he later claimed that he had no idea that the crash was going to involve trucks on the freeway until he actually got on the road. Juan Carlos Amaya, suspected of being a swoop-car driver for Santiago, had been responsible for picking out the truck, then for giving the squat car a reason to stop short by cutting it off and exiting the freeway before the police arrived. Amaya, in his lower-risk job, was apparently undeterred by the failures and went back out on the freeway each time to try again. José Perez was troubled by the previous failed staging attempts, however. Just after the cars entered the freeway, he pulled to the shoulder and asked one of his passengers, Jorge Sanchez, to take the wheel. Perez moved to the relative safety of the backseat, where, he thought, he was less likely to be impaled on the steering wheel or to fly through the windshield on impact. Rubidia Lopez sat next to Perez. Eyeing the car carrier through the back windshield minutes before the collision, the twenty-four-year-old woman asked nervously: "Can't someone get killed doing this?" José Perez did not respond. Lopez later recalled, except to indicate a half-hearted agreement with [Santiago's] earlier assurances of safety.

Id. at 4.

⁵⁷ See NEV. REV. STAT. § 195.020 (2015).

Every person concerned in the commission of a felony, gross misdemeanor or misdemeanor, whether the person directly commits the act constituting the offense, or aids or abets in its commission, and whether present or absent; and every person who, directly or indirectly, counsels, encourages, hires, commands, induces or otherwise procures another to commit a felony, gross misdemeanor or misdemeanor is a principal, and shall be proceeded against and punished as such. The fact that the person aided, abetted, counseled, encouraged, hired, commanded, induced or procured, could not or did not entertain a criminal intent shall not be a defense to any person aiding, abetting, counseling, encouraging, hiring, commanding, inducing or procuring him or her.⁵⁸

“[I]n order for a person to be held accountable for the specific intent crime of another under an aiding or abetting theory of principal liability, the aider or abettor must have knowingly aided the other person with the intent that the other person commit the charged crime.”⁵⁹ Battery with a deadly weapon and second-degree murder are general-intent crimes, while insurance fraud, theft by material misrepresentation, and obtaining money by false pretenses are specific-intent crimes.⁶⁰

Thus, the staged-accident participants will be criminally culpable for the crimes they directly perpetrated, as well as those they aided and abetted, so long as they possessed the requisite mens rea when aiding and abetting the commission of those crimes. Additionally, members of staged-accident rings may be held vicariously liable for the conduct of their coconspirators.⁶¹ Determining whom to charge in a case involving a single staged accident poses few challenges; charging decisions become challenging in cases where multiple accidents are staged by numerous participants, some of whom do not participate in all of the staged accidents.

III. CHARGING ISSUES THAT ARISE IN THE PROSECUTION OF STAGED-ACCIDENT INSURANCE FRAUD CASES

Staged-accident rings often stage numerous accidents before they are caught.⁶² The prosecution of such rings commonly raises the question of whether a single charging document can be used to charge all of the ring’s participants for all of their criminal conduct, or whether multiple cases should be prosecuted in order to charge the participants for separate and distinct criminal acts stemming from each individual accident. This Article focuses on the prosecution’s ability to charge, in a single case, members of a staged-accident ring for all of crimes committed by the ring.

⁵⁸ *Id.* § 195.020.

⁵⁹ *Sharma v. State*, 56 P.3d 868, 872 (Nev. 2002).

⁶⁰ *See infra* Part III.C.

⁶¹ *See infra* Part III.D.

⁶² *See, e.g.*, *People v. Shamis*, 68 Cal. Rptr. 2d 388 (1997).

A. Joinder of Charges

The Miller Ring was not caught until the June 17, 1992, accident resulted in the death of one of its participants.⁶³ For about two years prior to that fateful accident, the Miller Ring staged several additional accidents that resulted in fraudulent insurance payouts.⁶⁴ In such matters, prosecutors are faced with deciding whether they can charge in a single criminal case the crimes committed in relation to each of those accidents.⁶⁵ For example, imagine that prosecutors had evidence that suspects Miller, Santiago, Amaya, and others, staged accidents, including a fatal accident, in Nevada on the following dates:

- June 1, 1991
- September 20, 1991
- December 31, 1991
- March 15, 1992
- June 17, 1992

Assume all of these staged accidents were carried out in a similar manner—in what is known as a “Swoop and Squat” by law enforcement and by the insurance industry—described as follows.⁶⁶

⁶³ *Id.* at 391.

⁶⁴ *Id.* at 389–90.

⁶⁵ It is important to remember that, “even if charges could otherwise be properly joined, severance may still be mandated where joinder would result in unfair prejudice to the defendant.” *Weber v. State*, 119 P.3d 107, 121 (Nev. 2005).

⁶⁶ In addition to the “Swoop and Squat,” the National Insurance Crime Bureau (“NICB”), a nonprofit organization that partners with insurers and law enforcement agencies to facilitate the identification, detection and prosecution of insurance criminals, identifies three additional, commonly-used accident schemes: (1) the “Side Swipe”; (2) the “Panic Stop”; and (3) the “Drive Down.” NAT’L INS. CRIME BUREAU, STAGED AUTOMOBILE ACCIDENT FRAUD: THAT WAS NO ACCIDENT, https://www.nicb.org/theft_and_fraud_awareness/brochures [<https://perma.cc/KG58-P2J2>] (select “Staged Automobile Accident Fraud” hyperlink) (last visited Feb. 8, 2017). The NICB describes those schemes as follows:

Side Swipe

This caused accident scheme typically occurs at busy intersections with dual left turn lanes. The criminal positions his vehicle in the outer lane. As soon as the victim’s vehicle drifts into the outer turn lane, the criminal side swipes it. To help ensure the scheme’s success, the criminal conducts advance surveillance to identify heavily traveled intersections with a high volume of newer vehicles, and ones where vehicles in the inner turn lane oftentimes drift across lane divider lines into the outer left turn lane.

Panic Stop

In this scheme, the criminal typically drives an older vehicle filled with passengers. The criminal positions his car in front of the victim’s while a backseat passenger in the criminal’s vehicle watches and waits for the innocent motorist to be distracted, such as by a cell phone call. Sometimes criminals will intentionally damage their brake light bulbs so that they do not function, thus providing no warning to the victim that the scheme is about to occur. Once the victim is distracted, the backseat passenger tells the driver to slam on the brakes, thus causing the innocent motorist to rear end the criminal’s vehicle. Even though the victim suspects that the criminal’s vehicle “suddenly stopped for no apparent reason,” the victim’s insurance company must pay for the vehicle damages as well as the injuries that passengers claim to suffer from the accident.

The defendants use two of their own vehicles or vehicles of other ring participants to stage the accident: the swoop vehicle and the squat vehicle. The drivers of the swoop and squat vehicles find a victim to target—often a commercial vehicle that is likely to be insured with high policy limits.⁶⁷ Amaya, driving the swoop vehicle, speeds up to get ahead of the victim's vehicle while the driver of the squat vehicle speeds ahead of the victim to position the squat vehicle between the swoop vehicle and the victim's vehicle. Amaya then brakes abruptly, which gives the driver of the squat vehicle an excuse to brake, causing the victim to rear-end the squat vehicle.⁶⁸ Finally, Amaya quickly drives off in the swoop vehicle.

The ring participants who were in the squat vehicle now claim to have suffered injuries as a result of being rear-ended. Police, who often lack the training needed to spot signs that the accident was staged, generally cite the victim for following too closely behind the squat vehicle. The ring participants then collect insurance payouts for the accident they intentionally caused. Santiago is the "capper," the individual who organizes the participants and plans the accident before referring the resulting personal injury case to Miller. Miller is the attorney who encourages the commission of the offenses and then demands payment from the victims' insurers.

An analysis of the issue—whether those three particular defendants, Miller, Santiago, and Amaya, can be charged for crimes stemming from each of those staged accidents (insurance fraud, theft, obtaining money by false pretenses, battery with a deadly weapon, and murder)—begins with a review of Nevada's statutory law regarding joinder of offenses. For the sole purpose of analyzing Nevada's laws regarding joinder, let us first address the issue without regard to

Drive Down

In the drive down scheme, the victim merges his vehicle into traffic after being motioned in by the criminal. As the innocent driver begins to merge, the criminal speeds up and causes a collision. When questioned, the criminal denies motioning the victim to merge into traffic or gives an excuse, such as "I was swatting a fly." This type of caused accident scheme works well where vehicles have to merge, such as at four-way stop signs, T-intersections, merge and yield signs, lane reductions and closures, freeway ramps, and parking lots.

The left turn drive down is a new spin on this scheme. Criminals target innocent motorists who are often trying to complete a left turn into a strip mall or other parking structure. The criminal enlists an accomplice such as another car, a pedestrian or even a security guard to block the innocent motorist's path. The criminal then quickly drives up and causes the accident, the innocent motorist is still at fault because a car making a left turn is almost always liable to a car coming straight in the other direction.

Id.

⁶⁷ *Id.* ("Fraudulent automobile accidents occur more frequently in urban areas where there is a greater volume of vehicles and in wealthier communities because drivers there are perceived to have better insurance coverage. Criminals oftentimes target new, rental or commercial vehicles because they are typically well-insured.")

⁶⁸ *Id.* At times, the rings utilize one or more additional vehicles for the purpose of boxing in the victim and preventing him or her from avoiding the accident.

the effect that the addition of a conspiracy or racketeering charge may have on the discussion.⁶⁹

NRS 173.115 provides:

Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are:

1. Based on the same act or transaction; or
2. Based on two or more acts or transactions connected together or constituting parts of a common scheme or plan.⁷⁰

A thorough analysis of NRS 173.115(2) is set forth in *Weber v. State*.⁷¹ It is important to remember that “even if charges can otherwise be properly joined, severance may still be mandated where joinder would result in unfair prejudice to the defendant.”⁷²

Under NRS 173.115(2), crimes are “connected together” when “evidence of either crime would be admissible in a separate trial regarding the other crime.”⁷³ NRS 48.045 provides for the admission of “other acts” evidence, and NRS 48.045 provides for the admission of *res gestae* evidence.⁷⁴

In the hypothetical involving the Miller Ring, it can reasonably be argued that crimes stemming from each of the accidents were “connected together” for the purposes of NRS 173.115(2); if each accident was charged in separate cases, under NRS 48.045, evidence of all of the accidents would be admissible in the trials for each of those separate cases.

NRS 48.045(2) states that “[e]vidence of other crimes, wrongs or acts . . . may . . . be admissible for other purposes, such as proof of motive, opportunity,

⁶⁹ See *infra* Part III.C–D (discussing the effect of conspiracy and racketeering charges is discussed in detail).

⁷⁰ NEV. REV. STAT. § 173.115 (2015).

⁷¹ *Weber v. State*, 119 P.3d 107 (Nev. 2005).

⁷² See *id.* at 121.

⁷³ *Id.* at 120.

⁷⁴ *Id.* at 121. “Evidence which is probative of the crime charged and does not solely concern uncharged crimes is not ‘other crimes’ evidence.” *United States v. DeClue*, 899 F.2d 1465, 1472 (6th Cir. 1990). General hornbook law explains the principal of *res gestae* as follows:

In criminal cases, all facts tending to exhibit the *res gestae*, or to establish a chain of circumstantial evidence with respect of the act charged, are admissible. It is necessary only that they tend to prove the issue or constitute a link in the chain of evidence. On the other hand, circumstantial evidence may be irrelevant because a link in the chain of facts is missing, which is required to give probative value to the evidence.

29 AM. JUR. 2D *Evidence* § 317 (2016) (footnotes and citations omitted). The Nevada Supreme Court has narrowly construed this principal, stating that “admission of evidence under NRS 48.035(3) is limited to the statute’s express provisions.” *Bellon v. State*, 117 P.3d 176, 181 (Nev. 2005). Nevada’s *res gestae* law is codified in NEV. REV. STAT. § 48.035(3) (2015), which provides:

Evidence of another act or crime which is so closely related to an act in controversy or a crime charged that an ordinary witness cannot describe the act in controversy or the crime charged without referring to the other act or crime shall not be excluded, but at the request of an interested party, a cautionary instruction shall be given explaining the reason for its admission.

intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”⁷⁵ In the context of staged-accident cases, evidence of other staged accidents can be used for a number of purposes. Clearly, evidence of the other staged accidents can be used to establish motive, i.e., obtaining insurance payouts. The evidence could also be used to establish a common plan, given the fact that each accident was staged in a similar manner, with some of the same participants carrying out the same roles for the ring. Further, the evidence of the other staged accidents can be used to negate the defense’s likely argument that the crash was truly an accident. Finally, because NRS 48.045(2)’s list of uses is not inclusive, the other accidents can be used to support an expert witness’s opinion that the accident at issue was staged.⁷⁶

Even if a court ruled that the crimes stemming from the staged accidents were not “connected together” for the purposes of NRS 173.115(2), the prosecution would likely be able to establish that they were part of a “common scheme or plan.”

A fact-specific analysis must be used to determine whether a common scheme or plan existed.⁷⁷ Using *Black’s Law Dictionary* definitions of the terms “scheme” and “plan,” the Nevada Supreme Court has explained:

[P]urposeful design is central to a scheme or plan, though this does not mean that every scheme or plan must exhibit rigid consistency or coherency. We recognize that a person who forms and follows a scheme or plan may have to contend with contingencies, and therefore a scheme or plan can in practice reflect some flexibility and variation but still fall within an overall intended design.⁷⁸

The Nevada Supreme Court has shown a willingness to join charges even when the crimes upon which the charges are based occurred many months apart from one another. In *Middleton v. State*, the defendant was convicted on numerous charges for the kidnapping and murder of Katherine Powell in February of 1995 and Thelma Davila in August of 1994.⁷⁹ On appeal, the defendant challenged, among other things, the trial court’s denial of his request to “sever the counts relating to Davila from the counts relating to Powell.”⁸⁰ The Nevada Supreme Court upheld the trial court’s ruling, noting numerous similarities between the crimes:

⁷⁵ NEV. REV. STAT. § 48.045(2) (2015).

In order to overcome the presumption of the inadmissibility, the prosecution must request a hearing and establish that: (1) the prior bad act is relevant to the crime charged and for a purpose other than proving the defendant’s propensity, (2) the act is proven by clear and convincing evidence, and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.

Bigpond v. State, 270 P.3d 1244, 1250 (Nev. 2012).

⁷⁶ See *Bradley v. State*, 864 P.2d 1272, 1274 (Nev. 1993) (permitting admission of evidence of prior acts for the purpose of explaining an expert witness’s testimony).

⁷⁷ *Weber v. State*, 119 P.3d 107, 119 (Nev. 2005).

⁷⁸ *Id.* at 120 (footnote omitted).

⁷⁹ *Middleton v. State*, 968 P.2d 296, 300–03 (Nev. 1998).

⁸⁰ *Id.* at 308.

[B]oth victims were unmarried females of similar age (one was forty-two and the other forty-five); both were alone at home when they disappeared; both homes had been serviced by Middleton's employer, TCI Cable; Middleton had met both victims before their disappearance (the evidence that Middleton met Davila is not conclusive, but strong); neither victim's home showed evidence of a forced entry; Middleton went to his storage unit on the day that each victim disappeared; his storage unit yielded DNA evidence from each of the victims and property belonging to each; and the remains of each victim were found dumped in remote or concealed locations, wrapped in plastic garbage bags and bound with rope similar to rope found in Middleton's storage unit.⁸¹

As was the case in *Middleton*, there are numerous similarities between the crimes stemming from the accidents described in the Miller Ring hypothetical—from the involvement of common participants (i.e., Miller, Santiago, and Amaya), to the characteristics of the victims (i.e., drivers of commercial vehicles), to the manner in which the accidents were staged (i.e., Swoop and Squats), to the ultimate purpose of the staging (i.e., the submission of fraudulent insurance claims). Thus, NRS 173.115(2)'s common-scheme-or-plan clause is another proper basis for joinder of the crimes stemming from each of the staged accidents.

B. Joinder of Defendants

Clearly, Miller, Santiago, and Amaya were not the only participants in the staged accidents. These schemes require someone to drive the squat car, which is often filled with several passengers in order to maximize any insurance payout realized down the road.⁸² Commonly, prosecutors are confronted with cases in which some of the ring's participants were involved with only some of the accidents staged by the ring. The question becomes whether, in a single charging document filed in a single criminal case, all of the ring's participants can be charged for their crimes stemming from the ring's overall scheme. Again, for the purpose of analyzing Nevada's laws regarding joinder, set aside any thoughts as to the effect that the addition of a conspiracy or racketeering charge may have on the discussion.⁸³ Nevada's laws regarding joinder provide only limited assistance to a prosecutor who wishes to file a single criminal case to secure convictions against all of the ring's participants.

For the purposes of examining issues relating to joinder of defendants, let us take the Miller Ring hypothetical a step further and identify the (hypothetical) additional members of the ring that participated in each accident, as well as the roles of those additional members. This will help illustrate how the lim-

⁸¹ *Id.* at 308–09.

⁸² DORNSTEIN, *supra* note 1, at 3 (“The drivers and passengers of the cars take to the roads looking to trap another car (or a truck) into rear-ending the squat car so that the passengers can make personal injury claims against that other driver's insurance company. . . . The squat cars are often stuffed with anyone who happens to be around at the time of the planning . . .”).

⁸³ See *infra* Parts III.C.–D.

ited scope of certain members' roles affects the prosecution's ability to charge those members in the same case as members who played more prominent roles in the ring's activities:

- June 1, 1991 (Joe Smith – driver of the squat car)
- September 20, 1991 (Mary Jones – passenger in the squat car)
- December 31, 1991 (Joe Smith – passenger in the squat car)
- March 15, 1992 (no known additional participants)
- June 17, 1992 (no known additional participants)

Having established the participants' (hypothetical) roles, we now turn to the pertinent law affecting joinder of Smith and Jones.

The United State Supreme Court has acknowledged that “[j]oint trials ‘play a vital role in the criminal justice system.’”⁸⁴ “They promote efficiency and ‘serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts.’”⁸⁵

NRS 173.135 provides:

Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.⁸⁶

While “defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials,”⁸⁷ the prosecution's ability to try multiple defendants in a joint trial is not absolute. A determination regarding the propriety of jointly trying multiple defendants often turns on one question: can the jury “reasonably be expected to compartmentalize the evidence as it relates to separate defendants?”⁸⁸ The prosecution must ensure that “evidence against one defendant [was] not disproportionate in regard to another, thereby creating the potential for an unfair ‘overlapping’ effect.”⁸⁹ In other words, even if joinder would be permissible under the plain language of NRS 173.135, courts will consider whether application of that plain language would be fair to the defendant being joined.

⁸⁴ *Zafiro v. United States*, 506 U.S. 534, 537 (1993) (quoting *Richardson v. Marsh*, 481 U.S. 200, 209 (1987)).

⁸⁵ *Id.* (quoting *Richardson*, 481 U.S. at 210); see *Jones v. State*, 899 P.2d 544, 547 (Nev. 1995) (noting the public interest in joint trials of persons charged together).

⁸⁶ NEV. REV. STAT. § 173.135 (2015).

⁸⁷ *Zafiro*, 506 U.S. at 540.

⁸⁸ *Jones*, 899 P.2d at 547.

⁸⁹ *Amen v. State*, 801 P.2d 1354, 1358 (Nev. 1990); see *Zafiro*, 506 U.S. at 539 (“When many defendants are tried together in a complex case and they have markedly different degrees of culpability, th[e] risk of prejudice is heightened.”).

Additionally, severance is proper if “there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants”⁹⁰—the right to confront and cross-examine witnesses, for example. Further, severance is proper when inconsistent defenses asserted by codefendants are “antagonistic to the point that they are mutually exclusive.”⁹¹ Again, the plain language of NRS 173.135 is not controlling; joinder must also be fair and not negate the rights of the accused.

Given these court-created exceptions to NRS 173.135, it is difficult to answer the question of whether, in our hypothetical, the prosecution could charge all of the known participants for their respective crimes in the same charging document. Clearly, Mary Jones and Joe Smith played lesser roles compared to the other ring members noted. While a jury may reasonably be expected to be able to compartmentalize the evidence against Mary Jones and/or Joe Smith,⁹² a more fact-specific analysis is required to determine whether a joint trial may compromise their individual rights (e.g., the right to confront and cross-examine witnesses). For example, had one of the ringleaders made a statement to an officer who responded to the staged accident that implicated Mary Jones, then Mary Jones’s attorney may wish to cross-examine that ringleader about that statement; however, if that ringleader and Mary Jones are charged in the same case, her attorney could never call that ringleader to the stand (assuming the ringleader would invoke his right to remain silent). Moreover, it will be a matter of judicial discretion to determine whether Jones or Smith are at a heightened risk of prejudice as a result of existence of disproportionate evidence against the other ring members. In short, the propriety of joining defendants is a matter of judicial discretion requiring a fact-specific analysis. There is no hard and fast rule; determinations will be made on a case-by-case basis.

C. *Traditional Conspiracy*

As previously noted, the discussion regarding joinder intentionally did not include a discussion of the effect conspiracy and/or racketeering charges have on charging issues. Let us now turn to the effect of adding the charge of conspiracy, while temporarily setting aside a discussion of the effect of any racketeering charge.

“Nevada law defines a conspiracy as ‘an agreement between two or more persons for an unlawful purpose.’”⁹³

⁹⁰ *Zafiro*, 506 U.S. at 539. “Evidence that is probative of a defendant’s guilt but technically admissible only against a codefendant also might present a risk of prejudice.” *Id.* (citing *Brunton v. United States*, 391 U.S. 123 (1968)).

⁹¹ *Amen*, 801 P.2d at 1359.

⁹² *See State v. Sheeley*, 162 P.2d 96, 100 (Nev. 1945) (“It must be presumed by this court that the jury followed the evidence in the case, and the law given by the court.”).

⁹³ *Bolden v. State*, 124 P.3d 191, 194 (Nev. 2005) (quoting *Doyle v. State*, 921 P.2d 901, 911 (Nev. 1996)).

A person who knowingly does any act to further the object of a conspiracy, or otherwise participates therein, is criminally liable as a conspirator; however, “[m]ere knowledge or approval of, or acquiescence in, the object and purpose of a conspiracy without an agreement to cooperate in achieving such object or purpose does not make one a party to conspiracy.”⁹⁴

At the same time, “it shall not be necessary to prove that any overt act was done in pursuance of such unlawful conspiracy or combination.”⁹⁵

Faced with far-flung, loosely associated criminal enterprises such as those that carry out staged-accident frauds, prosecutors often face two distinct questions: (1) Should the prosecutor charge the defendants with participating in (a) a single conspiracy that encompasses all of the acts of the staged-accident ring, or (b) multiple conspiracies, with each conspiracy charge encompassing a separate and distinct agreement to stage an accident?; and (2) Under a traditional Nevada coconspirator vicarious-liability theory, to what extent is one coconspirator responsible for the conduct of other coconspirators?

1. Single Conspiracy vs. Multiple Conspiracies

Kotteakos v. United States is the seminal United States Supreme Court case addressing the impropriety of charging a single conspiracy where the evidence admitted at trial, instead, establishes the existence of multiple conspiracies.⁹⁶

Kotteakos involved a classic wheel, or hub-and-spoke, conspiracy.⁹⁷ Essentially, the government alleged that thirty-two individuals sought to defraud financial institutions in violation of the National Housing Act.⁹⁸ The defendants were part of eight or more groups (the spokes) who worked independently to defraud financial institutions.⁹⁹ Although none of the groups had any connection with the others, all groups worked with defendant Simon Brown (the hub) in carrying out their fraudulent acts.¹⁰⁰

The Court explained that, “[t]he proof therefore admittedly made out a case, not of a single conspiracy, but of several, notwithstanding only one was charged in the indictment.”¹⁰¹ The Court went on to state that the prosecution could not “string together, for common trial, eight or more separate and distinct crimes, conspiracies related in kind though they might be, when the only nexus

⁹⁴ *Doyle*, 921 P.2d at 911 (citation omitted).

⁹⁵ NEV. REV. STAT. § 199.490 (2015).

⁹⁶ *Kotteakos v. United States*, 328 U.S. 750 (1946).

⁹⁷ *See id.* at 750–56. A “wheel conspiracy” is “[a] conspiracy in which a single member or group (the ‘hub’) separately agrees with two or more other members or groups (the ‘spokes’). The person or group at the hub is the only party liable for all the conspiracies. [] Also termed . . . *circle conspiracy*; *hub-and-spoke conspiracy*.” *Wheel Conspiracy*, BLACK’S LAW DICTIONARY (10th ed. 2014).

⁹⁸ *Kotteakos*, 328 U.S. at 752.

⁹⁹ *Id.* at 754–55.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 755.

among them lies in the fact that one man participated in all.”¹⁰² The Court reversed the defendants’ convictions, explaining that it was “highly probable” that the error in charging and trying the separate and distinct conspiracies as though they were one conspiracy “had substantial and injurious effect or influence in determining the jury’s [guilty] verdict.”¹⁰³ In other words, it was not fair to the defendants who participated in a single, smaller conspiracy to be cast to the jury as part of a much larger conspiracy in which they played only a minor role.

The year after it issued its opinion in *Kotteakos*, the Supreme Court clarified that individuals who are not aware of one another’s activities can, nevertheless, be deemed participants in a single conspiracy:

Secrecy and concealment are essential features of successful conspiracy. The more completely they are achieved, the more successful the crime. Hence the law rightly gives room for allowing the conviction of those discovered upon showing, sufficiently the essential nature of the plan and their connections with it, without requiring evidence of knowledge of all its details or of the participation of others.¹⁰⁴

Think, for example, of a very basic drug-trafficking chain conspiracy.¹⁰⁵ The drug cultivator/manufacturer deals exclusively with a large-scale drug trafficker. The trafficker then deals exclusively with smaller-scale distributors. The drug cultivator/manufacturer never has any contact with, or knowledge of, the smaller-scale distributors. Despite the fact that the drug cultivator/manufacturer and smaller-scale distributors were parties to two separate and distinct agreements with a third party—the large-scale trafficker—they are part of the same, single drug-trafficking chain conspiracy.¹⁰⁶

The Court of Appeals for the District of Columbia has stated that “[a] conspiracy may pursue multiple schemes with different *modi operandi* without dividing into multiple conspiracies, as long as there is a single objective,” though

¹⁰² *Id.* at 773.

¹⁰³ *Id.* at 776.

¹⁰⁴ *Blumenthal v. United States*, 332 U.S. 539, 557 (1947).

¹⁰⁵ A “chain conspiracy” is:

A single conspiracy in which each person is responsible for a distinct act within the overall plan, such as an agreement to produce, import, and distribute narcotics in which each person performs only one function. All participants are interested in the overall scheme and liable for all other participants’ acts in furtherance of that scheme.

Chain Conspiracy, BLACK’S LAW DICTIONARY (8th ed. 2004).

¹⁰⁶ See *Blumenthal*, 332 U.S. at 558 (discussing a conspiracy to sell whiskey at unlawful prices: “By their separate agreements, if such they were, they became parties to the larger common plan, joined together by their knowledge of its essential features and broad scope, though not of its exact limits, and by their common single goal.”); see also *United States v. Kelly*, 892 F.2d 255, 258 (3d Cir. 1989) (“The government’s theory at trial was that a classic chain conspiracy was created, where a product is first transported, then refined, and then distributed to the ultimate user.”); *United States v. Smith*, 789 F.2d 196, 200 (3d Cir. 1986) (“[A] finding of a master conspiracy with sub-schemes does not constitute a finding of multiple, unrelated conspiracies . . .”).

the court also warned that the objective “should not be defined in [terms] too narrow or specific.”¹⁰⁷

Research reveals no cases in which the Nevada Supreme Court has tackled the issue of whether an agreement constitutes a single conspiracy or encompasses multiple conspiracies. Nevertheless, it is important for prosecutors to charge any such conspiracy in the proper manner because, like the United States Supreme Court, the Nevada Supreme Court has held that “reversible error exists . . . where the variance between the charge and proof was such as to affect the substantial rights of the accused.”¹⁰⁸

Should the Nevada Supreme Court take cues from the United States Supreme Court’s opinion in *Blumenthal*, when determining whether defendants were members of a single conspiracy or multiple conspiracies, it will likely look to whether the charged participants: (1) knew of the essential nature of the overall scheme; and (2) were sufficiently connected to the scheme.

Let us again consider the Miller Ring hypothetical involving Miller, Santiago, Amaya, Smith, and Jones. Quite obviously, Miller, Santiago, and Amaya—participants in each of the staged accident frauds—played roles in an overall scheme to fraudulently obtain insurance payouts. Because Smith participated in two of the accidents, a jury could reasonably infer that he was aware of the overall scheme, involving accidents other than those in which he was directly involved. On the other hand, Jones’s involvement in a single accident, on its own, is not likely to support an inference that she was aware of the larger conspiracy.

Should there be evidence that Jones knew she was part of a larger conspiracy; the question becomes whether she was sufficiently connected to the larger conspiracy to be charged as a participant in it rather than as a participant in a smaller conspiracy that carried out the single staged accident in which she participated. As noted above, the squat cars are frequently filled with passengers in order to maximize any payout received from an insurance company. A strong argument can be made that Jones was sufficiently connected to the overall scheme. Jones risked her life in furtherance of the conspiracy’s goals. Additionally, she was a necessary participant for the filing of multiple insurance claims. Moreover, she carried out the scheme at the direction of the capper involved in all of the accidents, and in cooperation with at least one other individual who participated in staging each of the accidents carried out in connection with the overall scheme.

¹⁰⁷ *United States v. Hemphill*, 514 F.3d 1350, 1364 (D.C. Cir. 2008) (citations and internal quotation marks omitted).

¹⁰⁸ *State v. Jones*, 605 P.2d 202, 204 (Nev. 1980). This holding was based, in part, on Nevada Revised Statute § 173.075 requirement that “[t]he indictment or the information [consist of] a plain, concise and definite written statement of the essential facts constituting the offense charged.” NEV. REV. STAT. § 173.075(1) (2015). The Court further noted that, in the past, it has “looked to determine whether the challenge to the indictment was brought before trial or after trial and ha[s] said that reduced standards apply to the sufficiency of indictments challenged after trial in contrast to pre-trial challenges.” *Jones*, 605 P.2d at 204.

2. *Coconspirator Vicarious Liability*

Once the scope of one or more conspiracies is established, the prosecution must often determine the extent to which one coconspirator—Mary Jones in our present hypothetical—can be held vicariously liable for the conduct of her coconspirators.

In *Bolden v. State*, the Nevada Supreme Court thoroughly addressed the issue of vicarious liability for coconspirators.¹⁰⁹ The Court began its analysis by declining to adopt the United States Supreme Court's theory of coconspirator vicarious-liability law applicable to federal conspiracy charges. That theory—known as the federal *Pinkerton* Rule or “the natural and probable consequences doctrine”—imposes liability on a coconspirator for *specific-intent* offenses that were reasonably foreseeable and performed in furtherance of the conspiracy.¹¹⁰

The Nevada Supreme Court then explained that “vicarious coconspirator liability may be properly imposed for *general intent* crimes only when the crime in question was a ‘reasonably foreseeable consequence’ of the object of the conspiracy.”¹¹¹ At the same time, the Court cautioned the prosecution that it would “not hesitate to revisit the doctrine’s applicability to general intent crimes if it appears that the theory of liability is alleged for crimes too far removed and attenuated from the object of the conspiracy.”¹¹²

The Court went on to address *specific-intent* crimes, holding that “a defendant may not be held criminally liable for the specific intent crime committed by a coconspirator simply because that crime was a natural and probable consequence of the object of the conspiracy.”¹¹³ Instead, the prosecution “must show that the defendant actually possessed the requisite statutory intent.”¹¹⁴

Applying the Nevada Supreme Court’s ruling to the Miller Ring hypothetical, determining whether Joe Smith can be held liable for the criminal conduct of all of the Miller Ring participants first requires deciding whether each of the crimes committed by the Miller Ring’s members is a general- or a specific-intent crime.

General intent is “the intent to do that which the law prohibits. It is not necessary for the prosecution to prove that the defendant intended the precise harm or the precise result which eventuated.” . . . [S]pecific intent is ‘the intent to accomplish the precise act which the law prohibits. . . .To hold a defendant criminally liable for a specific intent crime, Nevada requires proof that he possessed the state of mind required by the statutory definition of the crime.’¹¹⁵

¹⁰⁹ *Bolden v. State*, 124 P.3d 191, 196–99 (Nev. 2005).

¹¹⁰ *Id.* at 197.

¹¹¹ *Id.* at 201 (emphasis added).

¹¹² *Id.*

¹¹³ *Id.* at 200.

¹¹⁴ *Id.* at 200–01.

¹¹⁵ *Id.* at 201 (quoting *General Intent*, BLACK’S LAW DICTIONARY (6th ed. 1990)).

As discussed above, staged-accident rings often commit numerous offenses, ranging from insurance fraud, theft, and obtaining money by false pretenses to battery with a deadly weapon and murder.¹¹⁶ A review of general hornbook law, the Nevada Revised Statutes, and Nevada Supreme Court case law assists in characterizing each of those crimes as a general intent crime or a specific intent crime.

While the Nevada Supreme Court has not addressed the issue of whether the crime of insurance fraud is a general- or specific-intent crime, it is generally understood that “the mens rea for fraud is ‘specific intent to defraud.’”¹¹⁷ Moreover, “[a]t common law, the specific-intent crimes were robbery, assault, *larceny*, burglary, forgery, *false pretenses*, embezzlement, attempt, solicitation, and conspiracy.”¹¹⁸ Thus, the Nevada Supreme Court would likely conclude that the crime of insurance fraud occurs only when a defendant acts with the specific intent to defraud an insurer. Similarly, theft or obtaining money by false pretenses requires the specific intent to defraud.¹¹⁹

In *Byars v. State*, the Nevada Supreme Court followed California’s lead, clarifying that battery is a general-intent crime and explained that “the prosecutor need only prove that ‘the defendant actually intend[ed] to commit a willful and unlawful use of force or violence upon the person of another.’”¹²⁰ The addition of the deadly weapon enhancement does not transform the crime into a specific-intent crime.¹²¹ Similarly, the crime of second-degree murder does not require the specific intent to kill.¹²²

Having established the crimes committed and the mens rea required for those crimes, the question becomes: To what extent can a defendant be held criminally liable for the conduct of his or her conspirator(s)? Again using the Miller Ring hypothetical, this issue can be analyzed by determining to what extent, if any, Joe Smith, a participant in the June 1, 1991 and December 31, 1991 staged accidents, can be held criminally liable for any crimes stemming from the acts of his coconspirators when they staged the fatal June 17, 1992 accident.

Smith was a participant in the Miller Ring’s large, overall scheme to stage multiple accidents in order to fraudulently obtain insurance payouts. Let us assume that, sometime after the fatal June 17, 1992 accident but before law en-

¹¹⁶ See *supra* Part II.

¹¹⁷ Samuel W. Buell, *Novel Criminal Fraud*, 81 N.Y.U. L. REV. 1971, 1985 (2006).

¹¹⁸ *Specific Intent*, BLACK’S LAW DICTIONARY (8th ed. 2004) (emphasis added).

¹¹⁹ NEV. REV. STAT. § 205.0832(1)(c) (2015) (theft by material misrepresentation); *id.* § 205.380(1) (obtaining money by false pretenses); *Schertz v. State*, 849 P.2d 1058, 1060 (Nev. 1993) (setting forth the elements of obtaining money by false pretenses).

¹²⁰ *Byars v. State*, 336 P.3d 939, 949 (Nev. 2014) (quoting *People v. Lara*, 51 Cal. Rptr. 2d 402, 405 (Cal. Ct. App. 1996)).

¹²¹ See *Coats v. State*, 643 P.2d 1225, 1226 (Nev. 1982) (discussing that the addition of a deadly weapon enhancement does not transform the general intent crime of robbery into a specific intent crime).

¹²² *Hancock v. State*, 397 P.2d 181, 182 (Nev. 1964). Manslaughter is also a general intent crime. *Id.*

forcement discovered the true nature of the accident, Miller—in accordance with the overall plan of the large conspiracy—made claims for insurance benefits on behalf of the participants in the accident.

It can reasonably be anticipated that the participants in the June 17, 1992 staging will face charges of insurance fraud, theft or obtaining money by false pretenses, battery with a deadly weapon, and homicide—most likely, second degree murder. As explained above, a jury could find that one who stages an accident resulting in death used his or her vehicle as a deadly weapon and acted with a “general malignant recklessness of others’ lives and safety or disregard of social duty.”¹²³ As a member of the large overall Miller Ring conspiracy, Smith could be held liable only for the acts of his coconspirators if he possessed the requisite statutory intent.

Since battery with a deadly weapon and second degree murder are general-intent crimes, the prosecution would be required to prove that Smith intended to do that which the law prohibits—not that he intended to accomplish the precise act which the law prohibits.¹²⁴ There can be little argument with the fact that Smith intended to carry out acts in furtherance of the Miller Ring’s overall plan to fraudulently obtain insurance payouts. He intentionally drove a squat car for one accident, and he was a passenger, for the purpose of maximizing payouts, in another. Accordingly, Smith acted with the mens rea required for him to be held criminally liable for other acts of battery and/or murder committed by coconspirators in furtherance of the overall conspiracy.

Since insurance fraud and theft or obtaining money by false pretenses are specific-intent crimes, the prosecution would be required to prove that Smith acted with the intent to defraud an insurer. Once the prosecution proves that the accidents were staged, there should be little problem proving that Smith carried out his actions with the intent to defraud an insurer; there is simply no other logical reason to stage an accident. Thus, Smith also acted with the mens rea required for him to be held criminally liable for any acts of theft or obtaining money by false pretenses that emanated from the fatal accident in which he did not directly participate.

D. Racketeering Conspiracy

Assume for the purposes of this section that all of the participants who staged accidents in connection with the Miller Ring were part of a single conspiracy designed to stage accidents and defraud insurers. In other words, each member of the conspiracy participated in each staged accident. With those facts, in a single case, all of the defendants can be charged for all of their criminal activities; there is no multiple conspiracy issue.

In order to see how Nevada’s racketeering statutes can affect the scope of a criminal case, let us take that tidy Miller Ring hypothetical a step further. Imag-

¹²³ See *supra* Part II.

¹²⁴ See *Bolden v. State*, 124 P.3d 191, 201 (Nev. 2005).

ine that, in addition to heading the conspiracy to defraud insurers, over that same three-year period when the accidents were being staged, Miller was also conspiring with an entirely different individual, Jane Doe, to use his office to perpetrate numerous acts of mortgage fraud. Specifically, Miller and Doe conspired to make false statements in mortgage applications in order to defraud housing lenders, with Doe working to recruit applicants and Miller filling out and submitting to the lenders the requisite paperwork.

Finally, let us also imagine that Doe and the staged-accident participants, other than Miller, knew nothing about one another's activities or existence. Here, we have two separate and distinct traditional—as opposed to racketeering—conspiracies: (1) the staged-accident conspiracy; and (2) the mortgage fraud conspiracy.

The question becomes: Can a prosecutor in a single criminal case charge all of the members of each conspiracy for all crimes involving Miller? Applying Nevada traditional-conspiracy laws, the prosecutor runs the risk that the court would answer in the negative on the grounds that there is no discernible basis for joinder of the separate and distinct conspiracies.¹²⁵ Aside from Miller, there is no evidence that the coconspirators knew of any overall plan to perpetrate distinct frauds. The addition of a racketeering conspiracy charge, however, alters our analysis.

Nevada's racketeering statutes provide for substantive racketeering offenses, as well as the offense of conspiracy to commit racketeering.¹²⁶ For the purposes of this Article, it is important to distinguish those "substantive" racketeering offenses from the racketeering conspiracy offense. NRS 207.400(1) establishes several substantive racketeering offenses.¹²⁷ NRS 207.400(1)(c) ad-

¹²⁵ See *supra* Part III.C.1.

¹²⁶ NEV. REV. STAT. § 207.350–.520 (2015).

¹²⁷ *Id.* § 207.400(1)(a)(i), sets forth the substantive racketeering offenses as follows:

1. It is unlawful for a person:
 - (a) Who has with criminal intent received any proceeds derived, directly or indirectly, from racketeering activity to use or invest, whether directly or indirectly, any part of the proceeds, or the proceeds derived from the investment or use thereof, in the acquisition of:
 - (1) Any title to or any right, interest or equity in real property; or
 - (2) Any interest in or the establishment or operation of any enterprise.
 - (b) Through racketeering activity to acquire or maintain, directly or indirectly, any interest in or control of any enterprise.
 - (c) Who is employed by or associated with any enterprise to conduct or participate, directly or indirectly, in:
 - (1) The affairs of the enterprise through racketeering activity; or
 - (2) Racketeering activity through the affairs of the enterprise.
 - (d) Intentionally to organize, manage, direct, supervise or finance a criminal syndicate.
 - (e) Knowingly to incite or induce others to engage in violence or intimidation to promote or further the criminal objectives of the criminal syndicate.
 - (f) To furnish advice, assistance or direction in the conduct, financing or management of the affairs of the criminal syndicate with the intent to promote or further the criminal objectives of the syndicate.

dresses one of the more commonly charged substantive racketeering offenses.¹²⁸ It makes it unlawful for a person employed by or associated with any enterprise to conduct or participate, directly or indirectly, in “(1) The affairs of the enterprise through racketeering activity, or (2) Racketeering activity through the affairs of the enterprise.”¹²⁹ NRS 207.400(1)(j) makes it unlawful for anyone to conspire to commit a substantive racketeering offense.

In order to prove that defendants conspired to commit a substantive racketeering offense—namely, NRS 207.400(1)(c)—in violation of NRS 207.400(1)(j), the prosecution must prove the following:

- (1) Existence of an enterprise;
- (2) Employment by or association with enterprise;
- (3) Participation in (a) the affairs of the enterprise through racketeering activity, or (b) racketeering activity through the affairs of the enterprise; and
- (4) Conspiring with others for the purpose of carrying out criminal conduct satisfying elements i through iii.¹³⁰

A finding that a defendant conspired to violate NRS 207.400(1)(c) does not require a finding of the commission of two or more crimes related to racketeering.¹³¹ A closer examination of each element reveals the issues that arise when charging a staged-accident ring member with conspiracy to commit a substantive racketeering offense.

(g) Intentionally to promote or further the criminal objectives of a criminal syndicate by inducing the commission of an act or the omission of an act by a public officer or employee which violates his or her official duty.

(h) To transport property, to attempt to transport property or to provide property to another person knowing that the other person intends to use the property to further racketeering activity.

(i) Who knows that property represents proceeds of, or is directly or indirectly derived from, any unlawful activity to conduct or attempt to conduct any transaction involving the property:

- (1) With the intent to further racketeering activity; or
- (2) With the knowledge that the transaction conceals the location, source, ownership or control of the property.

¹²⁸ See *e.g.*, *Balgas v. State*, No. 65512, 2016 WL 207617, at *1 (Nev. Jan. 15, 2016); *Ahearn v. State*, No. 66123, 2016 WL 1109110, at *1 (Nev. Mar. 18, 2016).

¹²⁹ NEV. REV. STAT. § 207.400(1)(c) (2015).

¹³⁰ It should be clarified that, while the case law discussed herein relates to racketeering conspiracies in which the participants both agree to commit a substantive racketeering offense *and* actually carry out the agreed upon substantive offense, there may be situations in which one can be convicted of conspiring to commit a substantive racketeering offense without having committed that substantive offense; the mere agreement would constitute the conspiracy. See NEV. REV. STAT. § 207.400(1)(c), (j) (2015).

¹³¹ *Ahearn*, 2016 WL 110911, at *3. Additionally, unlike the federal crime of racketeering, Nevada racketeering law does not require a finding that the defendant was “involved in directing the broader operation or management of the enterprise.” *Id.* (citing *Reves v. Ernst & Young*, 507 U.S. 170, 179, 185 (1993)). In support of that conclusion, the Nevada Supreme Court explained that Nevada’s racketeering laws “lack[] the ‘in the conduct’ language [of 18 U.S.C. § 1962(c)] and thus the management requirement.” *Id.*

1. *Existence of an Enterprise*

Nevada courts presiding over staged-accident prosecutions are likely to be confronted with the issue of whether a loosely organized crime ring such as Miller’s hypothetical ring (encompassing both insurance and mortgage fraud conspiracies) constitutes an “enterprise,” as contemplated by Nevada’s racketeering statutes. NRS 207.380 defines the term “enterprise” as follows:

1. Any natural person, sole proprietorship, partnership, corporation, business trust or other legal entity; and
2. Any union, association or other group of persons associated in fact although not a legal entity.

The term includes illicit as well as licit enterprises and governmental as well as other entities.¹³²

Minutes from Nevada’s 1983 legislative session indicate that Nevada’s racketeering laws were largely influenced by similar, existing federal law, existing Arizona law, and law that was also being proposed in 1983 for the state of Illinois.¹³³

Nevada’s definition of the term “enterprise” is in many ways similar to that of the federal, Arizona, and Illinois racketeering statutes.¹³⁴ While Nevada Supreme Court case law discussing racketeering enterprises is scarce, the United States Supreme Court has analyzed the breadth of the term’s definition with respect to federal racketeering law. Where Nevada’s definition of racketeering tracks the federal definition, the United States Supreme Court’s thorough anal-

¹³² NEV. REV. STAT. § 207.380 (2015).

¹³³ *Hearing on A.B. 124 Before the Assemb. Comm. on Jud.*, 1983 Leg., 66th Sess. 6–7 (Nev. 1983) (statement of Brian Hutchins, Deputy Attorney Gen.); *see also* 18 U.S.C. §§ 1961–65 (2012).

¹³⁴ Federal law provides that an “enterprise” is “any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.” 18 U.S.C. § 1961(4). Under Arizona law, an “enterprise” is defined as “any corporation, partnership, association, labor union or other legal entity or any group of persons associated in fact although not a legal entity. ARIZ. REV. STAT. § 13-2301(D)(2) (2015). Illinois law provides:

“Enterprise” includes:

- (1) any partnership, corporation, association, business or charitable trust, or other legal entity; and
- (2) any group of individuals or other legal entities, or any combination thereof, associated in fact although not itself a legal entity. An association in fact must be held together by a common purpose of engaging in a course of conduct, and it may be associated together for purposes that are both legal and illegal. An association in fact must:
 - (A) have an ongoing organization or structure, either formal or informal;
 - (B) the various members of the group must function as a continuing unit, even if the group changes membership by gaining or losing members over time; and
 - (C) have an ascertainable structure distinct from that inherent in the conduct of a pattern of predicate activity.

As used in this Article, “enterprise” includes licit and illicit enterprises. 720 ILL.COMP. STAT. 5/33G-3(b) (2013).

ysis of that language may prove instructive for Nevada courts confronted with issues of statutory interpretation.

In *Boyle v. United States*, the United States Supreme Court tackled the issue of “whether an association-in-fact enterprise¹³⁵ under the Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C. § 1961 *et seq.*, must have an ascertainable structure beyond that inherent in the pattern of racketeering activity in which it engages.”¹³⁶ The facts of the case are as follows.

Throughout the 1990s, several individuals participated in a series of night-deposit-box thefts carried out in New York, New Jersey, Ohio, and Wisconsin.¹³⁷ The thefts were carried out by a core group, along with others who participated from time to time.¹³⁸ Before each theft, a group of the participants would meet to gather tools used to perpetrate the crimes and assign roles to the participants.¹³⁹ The Court explained, “[t]he group was loosely and informally organized. It does not appear to have had a leader or hierarchy; nor does it appear that the participants ever formulated any long-term master plan or agreement.”¹⁴⁰ Prior to the petitioner’s involvement, the core group had committed more than thirty thefts.¹⁴¹ By 1994, the petitioner joined the group and participated in numerous thefts over the subsequent five years.¹⁴²

The petitioner was indicted on numerous charges, including “participation in the conduct of the affairs of an enterprise through a pattern of racketeering activity,”¹⁴³ and conspiracy to commit that offense.¹⁴⁴ The trial court denied the petitioner’s request that the jury be instructed that “the Government was required to prove that the enterprise had an ongoing organization, a core membership that functioned as a continuing unit, and an ascertainable structural hierarchy distinct from the charged predicate acts.”¹⁴⁵ The petitioner was

¹³⁵ An “association-in-fact enterprise” is defined as follows: “Under RICO, a group of people or entities that have not formed a legal entity, but that have a common or shared purpose, and maintain an ongoing organizational structure through which the associates function as a continuing unit.” *Association-in-fact Enterprise*, BLACK’S LAW DICTIONARY (10th ed. 2014).

¹³⁶ *Boyle v. United States*, 556 U.S. 938, 940–41 (2009) (internal quotation marks omitted).

¹³⁷ *Id.* at 941.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* 18 U.S.C. § 1962(c) (2012), which is comparable to NEV. REV. STAT. § 207.400(1)(c) (2015), states:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity or collection of unlawful debt.

¹⁴⁴ *Boyle*, 556 U.S. at 941; *see also* 18 U.S.C. § 1962(d), which is comparable to NEV. REV. STAT. § 207.400(1)(j), states: “It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.”

¹⁴⁵ *Boyle*, 556 U.S. at 943 (internal quotation marks omitted).

convicted of the racketeering charges, and the Second Circuit Court of Appeals affirmed the conviction.¹⁴⁶ The United States Supreme Court granted certiorari “to resolve conflicts among the Courts of Appeals concerning the meaning of a RICO enterprise.”¹⁴⁷

The Court rejected the dissent’s position that the definition of a RICO enterprise is limited to business-like entities.¹⁴⁸ The Court also rejected the petitioner’s contention that an enterprise must have

structural attributes, such as a structural hierarchy, role differentiation, a unique *modus operandi*, a chain of command, professionalism and sophistication of organization, diversity and complexity of crimes, membership dues, rules and regulations, uncharged or additional crimes aside from predicate acts, an internal discipline mechanism, regular meetings regarding enterprise affairs, an enterprise name, and induction or initiation ceremonies and rituals.¹⁴⁹

The Court explained that, instead, an enterprise must have: (1) a purpose, (2) relationships among those associated with the enterprise, and (3) longevity sufficient to permit the associates to pursue the enterprise’s purpose.¹⁵⁰ According to the Court, “[m]embers of the group need not have fixed roles; different members may perform different roles at different times.”¹⁵¹

Additionally, the Court explained that “the existence of an enterprise is an element distinct from the pattern of racketeering activity and ‘proof of one does not necessarily establish the other.’”¹⁵² The Court noted, however, that the existence of an enterprise *may* be inferred from evidence showing that persons associated with it engaged in a pattern of racketeering activity.¹⁵³ To that end, the Court ruled that the trial court “did not err in instructing the jury that the existence of an association-in-fact is oftentimes more readily proven by what it does, rather than by abstract analysis of its structure.”¹⁵⁴

There should be little doubt that Nevada courts are likely to follow the lead of the United States Supreme Court and adopt a similarly broad definition of the term “enterprise,” as that term is used in relation to Nevada’s racketeering laws. A comparison of Nevada and federal racketeering laws supports that conclusion.

The federal racketeering laws address the activities of enterprises—no other groups.¹⁵⁵ Nevada racketeering laws, however, differentiate enterprises from criminal syndicates.¹⁵⁶

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 945.

¹⁴⁹ *Id.* at 948 (internal quotation marks omitted).

¹⁵⁰ *Id.* at 946.

¹⁵¹ *Id.* at 948.

¹⁵² *Id.* at 947 (quoting *United States v. Turkette*, 452 U.S. 576, 583 (1981)).

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 951 (internal quotation marks omitted).

¹⁵⁵ *See* U.S.C. §§ 1961–68 (2012).

As discussed above, Nevada's definition of enterprise is nearly identical to that of the federal racketeering laws. But the Nevada Revised Statutes, unlike the United States Code, also define a criminal syndicate as "any combination of persons, so structured that the organization will continue its operation even if individual members enter or leave the organization, which engages in or has the purpose of engaging in racketeering activity."¹⁵⁷ While it is understandable that there may be some confusion as to whether a federal RICO enterprise requires an organized structure, there is no question that it is not required under Nevada's definition of a racketeering enterprise. If such a structure was required, there would be no need for the legislature to differentiate an enterprise (which includes no mention of an organized structure) from a criminal syndicate (which expressly requires an organized structure); a conclusion to the contrary would render them one and the same.¹⁵⁸ For these reasons, Nevada courts are likely to interpret Nevada's definition of the term "enterprise" at least as broadly as the United State Supreme Court interprets the same term as used in federal racketeering laws.

With that in mind, let us again turn to the hypothetical Miller Insurance and Mortgage Fraud Ring. Applying the enterprise elements set forth in *Boyle*, it is clear that Miller's Ring constitutes an enterprise. The enterprise had an overall purpose of obtaining money through Miller's law office by fraudulent means. Additionally, there were relationships among those associated with the enterprise; all of the participants' unlawful conduct ultimately led to Miller's fraudulent efforts to obtain money. Finally, the longevity requirement is satisfied, as the crimes were carried out over a three-year period and, likely, would have continued, had the June 17, 1992 accident not resulted in a fatality.

2. *Employment by or Association with Enterprise*

In our hypothetical, it is clear that Doe was associated with or employed by Miller's enterprise. Doe was responsible for recruiting the loan applicants Miller needed in order to submit fraudulent loan applications. Thus, the employment/association element of NRS 207.400(1)(j) has been satisfied.

3. *Participation in the Affairs of the Enterprise Through Racketeering Activity or Racketeering Activity Through the Affairs of the Enterprise*

"Racketeering activity" means:

engaging in at least two crimes related to racketeering that have the same or similar pattern, intents, results, accomplices, victims or methods of commission, or

¹⁵⁶ See NEV. REV. STAT. § 207.370 (2015) (defining criminal syndicate); *id.* § 207.380 (defining enterprise).

¹⁵⁷ *Id.* § 207.370.

¹⁵⁸ See *Leven v. Frey*, 168 P.3d 712, 716 (Nev. 2007) ("[S]tatutory interpretation should not render any part of a statute meaningless, and a statute's language should not be read to produce absurd or unreasonable results." (internal quotation marks omitted)).

are otherwise interrelated by distinguishing characteristics and are not isolated incidents, if at least one of the incidents occurred after July 1, 1983, and the last of the incidents occurred within 5 years after a prior commission of a crime related to racketeering.¹⁵⁹

The crimes related to racketeering include insurance fraud, felony battery, murder, and obtaining possession of money or property valued at \$650 or more by means of false pretenses.¹⁶⁰

During Nevada's 1983 legislative session, two examples of conduct that satisfies the participation requirement were discussed:

For example, there's a bar in some town. The owners, or people working there might be selling narcotics or something else illegal from this legitimate establishment. Basically, they would be conducting racketeering through their business.

The second situation comes from *U.S. vs. Elliot*, 571 Fed. 2d 880, it's a Fifth Circuit Fed. Appellate Court decision in 1980. In that case, there was a group of individuals whose basic desire was to make money. They combined and performed different jobs for the organization. They divided people into different departments of this business. They had not only an administrative level, but they also had a department that was involved with stolen merchandise and fencing; another department involved with narcotics sales and another that was involved with murder and obstruction of justice. All of these were efforts to help the organization gain money, thus they were participating in the affairs of the enterprise through racketeering activity.¹⁶¹

Given the plain language of the racketeering statutes and the examples provided by the Nevada legislature, it is clear that members of the hypothetical Miller Ring participate in the affairs of their enterprise (Miller's law practice), through racketeering activity (insurance fraud, theft, obtaining money by false pretenses, and less obviously, battery with a deadly weapon and murder).

4. *Conspiring with Others for the Carrying out of Criminal Conduct Satisfying Elements 1 Through 3*

NRS 207.400(1)(j)—Nevada's racketeering conspiracy statute—allows the prosecution to avoid the pleading and joinder problems it normally faces when dealing with multiple traditional conspiracies, as opposed to racketeering conspiracies.¹⁶² As discussed above, the prosecution is generally prohibited from charging multiple, distinct conspiracies in a single charge.¹⁶³ NRS

¹⁵⁹ NEV. REV. STAT. § 207.390 (2015).

¹⁶⁰ *Id.* § 207.360.

¹⁶¹ *Hearing on A.B. 124 Before the Assemb. Comm. on Judiciary*, 62nd Leg. Sess. 8 (1983). Any attempt to use the latter example in support of an argument that a Nevada enterprise must have the type of structure rejected in *Boyle* falls flat. The two examples discussed by the Nevada Legislature were illustrative, not exclusive. Moreover, as discussed above, any such argument would render the term "criminal syndicate" a nullity.

¹⁶² NEV. REV. STAT. § 207.400(1)(j) (2015).

¹⁶³ *See supra* Part III.C.1.

207.400(1)(j), however, allows the prosecution to charge defendants for conspiring to participate in the affairs of an enterprise with knowledge that the goal of the conspiracy was the commission of a substantive racketeering offense, such as violation of NRS 207.400(1)(c).¹⁶⁴ This is true even if the defendants being charged participated in the enterprise's affairs through what would otherwise be considered separate and distinct traditional conspiracies.

In *United States v. Maloney*, the Seventh Circuit Court of Appeals discussed this principle as it applies to federal racketeering conspiracy charges.¹⁶⁵ The relevant facts of *Maloney* were as follows.

Thomas J. Maloney was a judge in Cook County, Illinois from 1977 through 1990.¹⁶⁶ During his time on the bench, he accepted bribes and agreed to fix four cases, including three murder cases.¹⁶⁷

The first bribe occurred in 1981.¹⁶⁸ Chicago Alderman Fred Roti and Ward Secretary Pat Marcy contacted attorney Robert Cooley to defend hit man Lenny Chow from an attempted murder charge, which ultimately became a murder charge after the victim passed away.¹⁶⁹ Marcy assured Cooley that Maloney could be bribed.¹⁷⁰ Maloney did, in fact, make improper rulings resulting in Chow's acquittal in exchange for money received from Marcy.¹⁷¹

The remaining three bribes took place between 1982 and 1985.¹⁷² In each of those instances, Maloney fixed cases for attorney William Swano.¹⁷³

As a result, Maloney was convicted of a number of federal crimes, including racketeering and racketeering conspiracy.¹⁷⁴ On appeal, Maloney made a number of arguments, including the argument that "the Chow case was improperly included as part of the RICO conspiracy because it involved some participants, specifically Cooley and Marcy, who did not participate in the other predicate acts."¹⁷⁵ In other words, Maloney argued that the prosecution improperly charged multiple conspiracies in a single case—one conspiracy that included the individuals involved in the Chow case, and another conspiracy that included the individuals involved in the remaining three cases that were fixed.

The Seventh Circuit rejected that argument, explaining that the federal RICO conspiracy statute "is capable of providing for the linkage in one proceeding of a number of otherwise distinct crimes and/or conspiracies through

¹⁶⁴ NEV. REV. STAT. § 207.400(1)(j) (2015).

¹⁶⁵ *United States v. Maloney*, 71 F.3d 645, 664–65 (7th Cir. 1995).

¹⁶⁶ *Id.* at 650.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at 650–51.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 649.

¹⁷⁵ *Id.* at 664.

the concept of enterprise conspiracy.”¹⁷⁶ According to the Seventh Circuit, “a series of agreements that under pre-RICO law would constitute multiple conspiracies could under RICO be tried as a single ‘enterprise’ conspiracy if the defendants have agreed to commit a substantive RICO offense.”¹⁷⁷

Applying the facts in *Maloney* to those principles, the Seventh Circuit found that inclusion of all of the predicate acts of racketeering was permissible because all of the participants in the RICO conspiracy worked with Maloney in his capacity as a judge with a desire to “effect a corruption of that office.”¹⁷⁸ In other words, all of the named individuals participated in the affairs of an enterprise, the goal of which was to commit multiple acts of racketeering for the purpose of fixing cases.

Applying the facts of the hypothetical Miller Insurance and Mortgage Fraud Ring to those principles, the prosecution could file a racketeering conspiracy charge asserting that the enterprise’s overall goal was to fraudulently obtain money through the use of Miller’s law practice. That assertion would be supported by the fact that the insurance claims and mortgage applications were processed through the use of his practice. With the enterprise characterized in such terms, the prosecution should be able to charge all of the participants with conspiring to commit racketeering in violation of NRS 207.400(1)(j). The prosecution should also be able to use all of the crimes committed in furtherance of both the insurance fraud conspiracy and mortgage fraud conspiracy as the predicate acts upon which the racketeering conspiracy charge is based.

CONCLUSION

When multiple defendants commit a number of crimes, joinder issues can present prosecutors with challenging charging decisions. The addition of a traditional conspiracy charge and/or a racketeering conspiracy charge may resolve such issues. It is important to remember that, although all defendants *can* be charged for all crimes in a single criminal case, this should not be the sole basis for determining whether a single case *should* encompass all of the crimes committed by such complex crime rings. As another law review article has explained, when it comes to prosecuting organized crime, bigger is not always better.¹⁷⁹

As demonstrated by the facts of the Miller case, greed motivates accident stagers in ways most people would find difficult to imagine. One would hope that the average person would not risk a fraud conviction by telling a simple lie to an insurance company, let alone stage a car accident with a big rig. Accident stagers have a different way of thinking; greed trumps reason. To illustrate, a

¹⁷⁶ *Id.* (quoting *United States v. Neapolitan*, 791 F.2d 489, 501 (7th Cir. 1986)).

¹⁷⁷ *Id.* (citation omitted).

¹⁷⁸ *Id.* (citation and internal quotation marks omitted).

¹⁷⁹ See generally, e.g., Paul Marcus, *Re-Evaluating Large Multiple-Defendant Criminal Prosecutions*, 11 WM. & MARY BILL RTS. J. 67 (2002).

Los Angeles Times article published a little more than one year after the fatal accident brought down his ring revealed that Gary Miller was sued by Equitable Life Assurance Society (“Equitable”).¹⁸⁰ The suit had no direct connection to the fraudulent insurance payouts Miller had obtained in conjunction with the staged accidents.¹⁸¹ No, Equitable was suing Miller to recover \$85,000 in disability benefits Miller obtained for “job-related stress” that was the product of his arrest for murder and conspiracy.¹⁸²

¹⁸⁰ Julie Tamaki, *Insurer Sues Attorney Accused of Murder*, L.A. TIMES (Dec. 30, 1993), http://articles.latimes.com/1993-12-30/local/me-6819_1_disability-benefits [<https://perma.cc/JY9C-8DCM>].

¹⁸¹ *Id.*

¹⁸² *Id.*