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August 31, 2022

The Honorable Scott Harris  
Clerk of Court  
Supreme Court of the United States  
1 First Street NE  
Washington, D.C. 20543

Re: Shoop v. Cunningham, Case No. 21-1587

Dear Mr. Harris:

Respondent writes to inform the Court of a factual misrepresentation by Petitioner in his Reply Brief. At page 6 of the Reply Brief Petitioner wrote:

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).

Petitioner's citation to Ohio Rev. Code § 2953.21(A)(1)(e) failed to mention that it did not come into effect until April 6, 2017, years after Cunningham litigated his claims in state court. Cunningham's initial state post-conviction petition was denied by the trial court in 2004. Pet. App. 148a. His second post-conviction petition was denied in 2015. *State v. Cunningham*, 65 N.E.3d 307, 309 (Third Dist. 2016).

The prior versions of Ohio's post-conviction statute (Ohio Rev. Code § 2953.21) in effect at the time of Cunningham's post-conviction litigation contained no section addressing discovery. Ohio courts interpreted the former statutes as precluding discovery in the state post-conviction process. *See* Pet. App. 179a-180a. In Cunningham's case, the state court of appeals, citing this precedent, affirmed the denial of discovery in the initial state post-conviction petition stating:

In his second assignment of error, Cunningham argues that the trial court erred in not granting his request to conduct discovery to support his grounds for relief. Ohio law is clear that discovery is not available in the initial stages of a postconviction proceeding. *State v. Byrd* (2001), 145 Ohio App.3d 318, 332, 762 N.E.2d 1043. While a petition for

postconviction relief is a civil proceeding, the procedure is governed by R.C. 2953.21. The statute does not confer upon the trial court the power to conduct and compel discovery under the Civil Rules. *State v. Dean*, 149 Ohio App.3d 93, 2002 Ohio 4203, P10, 776 N.E.2d 116. Since discovery is not available in the initial stages of a postconviction proceeding, the trial court did not err in refusing to allow Cunningham to engage in discovery. Accordingly, the second assignment of error is overruled.

Pet. App. 179-180a.

Indeed, later in its opinion, the state court of appeals reiterated Ohio's then-absolute denial of discovery at the post-conviction level, when discussing another one of Cunningham's claims (not at issue here), stating:

In his third assignment of error, Cunningham argues that the trial court erred in denying his request for funds to retain a firearms and ballistics expert. Cunningham sought the funds to retain the expert to support his first and fourth grounds for relief. Since we have already determined that Cunningham's first and fourth grounds for relief are without merit and that R.C. 2953.21 does not confer power upon the trial court to conduct or compel discovery, we hold that the trial court did not err in denying Cunningham's request for funds to retain a firearms and ballistics expert. Accordingly, the third assignment of error is overruled.

Pet. App. 180a.

While Ohio Rev. Code § 2953.21(A)(1)(e) now addresses discovery, that was not the state of Ohio law at the time Respondent Cunningham presented his juror bias claims to the state courts. The 2017 amendment to Ohio Rev. Code § 2953.21 is irrelevant to Cunningham's state court litigation.

I would appreciate if you could circulate this letter to the Members of the Court.

Sincerely,

*Michael J. Benza*

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cc: Counsel of Record