

No. 17-1552

**In The
Supreme Court of the United States**

—◆—
JEANETTE M. BRUCE,

Petitioner,

v.

POTOMAC ELECTRIC POWER COMPANY,

Respondent.

—◆—
**On Petition For A Writ Of Certiorari To
The District Of Columbia Court Of Appeals**

—◆—
RESPONDENT'S OPPOSITION

MARTIN H. FREEMAN
100 Park Avenue
Suite 250
Rockville, MD 20850
(301) 315-0200
freemanlaw@frontier.net
*Counsel of Record and
Member of the Bar
of the Supreme Court*

MARK A. FREEMAN
100 Park Avenue
Suite 250
Rockville, MD 20850
(301) 315-0200
mafreeman@rcn.com

Counsel for Respondent Pepco

**POTOMAC ELECTRIC POWER
COMPANY'S DISCLOSURE PURSUANT
TO SUPREME COURT RULE 29.6**

Respondent, Potomac Electric Power Company (hereafter "Pepco"), by and through its attorney, Martin H. Freeman of Freeman & Freeman, P.C., pursuant to Supreme Court Rule 29.6, hereby gives Disclosure of its Affiliations and Financial Interests, and in support thereof, states as follows:

1. Respondent Pepco is wholly owned by Exelon Corporation (hereinafter "Exelon"), a publicly traded company.
2. Exelon has no parent company.
3. No publicly held corporation owns 10% or more of the stock of Exelon.
3. Other than as stated herein, no corporation or other business entity not already a party to this case has any financial interest in the outcome of this litigation.

TABLE OF CONTENTS

	Page
Table of Authorities	iii
Opposition to the Petition for Writ of Certiorari.....	1
Statement	1
Reasons for Denying the Petition.....	11
I. The Petition Does Not Meet the Require- ments of S. Ct. Rule 10	11
II. The Fourth Amendment Has No Applica- tion to the Instant Case.....	14
III. The Privacy Issue is Moot In Any Event.....	21
IV. Bruce Sustained No Undue Burden or Ex- pense by Producing the Cell Phone.....	25
Conclusion.....	32

TABLE OF AUTHORITIES

	Page
CASES:	
<i>Angelico v. Lehigh Valley Hospital</i> , 184 F.3d 268 (3d Cir. 1999)	17, 18
<i>Bakhit v. Safety Marketing, Inc.</i> , 2014 WL 2916490 (D. Conn. 2014)	19
<i>Banks v. Ferrell</i> , 411 A.2d 54 (D.C. 1979)	24, 25
<i>Barnard v. Young</i> , 720 F.2d 1188 (10th Cir. 1988)	17, 18
<i>Chandler v. Miller</i> , 117 S. Ct. 1295 (1997)	16
<i>Church of Scientology of California v. United States</i> , 506 U.S. 9, 113 S. Ct. 447, 121 L. Ed. 2d 313 (1992)	23, 25
<i>City & Cty. of San Francisco, Calif. v. Sheehan</i> , 135 S. Ct. 1765, 191 L. Ed. 2d 856 (2015)	12
<i>City of Ontario, California v. Quon</i> , 130 S. Ct. 2619 (2010)	16
<i>Cropp v. Williams</i> , 841 A.2d 328 (D.C. 2004)	24
<i>Evans v. Family Sav. & Loan Ass’n of Virginia</i> , 481 A.2d 1309 (D.C. 1984)	24
<i>Haoi v. Vo</i> , 935 F.2d 308 (D.C. Cir. 1991)	17
<i>Herbert v. Lando</i> , 441 U.S. 153 (1979)	26
<i>Hohl v. McGohan Brabender Financial, LLC, et al.</i> , 2015 WL 4540231 (S.D. Ohio, Western Division, 2015)	19, 20, 21
<i>In re Subpoena</i> , 967 F.2d 630 (D.C. Cir. 1992)	26

TABLE OF AUTHORITIES – Continued

	Page
<i>In re the Exxon Valdez</i> , 142 F.R.D. 380 (1992)	30
<i>James v. City of Boise</i> , 136 S. Ct. 685 (2016)	16
<i>Jordan v. Fox, Rothschild, O'Brien & Frankel</i> , 20 F.3d 1250 (3d Cir. 1994)	17, 18
<i>Los Angeles v. Patel</i> , 135 S. Ct. 2443 (2015)	16
<i>Linder v. Calero-Portocarrero</i> , 251 F.3d 178 (D.C. Cir. 2001)	25, 30
<i>Mills v. Green</i> , 159 U.S. 651, 16 S. Ct. 132, 40 L. Ed. 293 (1895)	22
<i>Montgomery v. Louisiana</i> , 136 S. Ct. 718 (2016)	16
<i>Murphy v. Hunt</i> , 455 U.S. 478 (1982)	24
<i>New Jersey v. T.L.O.</i> , 469 U.S. 325 (1985)	16
<i>North Carolina v. Rice</i> , 404 U.S. 244, 92 S. Ct. 402, 30 L. Ed. 2d 413 (1971)	22
<i>Preiser v. Newkirk</i> , 422 U.S. 395, 95 S. Ct. 2330, 45 L. Ed. 2d 272 (1975)	22
<i>Riley v. California</i> , 134 S. Ct. 2473 (2014)	<i>passim</i>
<i>Spingarn v. Landow & Co.</i> , 342 A.2d 41 (D.C. 1975)	25
<i>Schreiber v. Society for Savings Bancorp, Inc.</i> , 11 F.3d 217 (D.C. Cir. 1993)	26
<i>Thorn v. Walker</i> , 912 A.2d 1192 (D.C. 2006)	24
<i>Tolan v. Cotton</i> , 134 S. Ct. 1861, 188 L. Ed. 2d 895 (2014)	13, 14

TABLE OF AUTHORITIES – Continued

	Page
<i>United States v. Carpenter</i> , 819 F.3d 880 (6th Cir. 2016), <i>cert. granted</i> , 137 S. Ct. 2211, 198 L. Ed. 2d 657 (2017).....	15, 16
<i>Vaughn v. United States</i> , 579 A.2d 170 (D.C. 1990)	24
 CONSTITUTION, STATUTES AND RULES:	
U.S. Constitution, Amendment IV	<i>passim</i>
U.S. Supreme Court Rule 10	11, 12, 13, 14
U.S. Supreme Court Rule 15.2	1
D.C. Superior Court Civil Rule 45.....	<i>passim</i>
 OTHER:	
S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, <i>Supreme Court Practice</i> § 5.12(c)(3) (10th ed. 2013).....	13

**OPPOSITION TO THE PETITION
FOR WRIT OF CERTIORARI**

On behalf of Respondent, Potomac Electric Power Company, the undersigned opposes the Petition of Jeanette M. Bruce (“Bruce”) for a writ of certiorari, for reasons stated in this opposition. The holding in *Riley v. Carpenter*, 134 S. Ct. 2473 (2014) and the issues in *Carpenter v. United States*, under submission in 16-402, are not applicable to the facts of the instant case.

STATEMENT

In her petition, Bruce, a non-party witness in a District of Columbia Superior Court personal injury case, continues to contest the properly entered Superior Court Orders authorizing respondent Pepco to subpoena Bruce to produce her cell phone for examination for limited purposes. Bruce complied with the Court’s orders requiring her to produce her cell phone before noting her appeal to the District of Columbia Court of Appeals (hereinafter “DCCA”).¹

The Statement section of Bruce’s petition contains misstatements of fact so numerous that, in order to comply with Supreme Court Rule 15.2., Pepco offers the following statement, which accurately presents the facts bearing on the issues raised in Bruce’s petition.

¹ The underlying personal injury case settled and has been dismissed with prejudice.

This case involved a personal injury and wrongful death claim stemming from the June 29, 2012 derecho summer storm in the District of Columbia (“D.C.”), in which a large tree located in D.C.’s right-of-way on 31st Street N.W. fell down, causing Pepco’s power line to come down with it and contact the automobile of Mr. Ghafoorian (hereafter “Plaintiff’s decedent”) resulting in an auto fire. Thereafter, for reasons which were in dispute, Plaintiff’s decedent died while attempting to extinguish the fire, and Plaintiff, Ms. Ghafoorian was injured. Plaintiff demanded \$20,000,000 in damages. (Rec. Superior Court Docket Entry (hereafter “SCDE”) 10/21/2014, Plaintiff’s Amended Complaint.) Pepco denied Plaintiff’s allegations and any responsibility for the death and personal injuries about which Plaintiff complains. (Rec. SCDE 2/11/2013 Pepco’s Answer to Plaintiff’s Amended Complaint.)

Bruce (a non-party and neighbor of the Plaintiff) was identified as a witness to the incident, and her original deposition was taken on November 5, 2013. At her original deposition, she testified that she saw Plaintiff’s decedent fighting the fire on two occasions that night, and that on one of those two occasions, she snapped a photo of the incident on her cell phone depicting Mr. Ghafoorian fighting the fire. (DCCA Apx. pp. 25-39, photo and excerpts of deposition of Bruce.) What is depicted in the photograph and what Bruce saw when she took the photo were particularly significant and material to the issues in this case from Pepco’s perspective. Plaintiff had alleged that Mr. Ghafoorian was electrocuted as a result of the downed

power line which fell onto his Maserati parked in his driveway. Pepco asserted that Mr. Ghafoorian was not electrocuted, but received thermal burns and that the electric line had already been de-energized by the time he came out to fight the fire. (Rec. SCDE 11/4/2013, pp. 3-5, Pepco's 26b4 expert disclosure.) While there was a dispute as to the cause of death, it was undisputed by all parties and experts that by 11:05 p.m., the time the photograph was taken according to Plaintiff's expert, there was no power to the entire electrical feeder (line) including the section of the downed power line in front of the Ghafoorian residence. (Rec. SCDE dated 3/6/14, Pepco's Memorandum of Points and Authorities in Opposition to Bruce's Motion to Quash, p. 3, n.2, and Exhibits 4-7 attached thereto.) As such, it was Pepco's contention that if Mr. Ghafoorian was fighting the fire after the line was de-energized; there can be no legitimate argument that he was electrocuted as a result of Pepco's equipment.

Approximately one month after Bruce's original deposition, on December 13, 2013, Pepco received an errata sheet purportedly signed by Bruce. (DCCA Apx. pp. 37-38.) The errata sheet included substantive changes to Bruce's sworn testimony that she had seen Mr. Ghafoorian with a fire extinguisher when she snapped the photograph on her cell phone. Notwithstanding Bruce's confirmation three different times during her original deposition (DCCA Apx. pp. 25-39) that she saw Mr. Ghafoorian on both the first and second time she went outside, she later claimed in her errata sheet not to have seen him during her second trip

outside when she took the photograph on her cell phone. In effect, through the errata sheet, as to which there was no opportunity for cross-examination by Pepco, Bruce substantively changed critical testimony that bore directly on both Plaintiff's theory of the case and Pepco's defense, and which ultimately might have proved case dispositive. Characterizing each of her changes as a "clarification" (DCCA Apx. pp. 37-38), the errata sheet changes were not simply clarifications. Bruce's changes completely reversed her testimony as to when she took the photograph and when she saw Mr. Ghafoorian with the fire extinguisher. (DCCA Apx. pp. 37-38, errata sheet.)

Because it is undisputed that by 11:05 p.m. (the time the photo was taken) there was no electric current running through the downed power line, Bruce's deposition testimony, along with the photo of the incident and corresponding identifying information in the cell phone, were critical evidence impacting both Plaintiff's claims and Pepco's defense in this case. Accordingly, when Bruce subsequently reversed her deposition testimony in her errata sheet, it became necessary for Pepco to issue a second subpoena to Bruce (DCCA Apx. pp. 40-44, second subpoena, issued following the change in testimony) to have Pepco's forensic expert examine Bruce's cell phone to analyze the actual image along with the corresponding information, including the time the photograph was taken, contained directly in the cell phone.

The second subpoena was met with a high degree of resistance by Bruce and her then attorney, husband Stephen R. Bruce, who filed a motion to quash the subpoena, sought monetary sanctions against Pepco and its counsel, and refused all efforts by Pepco's counsel to address and resolve any privacy and undue burden concerns raised in the motion.² (Rec. SCDE 2/14/2014, Motion to Quash.) Pepco moved to compel Bruce's compliance with the second subpoena. The Superior Court

² On February 25, 2014, in an effort to resolve this issue without the necessity of motions practice, counsel for Pepco invited Mr. Bruce to meet and confer in an effort to resolve this issue. Counsel for Pepco specifically informed Mr. Bruce, acting as counsel for Mrs. Bruce, that it is never Pepco's desire to place any undue discovery burden on any party or third party fact witness, and that Pepco is always amenable to exploring and implementing the least expensive and intrusive methods of conducting discovery, provided that such methods permit Pepco to sufficiently discover relevant facts and evidence related to the case. Rec. SCDE dated 3/6/14, Pepco's Memorandum of Points and Authorities in Opposition to Bruce's Motion to Quash, Exhibit 12, 2/25/2014 Correspondence to Mr. Bruce. In this regard, a number of suggestions were made to address Mrs. Bruce's concerns regarding confidentiality and any undue burden. The suggestions included limiting both the breadth and scope of the records subpoena and deposition, production of information pursuant to the protective order already entered in this case, and having Pepco's forensic expert copy only that material relevant to this case without removing any personal information. Similarly, Pepco suggested that it could also arrange to have the forensic expert download relevant material on the day of production, which should alleviate any concern that Mrs. Bruce would be without her phone for any extended period of time. Mr. Bruce was not inclined to explore any of these or any other suggestions. Rec. SCDE dated 3/6/14, Pepco's Memorandum of Points and Authorities in Opposition to Bruce's Motion to Quash, Exhibit 13, Correspondence of Mr. Bruce.

denied Bruce's motion to quash and granted Pepco's motion to compel, both on the record during the Status Hearing held on April 24, 2014, and by written Court Order dated that same day. (DCCA Apx. pp. 47-90, Hearing Transcript dated April 24, 2014, at 26-30; DCCA Apx. pp. 91-92, Order dated April 24, 2014 granting Pepco's Motion to Compel.) In its April 24, 2014 Order, the Superior Court took affirmative measures to guard against undue intrusiveness and to protect Bruce's privacy concerns by requiring that the inspection and copying of the cell phone contents be conducted pursuant to protective order and that forensic examination and copying shall follow the protocol described at the status hearing, which required Pepco's forensic expert to delete all content copied from the phone with the exception of the photograph (and related identifying information) of the incident taken on June 29, 2012. (DCCA Apx. pp. 37-38, April 24, 2014 Order at Exhibit 5.)

Instead of complying with the April 24, 2014 Order, Bruce filed a Notice of Appeal to the DCCA on May 1, 2014 (Appeal No. 1). Rec. SCDE 5/1/14, Notice of Appeal. Shortly thereafter, Bruce filed a Motion for Stay Pending Appeal, in the Superior Court, in which she articulated her arguments supporting an immediate appeal of the April 24, 2014 Order. Rec. SCDE 5/8/14, Motion for Stay. Bruce's Motion for Stay was denied by the Superior Court in a six-page Order dated June 2, 2014. (DCCA Apx. pp. 93-98.) On June 11, 2014, Pepco filed in the DCCA its Motion to Dismiss Appeal No. 1. (Rec. DCCA Docket Entry 6/11/14, Motion to Dismiss

Appeal.) That same day, Bruce filed in the DCCA another Motion for Stay Pending Appeal. Rec. DCCA, 14-CV-0539 Docket Entry 6/11/14, Motion Stay pending appeal.) On June 30, 2014, Bruce filed a D.C. App. R. 28(k) Citation of Supplemental Authority to place the DCCA on notice of the Supreme Court's recent Fourth Amendment decision in *Riley v. California*, 134 S. Ct. 2473 (2014). (Rec. DCCA 14-CV-0539 Docket Entry 6/30/14, Rule 28(k) Citation of Supplemental Authority.) In Appeal No. 1, Bruce argued that the April 24, 2014 Order was appealable because (1) it would change or affect the possession of Bruce's property, (2) it was a collateral order, (3) it was a discovery order against a disinterested third party, and (4) the DCCA had discretionary authority to hear the appeal under a writ of mandamus. (Rec. DCCA 15-CV-0210, Motion for Summary Affirmance, Exhibit 6.) On July 1, 2014, after due consideration of Pepco's motion to dismiss and Bruce's opposition thereto, Bruce's motion for stay, and Bruce's citation to the Supreme Court's decision in *Riley*, the DCCA rejected Bruce's arguments and granted Pepco's motion to dismiss the appeal. (DCCA Apx. pp. 99-100, July 1, 2014 Order of D.C. Court of Appeals.) In its July 1st order, the DCCA expressly stated that it considered Bruce's Citation of Supplemental Authority, *i.e.*, the *Riley* decision. Citing a number of authorities supporting the Superior Court's right to issue a discovery order permitting Pepco to inspect and copy a photograph from Bruce's cell phone, the DCCA expressly stated that

Appellant's attempts to distinguish these authorities by reference to the sensitive nature of the information stored on her telephone are unpersuasive, as this court has routinely required non-party witnesses to await a sanction for contempt before they may obtain review of their claim that a subpoena or discovery order offends a privilege or privacy interest.

Id.

Once Appeal No. 1 was dismissed, pursuant to and consistent with the Superior Court's April 24, 2014 Order, Pepco served a third subpoena on Bruce on September 12, 2014, commanding her to produce her cell phone on September 24, 2014 at 10:00 a.m. at the Law Offices of Stephen R. Bruce. (DCCA Apx. pp. 101-107, Subpoena to Jeanette Bruce dated 9/12/14.) In that subpoena, Pepco expressly stated that Bruce is to produce her cell phone "pursuant to the Order of [the Superior] Court dated April 24, 2014." *Id.*

While resisting the Court's Order to produce her cell phone for examination by Pepco's expert, Bruce retained her own expert and produced her cell phone to him for examination and copying of relevant data. (DCCA Apx. pp. 108-123, Declaration of Charles Culley.) On September 24, 2014, counsel for Pepco together with Jonathan Fowler (Pepco's forensic engineer), appeared at the office of Mr. Bruce at the appointed time of 10:00 a.m. to inspect and copy relevant data from Bruce's cell phone pursuant to Pepco's subpoena and the Superior Court's Order of April 24, 2014. Upon

arrival, and not before then, Pepco's counsel and Mr. Fowler were informed by Mr. Bruce that production of the cell phone would not be made.

On September 26, 2014, Bruce filed her second motion to quash directed at Pepco's third subpoena, together with her motion for reconsideration of the April 24, 2014 Order. (Rec. SCDE 9/26/14 Motion to Quash and Motion for Reconsideration.) By order dated October 15, 2014, the Superior Court denied the second motion to quash and the motion for reconsideration. (DCCA Apx. pp. 126-128, 10/15/14 Order.)

During the following status conference in open court on October 29, 2014, Bruce again raised her privacy argument based on *Riley v. California*, 134 S. Ct. 2437 (2014), which again was rejected by the Superior Court, which repeated for the third time that Bruce was to comply with the Court's order compelling her to provide discovery related to the cell phone. At the October 29, 2014 conference, on the record, the Court specifically held that Bruce had not complied with the Court order, that her hiring an expert was not what the Court ordered her to do, that she unilaterally hired her own expert in an attempt to continue to avoid compliance with the subpoena and Court order, that the court entertained her "substantial compliance argument" by permitting Pepco to take the deposition at her expense (to which she consented), and ultimately determined that she needed to produce the phone. Also at that conference, Bruce for the first time suggested specific additional safeguards be added to the protective order, which the judge accepted and incorporated into the

order. (DCCA Apx. pp. 145-182, Transcript Excerpts of 10/29/14 Status Conference; *see also* DCCA Apx. pp. 183-185, 10/29/14 Order of the Court.)³

On December 4, 2014, Bruce produced her cell phone for examination in compliance with the Court's orders. (DCCA Apx. pp. 283-297, Forensic Report of Jonathan Fowler).

By Order of January 23, 2015, the Superior Court considered once again Bruce's privacy argument based on *Riley* and again determined that *Riley* was wholly inapplicable. (DCCA Apx. pp. 372- 377, 1/23/15 Order.)

On February 19, 2015, Bruce filed her second notice of appeal to the DCCA (Appeal No. 2) raising issues as to the privacy of her cell phone (now mooted) and as to the burden and expense of producing her cell phone. (Rec. SCDE 2/19/15, Notice of Appeal.)⁴

On October 8, 2015, Pepco informed the DCCA and Bruce that the underlying case had settled. Rec. DCCA 15-CV-0210 Docket Entry 10/8/15, Notice to the court of dismissal in Superior Court. On February 5, 2016, Bruce filed her brief in the DCCA. On June 29, 2017,

³ While Pepco filed a Motion requesting that Bruce be held in civil contempt, the Superior Court dismissed the motion by oral Order dated December 17, 2014. Rec. SCDE 12/17/14 Order.

⁴ On May 29, 2015, Bruce appeared for her follow-up deposition at Mr. Bruce's office (Rec. SCDE 3/14/16, 5/29/15 Deposition Transcript of Jeanette Bruce), complying with the other requirement of the Court's orders and Pepco's authorized subpoena.

the DCCA issued its decision and opinion (Bruce App. 1).



REASONS FOR DENYING THE PETITION

I. The Petition Does Not Meet the Requirements of S. Ct. Rule 10.

As a threshold matter, Bruce’s Petition for Writ of Certiorari does not meet the requirements of S. Ct. Rule 10. S. Ct. Rule 10 delineates “Considerations Governing Review on Certiorari”. It states:

Review on a writ of certiorari is not a matter of right, but of judicial discretion. **A petition for a writ of certiorari will be granted only for compelling reasons.** The following, although neither controlling nor fully measuring the Court’s discretion, indicate the character of the reasons the Court considers:

...

(b) a state court of last resort **has decided an important federal question** in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has **decided an important question of federal law** that has not been, but should be, settled by this Court, or **has decided an important federal question** in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

(Emphasis added.) *See also City & Cty. of San Francisco, Calif. v. Sheehan*, 135 S. Ct. 1765, 1779, 191 L. Ed. 2d 856 (2015), (expressly reiterating the Court’s adherence to the Rule).

In the instant case, the DCCA (the “state court of last resort” referenced in Rule 10(b)) decided:

1. because Bruce complied with the Superior Ct. Rule 45 subpoena and produced her cell phone, her appeal from the order of the Superior Court of the District of Columbia (“the Superior Ct.”) enforcing the subpoena was moot and was properly dismissed by the DCCA. (Apx. 2, 8-11), (See section III of this Opposition), and
2. regarding Bruce’s remaining claims, the Superior Ct. did not abuse its discretion in declining to sanction Pepco because Pepco’s subpoena was not improper, oppressive or issued in bad faith, nor unduly burdensome on Bruce, and therefore was in compliance with Superior Ct. Rule 45. (Apx. 2, 11-15), (see section IV of this Opposition).

These two decisions by the DCCA involved no federal questions.⁵ Contrary to the provisions of S. Ct. Rule 10, the decisions by the DCCA from which Bruce now petitions decided no important federal question. Therefore, the issues decided by the DCCA are not within the ambit of S. Ct. Rule 10(b) and (c).

Moreover, although S. Ct. Rule 10(b) and (c) may not fully measure the Court's discretion in granting a writ of certiorari, the Rule makes clear that the writ may be granted "only for compelling reasons", and "a writ is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *See, e.g., Tolan v. Cotton*, 134 S. Ct. 1861, 1868, 188 L. Ed. 2d 895 (2014), in which Justice Alito stated in his concurring opinion:

[T]he granting of review in this case sets a precedent that, if followed in other cases, will very substantially alter the Court's practice. *See, e.g., this Court's Rule 10* ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"); S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, *Supreme Court Practice* § 5.12(c)(3), p. 352 (10th ed. 2013) ("[E]rror correction . . . is outside the mainstream of the Court's functions and . . . not among the 'compelling reasons' . . . that govern the grant of certiorari").

⁵ The inapplicability of the Fourth Amendment is discussed in Section II of this Opposition.

Accordingly, per S. Ct. Rule 10 as clarified by Justice Alito in *Tolan*, Bruce's petition should be denied as failing to meet the requirements of S. Ct. Rule 10.

II. The Fourth Amendment Has No Application to the Instant Case.

Bruce argues that her Fourth Amendment right to privacy has been violated. However, the Fourth Amendment has no application to the instant case.

Riley v. California, 134 S. Ct. 2473 (2014) does not advance Bruce's privacy argument and is inapposite to this civil case. The case at bar involves Bruce's initial refusal to produce her cell phone in connection with a Court order commanding her to provide very limited examination of it in a civil action. The *Riley* decision, on the other hand, involved a *warrantless* search of a cell phone by a *state actor* (the police) in violation of the Fourth Amendment's warrant requirement. Of course, the protections of the Fourth Amendment do not extend to searches conducted by private parties, much less searches conducted pursuant to court order in civil actions. Thus, *Riley* and the Fourth Amendment have no bearing on this dispute.

Even if Fourth Amendment protections did apply to discovery in a civil action (which they do not), the facts here are certainly not analogous to a warrantless search and seizure of Bruce's cell phone. Indeed, search of Bruce's cell phone was to be conducted here pursuant to a court order. As stated by the Supreme Court in *Riley*: "Our holding, of course, is not that the

information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search. . . .” *Riley*, 134 S. Ct. at 2493. By analogy, the cell phone here was not searched without a court order, and in fact, similar to a court issuing a warrant (which is itself a court order), the Superior Court here issued a court order after due consideration of the matter and the privacy interests of Bruce.

In Bruce’s Motion to Stay Proceedings previously filed in the DCCA, she cited a number of cases around the country which concern a person’s expectation of privacy in connection with searches of cell phones by police ***without warrants***. *Riley* and all of those cases, are inapposite, again because the present matter does not involve a warrantless search of Bruce’s cell phone in violation of the Fourth Amendment.

Bruce cites no Fourth Amendment case in which someone’s privacy expectation in a cell phone trumps a court order authorizing a police search of the phone’s content. The parallel in a civil case, of course, is a court order granting a motion to compel, as has occurred here.

Like *Riley*, *United States v. Carpenter*, 819 F.3d 880 (6th Cir. 2016), *cert. granted*, 137 S. Ct. 2211, 198 L. Ed. 2d 657 (2017) is a Fourth Amendment criminal case involving the issue of whether a subpoena of a wireless carrier’s records showing when and where calls were made is an invasion of privacy. The instant case, on the other hand, is a civil case in which a non-party changed her deposition testimony relating to

what she saw when she took a picture on her cell phone. In the instant case, the trial court entered an order for Bruce to produce the cell phone under a protective order protecting her privacy rights. The protective order was amended twice at her request, and she then produced the phone. Accordingly, *Carpenter v. U.S.* is wholly inapposite to facts of the instant case, and therefore there is no basis for waiting for this Court's ruling on the petition for writ of certiorari in *Carpenter*.

Further, *Riley*, *Carpenter* and the other cases cited by Bruce address Fourth Amendment right to privacy restrictions on searches of cell phones by state (i.e. – government) actors.

Chandler v. Miller, 117 S. Ct. 1295 (1997), *City of Ontario, California v. Quon*, 130 S. Ct. 2619 (2010), *New Jersey v. T.L.O.*, 469 U.S. 325, 335 (1985), and *Los Angeles v. Patel*, 135 S. Ct. 2443, 2453 (2015), all cited in Bruce's brief in the DCCA, as well as other cases cited there, make clear that the Fourth Amendment right to privacy applies to acts invading privacy **by a state actor, not a private actor**. As stated above, Pepco is a private actor. *Montgomery v. Louisiana*, 136 S. Ct. 718, 727 (2016), *James v. City of Boise*, 136 S. Ct. 685, 686 (2016), and *New Jersey v. T.L.O.*, 469 U.S. 325, 335 (1985), all cited for the first time in Bruce's Petition, also involved state actors, not private actors. Here, there is no dispute that Pepco is a private actor, not a state actor. All of these cases, therefor, are not applicable.

The law is also clear that the obtaining of information through subpoena or recourse to local procedures by a private actor does not convert private action into state action, as was held in two other cases: *Barnard v. Young*, 720 F.2d 1188, 1189 (10th Cir. 1988) and *Haoi v. Vo*, 935 F.2d 308 (D.C. Cir. 1991).⁶ In the case at bar, Pepco issued the subpoena pursuant to Sup. Ct. Rule 45 and pursuant to Court orders. Per *Barnard* and *Haoi*, that did convert private action into state action.

Thus Pepco's issuance of a subpoena pursuant to and in the manner set forth in the Court order was not state action entitling Bruce to Fourth Amendment protection of the right to privacy.

Angelico v. Lehigh Valley Hospital, 184 F.3d 268, 278 (3d Cir. 1999) dealt with the issue of whether a private person may be considered a state actor for purposes of a civil rights action under Section 1983, rather than under the Fourth Amendment. Relied upon by Bruce in its DCCA brief, *Angelico* actually supports Pepco's position:

As we said in *Jordan [v. Fox, Rothschild, O'Brien & Frankel]*, 20 F.3d 1250 (3d Cir. 1994)], "[b]efore private persons can be considered state actors for purposes of section 1983, the state must significantly contribute to the constitutional deprivation, e.g., authorizing its own officers to invoke the force of law

⁶ Both of these cases were, in fact, cited by Bruce in her DCCA brief.

in aid of the private persons' request." 20 F.3d at 1266. Angelico claims that by issuing a subpoena, private attorneys use "the same compulsive powers of the state." We disagree. . . . We hold, therefore, that an attorney does not become a state actor simply by employing the state's subpoena laws. *See Barnard*, 720 F.2d at 1189 [(10th Cir. 1988)] ("If an attorney does not become a state actor merely by virtue of instigating state court litigation, then the attorney does not become a state actor merely by employing state authorized subpoena power." (citations omitted)). . . .

Id. Just as in *Angelico*, Pepco and its attorneys did not become a state actor merely by employing state authorized subpoena power.

Moreover, there has been no deprivation of property and the cell phone was never seized. Rather, it was produced by Bruce in response to Pepco's subpoena issued per the terms of the Court's Order, and examined by Pepco's expert "in camera" pursuant to the terms of the order and the protective order, under the supervision of Bruce's own expert, after which it was promptly returned to Bruce.

Respondent has found only two civil cases which did not involve state action and in which privacy interests were addressed and which mention *Riley* for its description of cell phone privacy concerns, though neither applied the Fourth Amendment. Each indicated that a motion to compel information from a cell phone

would be granted if limited in temporal and substantive scope.

In *Bakhit v. Safety Marketing, Inc.*, 2014 WL 2916490 (D. Conn. 2014) (cited by Bruce), plaintiffs argued they were entitled to inspect and image the cell phones of the individual defendants under the broad scope of discovery. Their motion to produce had no limits as to subject matter or time. The Court denied the motion without prejudice, stating: “[I]f plaintiffs re-file the motion, plaintiffs are encouraged to use other discovery devices to narrow the scope of their requested search and inspection of the cell phones. This included narrowing the requests in both temporal and substantive scope. . . .” *Id.*, at *3.

In the instant case, Pepco did exactly what the *Bakhit* Court encouraged the plaintiffs there to do. Pepco limited the temporal and substantive scope to the time of taking the photograph and to the substantive data (the original digital photograph) that would enable Pepco to determine if the photograph could be enhanced and which would confirm the time the photograph was taken. The Court further narrowed the discovery to examination only by the expert, so that any visualization of any unrelated matter would not be revealed to Pepco, its counsel or any other party in this action and Bruce’s privacy concerns as to any unrelated information contained in her phone would be honored.

Hohl v. McGohan Brabender Financial, LLC, et al., 2015 WL 4540231 (S.D. Ohio, Western Division, 2015)

is the other civil case not involving state actors and which mentioned *Riley* for its description of cell phone privacy concerns. The court stated:

Hohl . . . contends that the discovery of the cellphone records would violate her privacy. . . . In support of this latter argument, Hohl cites *Riley v. California*, 573 U.S. ___, 134 S.Ct. 2473 (2014), which addressed privacy concerns associated with warrantless searches of cellphones in the criminal context. *Id.* . . .

The Court finds that Hohl's privacy argument . . . lacks merit. Hohl cites *Riley*, which is distinguishable from the instant case. In *Riley*, a criminal case, the Supreme Court found privacy concerns associated with the multitude of information stored on cellphones, such as videos, pictures, text messages, email, internet browsing history, calendars, and bank statements. . . . Based on the limited amount of information Defendants seek, the Court finds *Riley* inapplicable. Finding Hohl has not met her burden, the Court DENIES her motion to quash.⁷

⁷ In recognition of Hohl's privacy concerns, the cellphone records shall be produced subject to a Protective Order that shall dictate that the records are to be kept confidential, used only for the purposes articulated by Defendants, and destroyed at the conclusion of this litigation.

Id., at *2-*3.

In the instant case, just as in *Hohl*, Pepco sought the production of very limited information, subject to a protective order that dictated that the records were to be kept confidential, used only for the purposes of the litigation, and, with the exception of the original photograph, all copies of any other information would be immediately deleted and Bruce's cell phone returned. (Rec. SCDE 3/29/13, Stipulated Protective Order). Indeed, the protective order, and addendum requested by Bruce, were narrower and contained more protections than the order in *Hohl*. DCCA Apx. pp. 280-282.

Based upon the law set forth above, as applied to the facts of this case, the Superior Court was correct in ruling that the Fourth Amendment right to privacy was inapplicable to the instant case. On this basis, Bruce's petition should be denied.

III. The Privacy Issue is Moot In Any Event.

The issue of the privacy of Bruce's cell phone has been rendered moot by Bruce's own actions. Prior to noting her appeal, Bruce took the following actions:

- (a) She voluntarily disclosed a copy of the cell phone photograph at her original deposition,
- (b) She voluntarily elected to testify about the content of the photograph of the incident contained on her cell phone,

(c) she voluntarily elected to produce her cell phone and have it examined by her own retained expert and,

(d) she **produced her cell phone** to Pepco's expert for examination pursuant to the Superior Court Order to do so.

In light of her own actions, whatever privacy concerns Bruce had with regard to producing her cell phone were mooted before she noted the instant appeal.

Even if the Fourth Amendment right to privacy applied here (which it does not), the United States Supreme Court has clearly addressed the mootness issue, as follows:

It has long been settled that a federal court has no authority "to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Mills v. Green*, 159 U.S. 651, 653, 16 S.Ct. 132, 133, 40 L.Ed. 293 (1895). See also *Preiser v. Newkirk*, 422 U.S. 395, 401, 95 S.Ct. 2330, 2334, 45 L.Ed.2d 272 (1975); *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S.Ct. 402, 404, 30 L.Ed.2d 413 (1971). For that reason, if an event occurs while a case is pending on appeal that makes it impossible for the court to grant "any effectual relief whatever" to a prevailing party, the appeal must be dismissed. *Mills*, 159 U.S., at 653, 16 S.Ct., at 133. In this case, after the Church took its appeal from the

April 15 order, in compliance with that order copies of the tapes were delivered to the IRS. The Government contends that it was thereafter impossible for the Court of Appeals to grant the Church any effectual relief. We disagree. . . .

When the Government has obtained such materials as a result of an unlawful summons, that interest is violated and a court can effectuate relief by ordering the Government to return the records. . . . Even though it is now too late to prevent, or to provide a fully satisfactory remedy for, the invasion of privacy that occurred when the IRS obtained the information on the tapes, a court does have power to effectuate a partial remedy by ordering the Government to destroy or return any and all copies it may have in its possession. The availability of this possible remedy is sufficient to prevent this case from being moot.

Church of Scientology of California v. United States, 506 U.S. 9, 12-13, 113 S. Ct. 447, 449-50, 121 L. Ed. 2d 313 (1992). Thus, the only thing that prevented the *Church of Scientology of California* appeal from being moot was the possible remedy of ordering the government to destroy or return all copies of the records in its possession.

In the instant case, the Court added additional privacy protocols to the protective order at Bruce's request (DCCA App. pp. 280-282, November 25, 2014 Addendum to the Protective Order). Bruce thereafter promptly produced her cell phone for examination

on December 4, 2014. In accordance with the provisions of the Protective Order and addendum, neither Pepco nor its counsel retained any part of, or data from, the cell phone other than an original copy of the picture Bruce took. Neither Pepco nor its counsel was shown any content of Bruce’s phone, other than the picture at issue.

In the civil case context, the District of Columbia Court of Appeals has addressed the issue of mootness to the same effect, and the mootness issue is now well settled. “A case is moot when the legal issues presented are no longer ‘live’ or when the parties lack a legally cognizable interest in the outcome.” *Cropp v. Williams*, 841 A.2d 328, 330 (D.C. 2004) (per curiam) (citing *Murphy v. Hunt*, 455 U.S. 478, 481 (1982)). “[I]t is well-settled that, while an appeal is pending, an event that renders relief impossible or unnecessary also renders that appeal moot.” *Vaughn v. United States*, 579 A.2d 170, 175 n.7 (D.C. 1990). “Although not bound strictly by the ‘case or controversy’ requirements of Article III of the U.S. Constitution, this court does not normally decide moot cases.” *Cropp*, 841 A.2d at 330; *see also Banks v. Ferrell*, 411 A.2d 54, 56 n.7 (D.C. 1979). *See Thorn v. Walker*, 912 A.2d 1192, 1195 (D.C. 2006) (“In deciding whether a case is moot, we determine whether this [c]ourt can fashion effective relief.” (internal quotation marks and citation omitted)); *Evans v. Family Sav. & Loan Ass’n of Virginia*, 481 A.2d 1309, 1310 (D.C. 1984) (per curiam) (“[T]he appeal is moot because there is no way in which we can grant effective relief.”). Yet “appellate courts will not decide abstract

questions.” *Spingarn v. Landow & Co.*, 342 A.2d 41, 42 (D.C. 1975). *See also Banks*, 411 A.2d at 56 n.7 (stating that our “adversary system can best adjudicate real, not abstract conflicts,” citing “judicial economy”).

Thus, it is impossible for this Court to provide any effectual relief as to the privacy issue to the extent that any privacy issue remains. As the United States Supreme Court has made clear, where it is “**impossible for the court to grant ‘any effectual relief whatever’ . . . , the appeal must be dismissed.**” *Church of Scientology of California*, *supra*, 506 U.S., at 12 (emphasis added). For the reasons stated, the privacy issue is moot, and Bruce’s Petition should be denied.

IV. Bruce Sustained No Undue Burden or Expense by Producing the Cell Phone.

Bruce argues that her expenditure of funds to oppose the production of the cell phone satisfied the “unduly burdensome” requirement, and that Pepco should reimburse her for that.

The standard of review of a Court order authorizing a subpoena is the “abuse of discretion” standard. *Linder v. Calero-Portocarrero*, 251 F.3d 178, 181 (D.C. Cir. 2001) held:

With respect to Rule 45, we have consistently proceeded under the ordinary standard of review to determine whether a district court properly considered the motion to compel production – inquiring whether the district court abused its discretion in denying or compelling

discovery. See *Schreiber v. Society for Savings Bancorp, Inc.*, 11 F.3d 217, 220 (D.C.Cir.1993); *In re Subpoena*, 967 F.2d 630, 633 (D.C.Cir.1992).

Bruce cites Rule 45, *Herbert v. Lando*, 441 U.S. 153, 177 (1979) and other cases (Bruce DCCA, Bruce brief, pp. 29-33) for the proposition that subpoenas not place an undue burden or expense on the party to whom the subpoena is issued. In full compliance with Rule 45 and the case law, the Superior Court placed no undue burden or expense on Bruce. The record makes that abundantly clear.

As to undue burden or expense, Sup. Ct. Rule 45(c) reads, in pertinent part:

- (1) *Avoiding Undue Burden or Expense; Sanctions.* A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena.
- (2) *Command to Produce Materials or Permit Inspection.*

(B) Objections. A person commanded to produce . . . electronically stored information, or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials . . . or to producing electronically stored information in the form or forms

requested. . . . If objection is made, the following rules apply:

- (i) At any time, on notice to the commanded person, the serving party may move the court for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) When Required. On timely motion, the court must quash or modify a subpoena that: . . .

- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

Sup. Ct. Rule 45(c).

Neither the court order to produce the Bruce cell phone for the limited purposes for which it was sought to be produced, nor the subpoena issued pursuant to the order, placed any undue burden or expense on Bruce in complying with the order and subpoena. SCRP Rule 26(b) permits Pepco to obtain discovery relevant or reasonably calculated to lead to the discovery of admissible evidence. Thus, this rule certainly allows

for such discovery, and given the serious nature of the claims and damages brought against Pepco in this case, due process required it, especially where critical testimony has been substantively changed in an errata sheet without the benefit of cross-examination, and where discovery of the original photograph from the cell phone may have ultimately confirmed the accuracy of Mrs. Bruce's original testimony.

Notwithstanding the importance of the additional discovery, reasonable steps were taken by Pepco to avoid imposing any undue burden on Bruce and there was virtually no expense in bringing Bruce's cell phone to be examined for a brief period of time. As noted above, Pepco invited Bruce to meet and confer in an effort to eliminate any undue discovery burden and to implement the least expensive and intrusive methods of conducting the necessary additional discovery. Exhibit 12, 2/25/2014. In this regard, Pepco made a number of suggestions, including limiting both the breadth and scope of the records subpoena, production of information pursuant to the protective order already entered in this case, and having Pepco's forensic expert copy only that material relevant to this case without removing any personal information. Bruce was not inclined to explore any of these or any other suggestions. Rec. SCDE dated 3/6/14, Pepco's Memorandum of Points and Authorities in Opposition to Bruce's Motion to Quash, Exhibit 13, Correspondence of Mr. Bruce. In fact, the burden and expense of which Bruce now complains is not a result of the Court's Order commanding her to produce her phone, but instead was caused by

Bruce's own efforts in attempting to avoid compliance with the subpoenas and Court orders, i.e., in filing motions to quash (after the entry of the initial Order), motions for re-consideration, motions to stay and appeals, all of which were denied or in the case of the first appeal dismissed. Rec. SCDE 2/14/14, Motion to Quash; Rec. SCDE 3/18/14 Opposition to Motion to Compel; Rec. SCDE 5/1/14, Notice of Appeal; Rec. SCDE 5/8/14, Motion for Stay; Rec. SCDE 9/25/14 Motion to Quash Subpoena and Production of Documents; Rec. SCDE 9/26/14 Motion to Quash Production of Cell Phone and Motion for Reconsideration; Rec. SCDE 11/20/14, Supplemental Status Report; Rec. SCDE 11/24/14, Memorandum in Support of Proposed Addendum to Protective Order; Rec. SCDE 12/16/14, Second Supplemental Status Report; Rec. SCDE 2/19/15, Notice of Appeal; Rec. SCDE 4/27/15, Motion to Quash 3rd Subpoena; Rec. SCDE 5/4/15, Memorandum in Support of Addendum to Protective Order. Furthermore, the expense of retaining an expert was voluntarily incurred by Bruce in her further effort to avoid compliance with the Court's Orders through which she argued that she had substantially complied with the Court's Order by having the cell phone examined by her own expert instead of Pepco's expert. DCCA Apx. pp. 108-123, Declaration of Charles Culley; Rec. SCDE 11/20/14, Bruce's Supplemental Status Report, p. 1.

The cases Bruce cites in support of avoiding undue burden and expense deal with the expense of **complying** with discovery, an appropriate consideration under Sup. Ct. Rule 45(c)(2)(B)(ii), cited above. For example,

Linder v. Calero-Portocarrero, 251 F.3d 178, 182 (D.C. Cir. 2001) held:

As amended in 1991, Fed.R.Civ.P. 45(c)(2)(B) provides that when a district court compels production by a non-party the court “shall protect” that person from “significant expense resulting from **the inspection and copying commanded.**”

Id. (Emphasis added.) *Linder* involved an expense of over \$200,000 for copying the subpoenaed documents, and it was a portion of that expense that the Court considered requiring the party issuing the subpoena to pay. *See also In re the Exxon Valdez*, 142 F.R.D. 380 (1992), which dealt with payment of the costs of production of the documents sought. In the case at bar, there was virtually no expense in providing the cell phone for a brief examination.

The Court here explained the careful and limited approach it took in its orders compelling production and balancing them to protect Pepco’s right to discovery while at the same time ensuring that no undue burden or expense was placed upon Bruce. DCCA Apx. pp. 162-169.

Bruce, however, argues that she has spent about \$50,000 in legal and expert witness fees. As a threshold matter, Bruce presented no evidence of any such expense. Moreover, as noted above, any expense in resisting the court orders was voluntarily incurred by Bruce. All of the motions and appellate practice, including Bruce’s opposition to the motion to compel, multiple

motions to quash, motion for reconsideration, multiple appeals, motions to stay, and expert witness retention, were litigation actions Bruce elected to pursue. Whatever expenses Bruce incurred as a result of contesting the valid court orders and subpoena were her choice. Certainly Pepco cannot be faulted or sanctioned for requesting the Court to enforce its discovery orders.

This is not to suggest that non-parties like Bruce should be precluded from initiating motions and appellate practice. However, while Sup. Ct. Rule 45 states that undue burden and expense in responding to discovery is to be avoided, no law holds that undue burden and expense of **complying** with discovery subpoenas and court orders compelling discovery includes the expense of **resisting** those same subpoenas and orders, as Bruce opted to do here.

In the instant case, virtually all of Bruce's expenses were sustained in resisting the court orders and authorized subpoena, while virtually no expense whatever was incurred in producing Bruce's cell phone for inspection by Pepco's expert.

For the reasons stated above, the trial court's orders authorizing Pepco to subpoena Bruce's cell phone and the authorized subpoena imposed no undue burden or expense on Bruce. Bruce's petition should be denied.



CONCLUSION

WHEREFORE, for the reasons stated, Respondent respectfully requests that Bruce's Petition for Writ of Certiorari be denied.

Respectfully submitted,

FREEMAN & FREEMAN, P.C.

MARTIN H. FREEMAN

100 Park Avenue, Suite 250

Rockville, Maryland 20850

(301) 315-0200

Counsel for Respondent Pepco