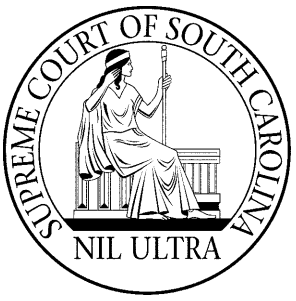

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 3
January 22, 2014
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Davontay Henson, Appellant.

Appellate Case No. 2011-204008

Appeal from York County
John C. Hayes, III, Circuit Court Judge

Opinion No. 27354
Heard November 6, 2013 – Filed January 22, 2014

REVERSED

Appellate Defender Susan B. Hackett, of Columbia, for Appellant.

Attorney General Alan M. Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General Brendan J. McDonald, all of Columbia; and Solicitor Kevin S. Brackett, of York, for Respondent.

JUSTICE HEARN: The central issue in this case is whether the admission of his codefendant's redacted confession during a joint trial violated appellant Davontay Henson's rights under the Confrontation Clause of the Sixth

Amendment to the United States Constitution. We find the admission of the redacted confession violated the Confrontation Clause because the jury could infer from the face of the confession that it referred to and incriminated Henson. Accordingly, we reverse.

FACTUAL/PROCEDURAL BACKGROUND

Maurice Jackson, Tyrone King, and Kenny Cunningham were sitting on the front porch of Jackson's home one evening in Rock Hill, South Carolina. A woman and a man wearing a mask walked into the yard and towards the porch. The man stopped and the woman walked up the stairs and onto the porch. As the man removed a firearm from his clothing, the woman announced it was a robbery and demanded Jackson, King, and Cunningham's possessions. After she collected their possessions, the perpetrators began to walk away. Suddenly, the man turned and began firing his weapon at the victims. The two then fled. Cunningham was struck in the leg and foot. King was hit in the head and later died from the wound.

Investigating the crime, the police focused on Donta Reid. They brought him in for questioning and over the course of the investigation he gave four confessions to the police. In the confession at issue here—the fourth—Reid implicated himself, Henson (nicknamed B'More), Samanatha Ervin (nicknamed Sam), and Aileen Newman (nicknamed LeLe) as the perpetrators, and stated Henson was the shooter.[1] His statement detailed the crimes from when the four first began discussing committing a robbery to their flight and Reid's first encounter with the police.

Henson, Reid, Ervin, and Newman were all arrested and charged with murder, assault and battery with intent to kill (ABWIK), criminal conspiracy, armed robbery, and possession of a firearm during the commission of a violent crime. Ervin and Newman pled guilty, and Henson and Reid proceeded to a joint trial.

At the outset, Henson moved for a severance. In support, he argued he and

[1] In the first and second statements Reid implicated himself and Darius Jeter—also known as "Duke"—in the crimes and stated Jeter was the shooter. In the third statement Reid continued to implicate himself and Jeter, added Ervin as an additional conspirator, and continued to assert Jeter was the shooter. The fourth statement made clear that Jeter was not involved.

Reid would present antagonistic defenses and the State would presumably offer Reid's fourth confession as evidence. He asserted Reid would likely not testify pursuant to the Fifth Amendment and thus, he would not be able to cross-examine Reid about the confession. Therefore, he contended the admission of Reid's fourth confession would violate his Confrontation Clause rights.

The State opposed the motion on the grounds of judicial economy and lack of prejudice and offered a redacted version of Reid's confession as a solution to the Confrontation Clause problem. In the redacted statement, Henson's name was replaced with "the guy," "he," and "him," and a statement about picking Henson out of a photo lineup was removed entirely. The circuit court ruled the redacted statement did not incriminate Henson on its face and therefore, its admission would not violate the Confrontation Clause. Finding the confession to be the sole basis for the motion to sever, the court also denied that motion.

At trial, the two surviving victims testified that on the night of the crimes Reid came to Jackson's home and borrowed his phone to make a call during which Reid was heard to say there were "two of them." Approximately fifteen to thirty minutes later, a man and woman walked into the yard and robbed them. As the two began to walk away from the home, the woman said to the man that the victims had seen her face and that he needed to go back and shoot them. The man then turned around and opened fire on the victims, after which he and the woman fled. The victims were generally unable to identify the perpetrators beyond describing them as an African-American male with dreadlocks and an African-American female both appearing to be in their twenties. However, Jackson testified that the man spoke with a Baltimore accent.

Ervin and Newman also testified at the trial and detailed Reid's, Henson's, and their own participation in the crimes. Both identified Henson as the shooter and testified that he was from Baltimore. They also both testified they entered into a plea deal with the State whereby they agreed to testify in exchange for the State dismissing several charges and recommending a sentencing range.

In addition to the victims and coconspirators, several other witnesses testified. A man riding his bike on Jackson's street on the night of the crimes testified he witnessed the crimes, but he was not able to identify the perpetrators other than that they were a man and a woman. An individual who knew the four conspirators and was in the area that night testified that he was near Jackson's home when a truck stopped with Ervin driving and Reid in the bed of the truck.

He spoke to Ervin and Reid, but was unable to see whether there were any other occupants of the truck. Finally, two individuals who were with the four conspirators at a home on the night of the crimes testified that the four left at one point and were gone for approximately forty-five minutes to an hour.

Finally, several police officers testified as to their investigation of the crime, among them Detective Leslie Herring who took Reid's fourth confession. Over Henson's objection, Herring was permitted to read the redacted version of Reid's fourth confession to the jury and it was entered into evidence. The redacted confession reads:

> I have earlier made statements to the police officers about what happened the night that Tyrone King, who I call Banks was shot. I told parts of the truth because I had been threatened by the guy that done the shooting. The night this happened it was me, the guy that did the shooting and LeLe over at Samantha's house on Keels Ave. Sam and the guy left and when they got back, the guy had a rifle and he was loading it up. The rifle was black and brown in color and was about 3 feet long. It had white tape around the butt of the gun. I assumed that Sam and the guy had went and got the gun because he didn't have it before they left and they said they were going to go get something. It was already dark and we were all standing around outside and Sam told him to take the gun in the house and he did. He took it to Sam's room. We all went up there too and I wanted to be noisy and see what gun looked like. [sic] The guy was holding the gun and he said he was wanting to let it rip. He said that it was automatic. He asked me if I wanted to walk with him because he had said something about robbing somebody. I didn't want to go because I didn't know where he was going to put the gun. He said that he was going to put it in his pants. I told him I didn't want to go. He asked Sam if she wanted to go somewhere. She asked him where and he said anywhere that he could make a lick.[2] Me, Sam, LeLe and the guy got into Sam's grandfather's truck, a small truck. I got in the bed and LeLe and the guy got in the cab with Sam and Sam drove. As we were leaving I saw Duke, who is Darius Jeter, walking near Sam's house. He tried to flag us down but we kept on going. We rode

[2] The evidence at trial established that "a lick" is slang for "a robbery."

around a little bit and went to Sam's mother's house. I asked Sam to take me home so I could use the bathroom. I called Maurice on Sam's phone on the way to my house. I was going to smoke with him and when I asked if he wanted to, he said yes. I told Maurice I would call him when I got home. Sam asked me if Maurice had any money or did he sell weed. I told her that he did sell weed and he might have some money. Sam asked me if I would set Maurice up. I told her that I really don't want to, but I can. When we got to my house, Sam told me to call Maurice when I got inside and find out who all was with him at his house and then to call her back. I went to the bathroom and I tried to call Maurice from my house phone, but he wouldn't pick up his cell phone, so I walked to his house. He only lived a couple of houses from me on Byers St. When I got there Maurice was there along with Tryone King and Kenny. I asked Maurice to use his cell phone to call Sam to let her know that there was two other people with Maurice. I then asked Maurice to walk with me to Midtown, but he wouldn't. While I was on the porch with Maurice, Sam drove by 3-4 times and Maurice said why does this truck keep coming by. I walked off the porch and when I got to the end of Byers St. I made a left on Maple St. and Sam was driving down Byers St. and when she saw me she made a left turn on Maple St. too. The guy and LeLe then got out after Sam stopped. I told LeLe that there was 3 people since Maurice wouldn't walk with me. The guy then said "fuck it, I might as well run up on the porch and robbed [sic] all three of them." Sam had drove over to Reynolds St. and parked on the dirt road to the left after the bridge. The guy asked me which house they were at and what did it look like. I told him that they were all on the porch. The guy had the rifle and him and LeLe walked towards Maurice's house. I walked to where Sam was parked. I knew where she was going to be because she told us where she was going to park. I got in the truck with Sam and we sat there for maybe 5 minutes and then heard a bunch of shots. Sam pulled off and picked up that guy and LeLe at the bridge. The guy got inside the truck with me and Sam and LeLe got in the bed. We all went back to Sam's house. We started talking about the situation and LeLe said that she was the one that asked the guys for weed. The guy started saying he didn't want anyone to snitch on him and that if anybody did snitch he would come back and get them. I got a call on Sam's house phone from my step-dad telling me that

> Tyrone and Kenny had been shot. That guy and LeLe left in the truck and LeLe drove. I believe that he took the rifle with him and LeLe came back a little while later by herself. I stayed all night at Sam's and when I woke up Sam had gotten a text message saying that Tyrone had died. My step-dad called again and told me that the police had been by the house and wanted to talk with me. I walked home and called the number the officer had left.

Reid and Henson neither testified nor presented any other evidence. Henson was convicted on all of the charges against him—murder, ABWIK, conspiracy, three counts of armed robbery, and five counts of possession of a firearm during the commission of a violent crime.[3] He was sentenced to life imprisonment for the murder charge, twenty years for the ABWIK charge, five years for the conspiracy charge, thirty years for each of the armed robbery charges, and five years for each of the firearm possession charges, all to run concurrently.

LAW/ANALYSIS

The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him . . . ." U.S. Const. amend. VI. This constitutional right, which applies to the states through the Fourteenth Amendment, guarantees a defendant in a criminal trial the right to cross-examine the witnesses against him. *Pointer v. Texas*, 380 U.S. 400, 403–04 (1965). In a joint trial, the admission of a nontestifying codefendant's confession that implicates a defendant violates the defendant's Confrontation Clause rights. *Bruton v. United States*, 391 U.S. 123, 126 (1968).

Historically, instructing the jury to consider a confession as only evidence against the confessing codefendant was considered sufficient under the Confrontation Clause, but in *Bruton* the United States Supreme Court dispensed with that fiction. *Bruton*, 391 U.S. at 135–36. It found "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and

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[3] Reid, indicted on the same charges, was convicted on three counts of armed robbery, three counts of possession of a firearm during the commission of a violent crime, and one count of conspiracy. He was found not guilty on the murder charge. On the ABWIK charge he was convicted of the lesser included offense of assault and battery of a high and aggravated nature.

the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Id.* at 135. The Court concluded the admission of a confession without the ability to cross-examine the confessor was just such a situation, reasoning "[n]ot only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others." *Id.* at 136. While appearing to establish a bright-line rule against the admission of a codefendant's confession which incriminates a defendant, the Court acknowledged there are alternatives which may allow the admission of a confession while still protecting a defendant's Confrontation Clause rights and in a footnote, mentioned redaction as one of those alternatives. *See id.* at 133–34 & n.10.

Since *Bruton*, the Supreme Court has twice revisited this issue in order to determine what constitutes sufficient redaction so as to protect a defendant's Confrontation Clause rights. In *Richardson v. Marsh*, 481 U.S. 200 (1987), the Court was called upon to decide whether the Confrontation Clause is violated "when the codefendant's confession is redacted to omit any reference to the defendant, but the defendant is nonetheless linked to the confession by evidence properly admitted against him at trial." *Id.* at 202. The Court ultimately held the Confrontation Clause is not violated by the admission of a codefendant's confession where a limiting instruction is given and "the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." *Id.* at 211. In a footnote appended to that holding, the Court declined to express any opinion "on the admissibility of a confession in which the defendant's name has been replaced with a symbol or neutral pronoun." *Id.* at 211 n.5.

The Supreme Court most recently addressed the issue in *Gray v. Maryland*, 523 U.S. 185 (1998), in which a codefendant's confession was redacted by the insertion of "deleted" or "deletion" when the confession was read to the jury and the insertion of blank spaces in the written document wherever the petitioner's name appeared. *Id.* at 188. The Court held that obviously redacted confessions so closely resemble unredacted confessions in their incriminating effect that they too are barred by *Bruton*. *Id.* at 192. The Court reasoned that "a jury will often react similarly to an unredacted confession and a confession redacted in this way, for the jury will often realize that the confession refers specifically to the defendant" and offered as an example:

Consider a simplified but typical example, a confession that reads "I,

> Bob Smith, along with Sam Jones, robbed the bank." To replace the words "Sam Jones" with an obvious blank will not likely fool anyone. A juror somewhat familiar with criminal law would know immediately that the blank, in the phrase "I, Bob Smith, along with , robbed the bank," refers to defendant Jones. A juror who does not know the law and who therefore wonders to whom the blank might refer need only lift his eyes to Jones, sitting at counsel table, to find what will seem the obvious answer, at least if the juror hears the judge's instruction not to consider the confession as evidence against Jones, for that instruction will provide an obvious reason for the blank. A more sophisticated juror, wondering if the blank refers to someone else, might also wonder how, if it did, the prosecutor could argue the confession is reliable, for the prosecutor, after all, has been arguing that Jones, not someone else, helped Smith commit the crime.

Id. at 193. Therefore, the Court concluded that the alterations performed the same accusatory function as using the defendant's name. *Id.* at 193–94.

Acknowledging that *Richardson* limited *Bruton* to facially incriminating confessions and placed confessions that "incriminate inferentially" outside *Bruton*, the Court distinguished *Richardson* on the basis that unlike the confession there, the confession admitted in *Gray* "refer[ed] directly to the 'existence' of the nonconfessing defendant." *Id.* at 192. The Court clarified that *Richardson* did not turn on whether the confession admitted required an inference in order to incriminate the defendant, but on the kind of inference required. *Id.* at 196. Ultimately, the Court held:

> The inferences at issue here involve statements that, despite redaction, obviously refer directly to someone, often obviously the defendant, and which involve inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial. Moreover, the redacted confession with the blank prominent on its face, in *Richardson*'s words, "*facially* incriminat[es]" the codefendant.

Id. at 196 (alteration in original). In other words, the Court brought within *Bruton*'s prohibition those confessions which facially incriminate through inference.

Gray did not directly address confessions redacted through the use of neutral pronouns as was done here. However, following *Gray*, in *State v. Holder*, 382 S.C. 278, 676 S.E.2d 690 (2009), this Court held, consistent with many other courts considering the issue, that even a confession redacted through the use of neutral pronouns violates the Confrontation Clause if it facially incriminates a nonconfessing codefendant. *Id.* at 285–86, 676 S.E.2d at 694. This follows directly from *Gray* where the holding turned on the fact that despite redaction the statements were "directly accusatory" and "obviously refer[ed] directly to someone, often obviously the defendant." *Gray*, 523 U.S. at 194, 196. In short, where redacted confessions use neutral pronouns which facially refer to a codefendant, they violate the Confrontation Clause.

In *Holder*, the appellant and a man she was living with were charged with homicide by child abuse for the death of the appellant's child and tried jointly. *Holder*, 382 S.C. at 281–82, 676 S.E.2d at 692–93. At trial, the man's redacted statement to the police that "he felt like she had been inflicting" injuries on the child was admitted into evidence. *Id.* at 283, 676 S.E.2d at 693. The Court held the redacted statement violated the Confrontation Clause because it was apparent the statement was referring to the appellant even without considering any other evidence introduced at trial. *Id.* at 285–86, 676 S.E.2d at 694.

We find this case comparable to *Holder*. We also find persuasive the holdings of courts in other jurisdictions that redactions similar to the one at issue here violate the Confrontation Clause. In *United States v. Richards*, 241 F.3d 335 (3d Cir. 2001), the appellant and a codefendant were tried jointly for robbing an armored car and the codefendant's redacted confession was admitted into evidence. *Id.* at 341. The redacted confession did not refer to the appellant by name but referred to him as the codefendant's "friend." *Id.* The court held the "reference to his 'friend' was just as blatant and incriminating of [the appellant] as the word 'deleted' in the *Gray* case." *Id.* The court explained that the confessor's statement "referred to the existence of three participants in the crime—[the confessor], the 'inside man,' and 'my friend.' Since the 'inside man' was easily identified as the driver of the Brink's van, the reference to 'my friend' sharply incriminated [the appellant], the only other person involved in the case." *Id.* Thus, knowing only who the parties were and the fact that the appellant sat before them as a defendant, the jury would likely infer that the statement referred to the appellant as a participant in the crime. Therefore, the confession directly implicated the appellant and violated the Confrontation Clause. *See id.*

In *Stanford v. Parker*, 266 F.3d 442 (6th Cir. 2001), the petitioner was tried jointly with a coconspirator. *Id.* at 449. His codefendant's confession was redacted to replace the petitioner's name with "the other person" and then read into evidence by a detective. *Id.* at 456. On appeal of the denial of his habeas corpus petition, the court held the redaction would not have prevented the jury from inferring that the confession referred to the petitioner and thus, the admission of the confession violated the Confrontation Clause. *Id.* at 457. The court reasoned the jury would make the inference because the petitioner "sat as a defendant before the jury" and the confession was offered into evidence by the prosecution which the jury knew was seeking the petitioner's conviction. *Id.*

Finally, the Arkansas Supreme Court addressed a similar issue in *Jefferson v. State*, 198 S.W.3d 527 (Ark. 2004), where three individuals robbed a bank courier, one pled guilty, and the other two were tried jointly. *Id.* at 529–30. A codefendant's confession was admitted into evidence after changing the appellant's name therein to "he," "they," or "some other guy." *Id.* at 530–31. The court found it was clear from the redacted statement that a third person participated in the crime. *Id.* at 535. The court concluded the confession "obviously directly referred to [the appellant], an inference that the jury easily could have drawn from [the appellant's] status as a codefendant and the State's concession that [the codefendant] was the shooter." *Id.* at 536. Accordingly, it held the admission of the confession violated the Confrontation Clause. *Id.*

Like *Holder* and these cases from other jurisdictions, here the jury could infer from the face of Reid's confession without relying on any other evidence, that the confession referred to and incriminated Henson. In his opening statement the solicitor asserted that four individuals—Henson, Reid, Ervin, and Newman—committed the crimes and that Henson was the shooter. Reid's redacted confession was offered into evidence by the solicitor. It identified three individuals by name as committing the crimes and acknowledged that another male participated and fired the fatal shots, but left that person unnamed. The jury likely would infer that Henson—a male, seated before them as a defendant, and the only defendant not named in the confession—was the fourth individual and the shooter referenced in Reid's confession. The jury also could presume the solicitor would not both assert that Henson was the fourth conspirator and offer the confession into evidence if the solicitor believed the confession referred to anyone other than Henson.

While Confrontation Clause violations are subject to harmless error analysis and the State would have us declare the error here harmless, we cannot do so.

Before an error can be held harmless, a court must find the error harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967). That requires a court to determine "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Fahy v. Connecticut*, 375 U.S. 85, 86 (1963); *see also State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006) ("Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained."). In the context of Confrontation Clause violations through the admission of a codefendant's confession, the harmless error standard has been formulated as: "In some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error." *Schneble v. Florida*, 405 U.S. 427, 430 (1972).

Here, we cannot say the admission of Reid's confession did not contribute to the verdict, nor can we say the evidence against Henson was overwhelming or the prejudicial effect of Reid's confession was insignificant. Other than the coconspirators, no witness was able to identify the shooter. The surviving victims, Jackson and Cunningham, were able to describe the shooter as a black male with a Baltimore accent, which matches Henson but is hardly overwhelming evidence. Additionally, no physical evidence linked Henson to the crimes. The only evidence other than Reid's confession actually identifying Henson as a conspirator was the testimony of Ervin and Newman. However, Ervin and Newman both faced charges for their participation in the crimes and thus, had an incentive to downplay their involvement and shift blame onto others. Therefore, we conclude the error was not harmless.

While severing trials certainly impacts judicial economy and State resources, these factors should not take precedence over the protection of a defendant's constitutional rights. Here, unless Reid's confession could be redacted in such a way that Henson was not implicated, the only alternatives were to not admit the confession or to grant Henson's motion to sever.

CONCLUSION

The admission of Reid's redacted confession violated Henson's Confrontation Clause rights and was not harmless error. Accordingly, we reverse and remand for a new trial.[4]

TOAL, C.J., PLEICONES, BEATTY, and KITTREDGE, JJ., concur.

[4] Henson also appealed the circuit court's removal and replacement of a juror due to the juror's independent knowledge of the case without the court first questioning the juror. Because the Confrontation Clause issue is dispositive, we decline to consider this additional issue. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding that where one issue is dispositive it is not necessary to consider any remaining issues).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Carnival Corporation, d/b/a Carnival Cruise Lines; South Carolina State Ports Authority; and City of Charleston, Defendants,

v.

Historic Ansonborough Neighborhood Association, Charlestowne Neighborhood Association, the Coastal Conservation League, and Preservation Society of Charleston, Plaintiffs.

Appellate Case No. 2011-197486

ORIGINAL JURISDICTION

Opinion No. 27355
Heard November 19, 2013 – Filed January 22, 2014

JUDGMENT FOR PETITIONERS

Marvin D. Infinger, of Nexsen Pruet, LLC, and Philip L. Lawrence, of South Carolina Ports Authority, both of Charleston, for Petitioner South Carolina State Ports Authority.

Gordon D. Schreck and David M. Collins, of Womble, Carlyle, Sandridge, & Rice, PLLC, of Charleston, for Petitioner Carnival Corporation.

Corporation Counsel Charlton De Saussure, Jr., Assistant Corporation Counsel Susan J. Herdina, and Assistant Corporation Counsel Frances I. Cantwell, all of Charleston, for Petitioner City of Charleston.

J. Blanding Holman, IV, of the Southern Environmental Law Center, of Charleston, for Respondents Historic Ansonborough Neighborhood Association, Charlestowne Neighborhood Association, and Coastal Conservation League.

Timothy C. Dargan, of Brown & Varnado, LLC, of Mt. Pleasant, for Respondent Historic Ansonborough Neighborhood Association.

John A. Massalon, of Wills Massalon & Allen, LLC, of Charleston, for Respondent Preservation Society of Charleston.

John C. Moylan, III, of Wyche, P.A., of Columbia, and Associate General Counsel William J. Cook, of Washington, D.C., for Amicus Curiae National Trust for Historic Preservation.

JUSTICE HEARN: In this case brought in our original jurisdiction, several citizens groups filed suit against a cruise ship operator alleging nuisance and zoning claims and seeking an injunction. We hold these groups lack standing and dismiss.

FACTUAL/PROCEDURAL BACKGROUND

The plaintiffs in this case consist of four Charleston citizens' groups: the Historic Ansonborough Neighborhood Association (Ansonborough Association), the Charlestowne Neighborhood Association (Charlestowne Association), the Coastal Conservation League (League), and the Preservation Society of Charleston (Preservation Society) (collectively Plaintiffs). The Ansonborough Association is a nonprofit corporation composed of residents, property owners, and tenants of the

Ansonborough neighborhood which is concerned with compliance with land use laws and threats to the quality of life in the area. Similarly, the Charlestowne Association is a nonprofit that seeks to protect the quality of life for residents of the Charlestowne neighborhood. Both the Ansonborough Association and the Charlestowne Association are located in the Old and Historic District near the Union Pier Terminal (the Terminal) in Charleston. The League is a nonprofit corporation with a mission of conserving natural resources and protecting the quality of life in South Carolina. The Preservation Society is a nonprofit corporation headquartered in Charleston which seeks to protect the historic, architectural, and cultural character of Charleston.

Plaintiffs brought suit seeking an injunction against what they believe to be the unlawful use of the Terminal by the Carnival Corporation's cruise ship, the *Fantasy*. Plaintiffs' complaint named Carnival as the sole defendant, but the South Carolina State Ports Authority, which owns and operates the Terminal, and the City of Charleston were later permitted to intervene as defendants (collectively Defendants).

Plaintiffs' first amended complaint alleges the Terminal is used as the *Fantasy*'s home port where crew, passengers, and supplies load and unload for each voyage. The *Fantasy* is 855 feet long and more than 60 feet tall from the water line and can carry up to 2,056 passengers and 829 crewmembers. Since 2010, the Ports Authority has contracted with Carnival for the use of the Terminal as the *Fantasy*'s home port. The Terminal is within the City's Old and Historic District which is listed on the National Register of Historic Places maintained by the United States Department of the Interior.

Plaintiffs allege the *Fantasy*'s operations at the Terminal harm the Old and Historic District and them in a number of ways. They allege the *Fantasy* can be seen above the historic buildings of Charleston and that it disrupts the historic skyline. The thousands of passengers and crew allegedly cause major traffic congestion in the area as well as the closure of public roads. The *Fantasy* allegedly emits noise pollution through music and broadcast announcements and air pollution through particulates produced by its diesel engines. Plaintiffs contend expanded cruise ship operations may jeopardize the Old and Historic District's listing on the National Register of Historic Places.

Plaintiffs' complaint seeks injunctive relief based on ten claims: seven based on City ordinances, a public nuisance claim, a private nuisance claim, and a claim

based on the South Carolina Pollution Control Act. The ordinance claims assert the *Fantasy*'s use of the Terminal violates the City's zoning code because it is not a permissible use within the light industrial zone applicable to the Terminal, it is an accommodations use in an area not zoned for accommodations uses, it is a tour boat use in an area not within a tour boat overlay zone, the *Fantasy* exceeds the applicable height ordinance, and the ship blocks views of the Cooper River in violation of the applicable view corridor provisions. The complaint also alleges Carnival violates the City's sign ordinance because the *Fantasy*'s smokestack is a sign and violates the City's noise ordinance because the *Fantasy* makes announcements over amplified sound systems.

Defendants initially filed motions to dismiss pursuant to Rule 12(b)(6), SCRCP, contending Plaintiffs' complaint fails to state a claim for relief because Plaintiffs lack standing, as a matter of law the ordinances do not apply to cruise ship operations at the Terminal, and to the extent the ordinances apply they are preempted by federal and state law. Before the circuit court could rule on the motions to dismiss, Defendants petitioned this Court to take the case in its original jurisdiction. The Court granted the petition, transferred the case to this Court, and appointed the Honorable Clifton B. Newman, Circuit Court Judge, as special referee to conduct a hearing and make recommendations on the motions to dismiss.

Following a hearing, Judge Newman issued a report recommending the Court grant the motions to dismiss as to all of the ordinance claims and the Pollution Control Act claim, but deny the motion as to the two nuisance claims. Generally, the report found that as a matter of law none of the ordinances apply to the *Fantasy*'s use of the Terminal, the Pollution Control Act does not govern the *Fantasy*'s discharges in South Carolina waters, and the complaint makes sufficient allegations to set forth both a private and a public nuisance cause of action. The report did not consider the issues of standing and preemption. Plaintiffs and Defendants filed exceptions to the report. After considering the report and the exceptions, this Court dismissed the noise ordinance, sign ordinance, and Pollution Control Act claims. This Court withheld ruling on the motions to dismiss on the five zoning and two nuisance claims and ordered the parties to brief the issues of standing, preemption, and whether the zoning ordinances apply to the *Fantasy*'s use of the Terminal.

ISSUES PRESENTED

I. Whether Plaintiffs possess standing to assert their claims?

II. Whether the zoning ordinances apply to the *Fantasy*'s use of the Terminal?

III. If the zoning ordinances are applicable to the *Fantasy*'s use of the Terminal, whether the zoning ordinances are preempted by federal or state law?

IV. Whether Plaintiffs' public nuisance claim should be dismissed for failing to state facts sufficient to constitute a cause of action?

V. Whether Plaintiffs' private nuisance claim should be dismissed for failing to state facts sufficient to constitute a cause of action?

STANDARD OF REVIEW

Under Rule 12(b)(6), a defendant may move to dismiss a complaint due to its "failure to state facts sufficient to constitute a cause of action." In considering a motion to dismiss under Rule 12(b)(6), a court must base its ruling solely on the allegations set forth in the complaint. *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, dismissal under Rule 12(b)(6) is improper. *Id.*

LAW/ANALYSIS

Defendants move to dismiss Plaintiffs' complaint in its entirety on the ground Plaintiffs lack standing to bring any of the claims contained therein. We agree.

For a plaintiff to possess standing three elements must be satisfied. First, the plaintiff must have suffered an injury-in-fact which is a concrete, particularized, and actual or imminent invasion of a legally protected interest. *Sea Pines Ass'n for the Prot. of Wildlife v. S.C. Dep't of Natural Res.*, 345 S.C. 594, 600–01, 550 S.E.2d 287, 291–92 (2001). Second, a causal connection must exist between the injury and the challenged conduct. *Id.* Third, it must be likely that a favorable decision will redress the injury. *Id.*

Here, Defendants focus on the first, injury-in-fact element of standing, asserting Plaintiffs allege only generalized grievances suffered by the public as a whole and fail to allege any particularized harm. Reviewing Plaintiffs' complaint, we conclude Plaintiffs fail to allege a concrete, particularized harm to a legally protected interest and therefore hold Plaintiffs lack standing.

In order for an injury to be particularized, it must affect the plaintiff in a personal and individual way. *Id.* at 602, 550 S.E.2d at 292; *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 n.1 (1992). While arising from the different context of a challenge to government action, in *Lujan* the United States Supreme Court distinguished generalized injuries from those injuries sufficiently particuarlized as to create standing, writing: "[A] plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not" possess standing. *Lujan*, 504 U.S. at 573–74.

Additionally, a plaintiff that is an association, such as Plaintiffs here, may possess standing by virtue of associational standing on behalf of its members. An organization has associational standing "if one or more of its members will suffer an individual injury by virtue of the contested act." *Sea Pines*, 345 S.C. at 600–01, 550 S.E.2d at 291. The three part test for associational standing requires that an association's members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000), *see also Beaufort Realty Co. v. Beaufort Cnty.*, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001) (applying that test). Accordingly, to possess standing, either Plaintiffs alone must have suffered a concrete, particularized injury or their members must have suffered such an injury and the other elements of associational standing must be satisfied.

Here, Plaintiffs fail to allege a particularized injury either to themselves or their members. Rather, they assert only generalized grievances suffered by the public as a whole which are insufficient to establish standing. Specifically, Plaintiffs' allegations of harm relevant to the remaining claims consist of the following:

- "The crowds, pollution, and traffic associated with these unlawful operations create a nuisance for Charleston citizens. This lawsuit aims to protect Charleston's neighborhoods, families and the environment by having Defendant Carnival play by the longstanding rules and norms that have made—and make—Charleston a wonderful place to work, live, and visit."

- "[T]he *Fantasy* visually disrupts the historic skyline."

- "The influx of thousands of passengers, crew, and support personnel (and associated traffic) . . . cause major traffic congestion downtown and the closure of public roads."

- "The vessels emit noise pollution, including broadcast announcements and music, and the burning of diesel fuel emits visible particulate soot from ship funnels—all adjacent to the Old and Historic District."

- "Home-porting cruise operations at an industrial scale could jeopardize the integrity, setting, and context that led to National Register designation and place maintenance of National Register status at risk."

- "On *Fantasy* embarkation and debarkation days, portions of Concord and Washington Streets—which are public streets—are closed for cruise business. Because of those closures, displacement of traffic, and the concentration of cruise traffic in a limited area for a limited time, cruise embarkations and debarkations cause increased congestion along the east side of the downtown Peninsula."

- "Cruise ships such as the Defendant's *Fantasy* also emit visible particulate soot and other pollutants, including nitrogen and sulfur oxides, which are harmful to human health when inhaled and are deposited into the surrounding waters and land."

- "Defendant's actions including noncompliance with zoning and environmental laws have injured the above Plaintiff organizations and their members by among other things reducing their use and enjoyment of the local environment and Charleston's historic assets, including their homes, neighborhoods and protected structures."

- "Cruise operations downtown and ineffective management of them cause, among other things, traffic congestion, pollution emissions, road closures, large crowds, loud noises, and obstructed views that are incompatible with the area's historic setting, scale, and residential character and impact health and the environment."

Lacking from these allegations is any claim that Plaintiffs themselves or their members have suffered a particularized harm. All members of the public suffer from and are inconvenienced by traffic congestion, pollution, noises, and obstructed views, and Plaintiffs have not alleged they suffer these harms in any personal, individual way. In short, these allegations are simply complaints about inconveniences suffered broadly by all persons residing in or passing through the City of Charleston and therefore, Plaintiffs fail to establish the first element of standing.

While a public nuisance cause of action can be used to remedy harms suffered by the public generally, typically only the State may assert this cause of action. *See Brown v. Hendricks*, 211 S.C. 395, 400, 45 S.E.2d 603, 605 (1947) (stating that generally "a private action does not lie to abate a public nuisance"). A private person may bring a private civil suit for a public nuisance only if he suffered a special injury to his real or personal property. *See Overcash v. S.C. Elec. & Gas. Co.*, 364 S.C. 569, 575, 614 S.E.2d 619, 622 (2005); *Brown*, 211 S.C. at 400, 45 S.E.2d at 605. A special injury is "individual or specific damage in addition to that suffered by the public," *Brown*, 211 S.C. at 400, 45 S.E.2d at 605, and must be "of a special character, distinct and different from the injuries suffered by the public generally," *Bowlin v. George*, 239 S.C. 429, 433–34, 123 S.E.2d 528, 530 (1962). In other words, the public nuisance cause of action does not obviate the requirement of a particularized injury. Rather, for a private party to bring a public nuisance cause of action, the private party must have suffered a particularized injury. As previously discussed, Plaintiffs fail to set forth any injury they or their members have suffered that is different from the injury suffered by the public generally. Therefore, the public nuisance cause of action does not provide Plaintiffs with the standing they otherwise lack.

Plaintiffs also assert that as to their zoning claims, Section 6-29-950 of the South Carolina Code (2004) provides standing. While that statute does provide a legally protected interest and thereby standing for neighbors of properties violating a local zoning ordinance, we conclude Plaintiffs' complaint fails to make factual allegations sufficient to establish the applicability of section 6-29-950 here.

Section 6-29-950 provides in part:

> In case a building, structure, or land is or is proposed to be used in violation of any ordinance adopted pursuant to this chapter, the zoning administrator or other appropriate administrative officer, municipal or

> county attorney, or other appropriate authority of the municipality or county *or an adjacent or neighboring property owner who would be specially damaged by the violation* may in addition to other remedies, institute injunction, mandamus, or other appropriate action or proceeding to prevent the unlawful erection, construction, reconstruction, alteration, conversion, maintenance, or use, or to correct or abate the violation, or to prevent the occupancy of the building, structure, or land.

(emphasis added). In short, under section 6-29-950 a specially damaged, adjacent or neighboring property owner can bring an action for an injunction based on an alleged violation of a zoning ordinance.

Section 6-29-950's requirement that a private party seeking to enjoin a zoning violation must be specially damaged incorporates the particularized injury requirement of general standing doctrine as a requirement for the statute to apply. Again, even assuming the *Fantasy* violates the City's zoning ordinances as alleged by Plaintiffs' complaint, Plaintiffs have not alleged that as a result of the violations they suffer any injury distinct from that suffered by the public generally. Additionally, section 6-29-950 only permits "an adjacent or neighboring *property owner*" to bring suit. (emphasis added). Here, Plaintiffs have made no allegations that they own adjacent or neighboring property. They do allege that the League is a tenant in a nearby property and that the Preservation Society holds a conservation easement on a nearby property. However, those interests do not make the League or the Preservation Society a "property owner" as required by the statute to bring suit. *See Connor Holdings, LLC v. Cousins*, 373 S.C. 81, 85, 644 S.E.2d 58, 60 (2007) (holding a tenant lacked standing under a town land management ordinance using identical "adjacent or neighboring property owner" language). Therefore, because Plaintiffs fail to allege that they are or will be specially damaged or that they are a neighboring or adjacent property owner, section 6-29-950 is inapplicable and does not provide Plaintiffs with standing to assert their zoning claims.

Finally, Plaintiffs assert the public importance exception should apply to remedy any lack of standing. South Carolina courts recognize an exception to the requirement that a plaintiff possess standing where "an issue is of such public importance as to require its resolution for future guidance." *Davis v. Richland Cnty. Council*, 372 S.C. 497, 500, 642 S.E.2d 740, 741 (2007). Whether the exception applies in a particular case turns on whether resolution of the dispute is needed for future guidance. *ATC South, Inc. v. Charleston Cnty.*, 380 S.C. 191,

199, 669 S.E.2d 337, 341 (2008). While the need for future guidance generally dictates when the exception applies, the application of the exception in a particular case does not turn on a rigid formula but rather is determined by the competing policy concerns underlying the exception. *Id.* Those competing concerns are that:

> Citizens must be afforded access to the judicial process to address alleged injustices. On the other hand, standing cannot be granted to every individual who has a grievance against a public official. Otherwise, public officials would be subject to numerous lawsuits at the expense of both judicial economy and the freedom from frivolous lawsuits.

Sloan v. Sanford, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004).

In support of their argument that the public importance exception applies, Plaintiffs first rely on Defendants' petition for original jurisdiction and its numerous statements that this case deals with matters of "public interest." Plaintiffs contend that if the Court found the case was of sufficient public interest so as to grant the petition for original jurisdiction, *a fortiori* the case is also of sufficient public importance such that the public importance exception applies. While the Court may exercise original jurisdiction under Rule 245, SCACR, "[i]f the public interest is involved," the "public interest" standard of Rule 245 is not synonymous with the public importance necessary for the public importance exception to standing to apply. Rule 245 is concerned with whether a case should be resolved by this Court in the first instance because of the public interest involved and the need for prompt resolution, whereas the public importance exception is concerned with whether a case is of such public importance that the requirement of standing should be waived. Thus, because the two rules aim to answer different questions—whether the public interest requires expeditious resolution of a case versus whether the public interest requires resolution of a dispute for future guidance despite the lack of standing—the grant of the petition for original jurisdiction has no effect upon whether the public importance exception applies.

Fundamentally, the issues in this case are whether zoning ordinances are preempted by federal and state law, the applicability of zoning ordinances to a cruise ship, and tort liability for a public and a private nuisance cause of action. The case presents no issue of the constitutionality or legality of government action. Additionally, the claims asserted by Plaintiffs could be brought by other parties

who can show the required injury. Therefore, we find the public importance exception inapplicable here.

In our constitutional system of government with its separation of powers, courts exercise the limited constitutional function of the "judicial power." S.C. Const. art. V, § 1. Accordingly, courts are limited to resolving cases and the powers inherent in that function. Courts are not bodies for the resolution of public policy and generalized grievances. Harms suffered by the public at large, like those Plaintiffs allege here, are to be remedied by the legislative and executive branches. If existing laws and regulations or their enforcement fail to protect the public from harm, it is incumbent upon the public to seek reform through their elected officials or failing that, at the ballot box.

CONCLUSION

We hold Plaintiffs lack standing. Because standing is a fundamental prerequisite for instituting a legal action, we do not consider the remaining issues. Accordingly, we grant Defendants' motions to dismiss.

TOAL, C.J., PLEICONES, BEATTY, and KITTREDGE, JJ., concur.

The Supreme Court of South Carolina

In the Matter of Charles Lee Anderson, Respondent

Appellate Case No. 2014-000056

ORDER

The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). Respondent consents to being placed on interim suspension.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of this Court.

IT IS FURTHER ORDERED that respondent is hereby enjoined from taking any action regarding any trust, escrow, operating, and any other law office account(s) respondent may maintain at any bank or other financial institution, including, but not limited to, making any withdrawal or transfer, or writing any check or other instrument on the account(s).

s/ Jean H. Toal C.J.

Columbia, South Carolina

January 14, 2014

The Supreme Court of South Carolina

In re: Amendment to Rule 402(i), SCACR

O R D E R

Pursuant to Article V, § 4, of the South Carolina Constitution, Rule 402(i), SCACR, is amended by adding the following:

> **(9) Prohibited Items at the Bar Examination.** An applicant who has an item which is prohibited by the Board of Law Examiners from being on the premises of the examination site or in the examination room during testing may be found guilty of contempt of the Supreme Court of South Carolina regardless of whether the applicant uses the item to cheat or attempt to cheat or aid or assist another applicant in cheating on the Bar Examination and may be punished accordingly. In addition, if it is determined that an applicant had a prohibited item at the examination site or in the examination room during testing regardless of whether the applicant used the item to cheat or attempt to cheat or aid or assist another applicant in cheating on the Bar Examination, the Board may fail the applicant on a section(s) of the examination or the entire examination and the Court may prohibit the applicant from reapplying for up to two years. Further, if the applicant has already been admitted, the Court may vacate the admission or discipline the lawyer under Rule 413, SCACR.
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> **(10) Removal of Testing Materials.** An applicant who removes any testing material from the Bar Examination may be found guilty of contempt of the Supreme Court of South Carolina regardless of whether the applicant removes the testing material to cheat or attempt to cheat or aid or assist another applicant in cheating on the Bar Examination and may be punished accordingly. In addition, if it is determined that an applicant removes testing material from the Bar Examination regardless of whether the applicant removes the testing material to cheat or attempt to cheat or aid or assist another applicant in cheating on the Bar Examination, the Board may fail the applicant

on a section(s) of the examination or the entire examination and the Court may prohibit the applicant from reapplying for up to two years. Further, if the applicant has already been admitted, the Court may vacate the admission or discipline the lawyer under Rule 413, SCACR.

This amendment shall take effect immediately.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

January 9, 2014