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August 31, 2022

Scott Harris, Clerk  
The United States Supreme Court  
One First Street, N.E.  
Washington, D.C. 20543

Re: *Tim Shoop, Warden v. Jeronique D. Cunningham*, Case No. 21-1587

Dear Mr. Harris:

Earlier today, Cunningham submitted a letter purporting to correct a “factual misrepresentation” in the Warden’s reply brief. Specifically, he refers to this paragraph from the Warden’s reply:

One final point. Cunningham insists that Ohio law would not have allowed him to take discovery in state-postconviction proceedings, which is where he raised his juror-bias claim. BIO.12. This paints an incorrect picture of Ohio law. Ohio courts may authorize capital prisoners to conduct discovery for good cause. Ohio Rev. Code §2953.21(A)(1)(e). Plus, when *Remmer* requires a hearing, state courts must hold a hearing *regardless* of what state law allows. In any event, this argument is irrelevant, since the state court did not unreasonably apply *Remmer* by failing to hold a hearing.

Reply at 6–7. Cunningham says that, by citing Ohio Revised Code §2953.21, the Warden suggested the statute applied to Cunningham’s state-postconviction proceedings.

But the Warden never claimed the statute applied to Cunningham’s case. So Cunningham’s letter identifies no factual misrepresentation. And the misrepresentation he purports to identify is irrelevant to the issues presented. The Warden’s counsel explained all this in an email exchange with Cunningham’s counsel. That exchange is attached to this letter. Here is what the Warden’s counsel said, in relevant part:

Regarding your note, we did not mean to suggest that the statute applied in this particular case. As the rest of the paragraph

explains, our primary answer to concerns about the availability of state law permitting discovery is this: the existence of such laws is irrelevant to this case, both because *Remmer* didn't require discovery and because it would have trumped state law if it did. The passage you quote is intended to respond to your claim "that under Ohio law . . . there *is* simply no avenue for post-conviction petitioners to obtain discovery." BIO.12 (emphasis added). We included the statute to make clear to the Court that Ohio law does allow for discovery in some cases, easing any concerns on that score. That is why we said the claim presented "an incorrect picture of Ohio law."

In short, the Warden never represented that Cunningham himself was entitled to seek discovery under the provision in question. The Warden cited this provision simply to correct the impression Cunningham's brief might have left about Ohio law pertaining to discovery.

One other (legally irrelevant) point deserves mention, lest the State leave the Court with the same misimpression. It is true that, before Ohio Revised Code §2953.21 was amended to explicitly permit discovery in postconviction cases, some courts in Ohio read its silence on the subject as denying a trial court the power to conduct discovery. *See generally State v. Montgomery*, 2015-Ohio-500 ¶12 (Ohio Ct. App. 2015) (collecting cases). But others read the silence as empowering trial courts to conduct discovery in their discretion. *See id.* at ¶¶ 13–16; *State v. McKelton*, 2015-Ohio-4228 ¶41 (Ohio Ct. App. 2015); *State v. Lawson*, 2012-Ohio-548 ¶¶16–18 (Ohio Ct. App. 2012); *State v. Stojetz*, 2010-Ohio-2544 ¶¶75–76 (Ohio Ct. App. 2010); *State v. Waddy*, No. 96APA07-863, 1997 Ohio App. LEXIS 2542, \*46 (Ohio Ct. App. June 10, 1997). And the Ohio Supreme Court eventually adopted the second reading, holding that, "because R.C. 2953.21 is silent about discovery, the decision to grant or deny a request for discovery rests with a trial court's sound discretion." *State v. Broom*, 146 Ohio St. 3d 60, 67 (2016). Thus, while Cunningham's letter accurately quotes the state-court decision in his case, this Court should not be left with the impression that all state courts, prior to the 2017 amendment, thought discovery was categorically unavailable to postconviction petitioners.

Respectfully yours,

Dave Yost  
Attorney General of Ohio

/s/ Benjamin M. Flowers

Benjamin M. Flowers  
Ohio Solicitor General

cc: Michael Benza, Counsel for Respondent

**Attachment**

**From:** [Benjamin Flowers](#)  
**To:** [Michael Benza](#); [Joshua Richardson](#); [Samuel Peterson](#)  
**Cc:** [Karl Schwartz](#)  
**Subject:** RE: Shoop v. Cunningham  
**Date:** Wednesday, August 24, 2022 3:14:00 PM

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Mike,

I hope you're doing well. Maybe we'll see your team at the Court again this year.

Regarding your note, we did not mean to suggest that the statute applied in this particular case. As the rest of the paragraph explains, our primary answer to concerns about the availability of state law permitting discovery is this: the existence of such laws is irrelevant to this case, both because *Remmer* didn't require discovery and because it would have trumped state law if it did. The passage you quote is intended to respond to your claim "that under Ohio law . . . there *is* simply no avenue for post-conviction petitioners to obtain discovery." BIO.12 (emphasis added). We included the statute to make clear to the Court that Ohio law does allow for discovery in some cases, easing any concerns on that score. That is why we said the claim presented "an incorrect picture of Ohio law."

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**From:** Michael Benza <mxb107@case.edu>  
**Sent:** Wednesday, August 24, 2022 2:51 PM  
**To:** Benjamin Flowers <Benjamin.Flowers@OhioAGO.gov>; Joshua Richardson <Joshua.Richardson@OhioAGO.gov>; Samuel Peterson <Samuel.Peterson@OhioAGO.gov>  
**Cc:** Karl Schwartz <Schwartz@wisemanschwartz.com>  
**Subject:** Shoop v. Cunningham

Good afternoon Gentlemen:

We wanted to drop a note about your Reply Brief in Cunningham. You assert on pages 6:

"Cunningham insists that Ohio law would not have allowed him to take discovery in state-postconviction proceedings, which is where he raised his juror-bias claim. BIO.12. This paints an incorrect picture of Ohio law. Ohio courts may authorize capital prisoners to conduct discovery for good cause. Ohio Rev. Code §2953.21(A)(1)(e)."

The section you cited did not exist during the relevant post-conviction proceedings in this matter. It was not adopted until 2017. The post-conviction court denied Cunningham's first post-conviction petition in 2004, and the second PCR in 2015.

Sincerely,  
Mike

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