

Response to Motion to Set
Execution Date –
Roy Lee Ward

**IN THE
INDIANA SUPREME COURT**

CASE No. 25S-SD-167

ROY LEE WARD,	)	
	)	
<i>Appellant,</i>	)	
	)	
v.	)	
	)	
STATE OF INDIANA,	)	
	)	
<i>Appellee.</i>	)	

THIS IS A CAPITAL CASE

RESPONSE TO MOTION TO SET EXECUTION DATE

There are now pending post-conviction requests on a legal challenge this Court has held as a matter of Indiana law was not ripe until the State’s motion to set the execution date. *Isom v. State*, 170 N.E.3d 623, 653-54 (Ind. 2021) (recognizing the State’s objection to providing discovery concerning the lethal injection protocol based on its argument the claim was not ripe since no execution date was set). With the unusual step of setting a “tentative” execution date, there is no question that the challenges to the method of execution after an unusual occurrence in an execution with overpriced drugs from an unknown source is now ripe. This Court should recall the tentative date and order the challenge not previously available based on new evidence be pursued according to this Court’s *Isom* decision.

A. Mr. Ward has satisfied his burden pursuant to *Corcoran v. State*, 240 N.E.3d 701 (Ind. 2024), Ind. Code § 35-50-2-9(k), and Post-Conviction Rule 1(12).

In *Corcoran v. State*, 240 N.E.3d 701 (Ind. 2024), this Court declined to use its authority under Ind. Code § 35-50-2-9(k) to consider new evidence of Corcoran’s mental illness because he also relied on evidence that had been previously presented. *Id.* at 702. This Court has acknowledged, though, that “a petitioner can raise claims involving previously undiscovered evidence through a written petition under Section 35-50-2-9(k) [or] raise constitutional claims through a successive petition for post-conviction relief under Post-Conviction Rule 1(12).” *Id.* For this reason, *Corcoran* does not preclude this Court from ever considering a petitioner’s claims involving previously undiscovered evidence under subsection (k) or Post-Conviction Rule 1(12) when performing its task of setting an execution date under subsection (h), contrary to the Attorney General’s argument that the task is merely administrative.¹

In Mr. Ward’s circumstances where there is new evidence in the form of witness accounts of troubling events occurring during Benjamin Ritchie’s execution, Mr. Ward satisfies this Court’s reading of I.C. § 35-50-2-9(k) and Post-Conviction

¹ The Attorney General only relies on the newly minted ruling from this Court that setting an execution date is a simple administrative act. Motion to Set Date p. 3. Although this Court held that setting an execution date is an administrative act, *Corcoran*, 240 N.E.3d 701, it did so without briefing or argument. Because Mr. Ward satisfies *Corcoran*, the tentative date should be recalled and during that process Mr. Ward will ask the courts to reconsider this questionable principle of law with briefing and argument.

Rule 1(12) in *Corcoran*. Indeed, and in addition to vitiating this aspect of *Corcoran*, if this Court were to accept the Attorney General's argument and set a real execution date under subsection (h) without performing its duty under subsection (k), it will be ignoring the legislature's intent with the promulgation of (k). Subsection (k) requires this Court to "determine . . . whether the person has presented previously undiscovered evidence that undermines confidence in . . . the death sentence." I.C. § 35-50-2-9(k). This Court can, and should, consider the issue of Indiana's method of execution including the State's use of costly and potentially expired drugs from an unknown and unregulated drug compounder, evidence that Mr. Ritchie's execution was not consistent with an uncompromised pentobarbital execution, and aspects of the execution chamber which would violate Mr. Ward's constitutional rights. This is particularly troubling since the Attorney General seeks a quick execution as it simultaneously denies Mr. Ward access to public information about its troubling execution protocol.

Here, there exists new evidence which cast significant doubt on the State's ability to perform the execution of Mr. Ward in a constitutionally permissible manner. Witnesses to Mr. Ritchie's May 20th execution described Mr. Ritchie "violently" lifting his head and shoulders off the gurney after the execution drug was administered. That should not happen when non-expired and uncontaminated pentobarbital is properly administered.

The Attorney General relies on this Court's decision in *Corcoran*, 240 N.E.3d 701, to incorrectly argue that this Court is bereft of any discretion – it must do what the executive asks it to do. A statute should not be so construed as to limit the function of this Court to such a mandatory act. “Under our Constitution, as amended, the Legislature may establish courts; but it cannot destroy the constitutional courts – the circuit courts and the Supreme Court – nor can it change their organization, nor redistribute their powers, for these courts owe their organization to the Constitution, and as the Constitution has ordained that they shall be organized, so they shall be. Judicial power distributed by the Constitution is beyond legislative control.” *Ex parte France*, 95 N.E. 515, 518 (Ind. 1911) (citing *State ex rel. v. Noble*, 21 N.E. 244 (1889)). Indiana Constitution Article 7, § 4 noted with distinction in death penalty cases as this Court's purview and empowers this Court “the power to review all questions of law and to review and revise the sentence imposed.” Contrary to the Attorney General's position, this Court is not limited to an administrative act of setting an execution date without considering the merits of Mr. Ward's legal claims based on new evidence and a claim which could not be raised any earlier pursuant to Indiana law. *Isom*, 170 N.E.3d at 653-54.

Regardless, this Court rejected such a cramped interpretation of this Court's discretion in *Corcoran* recognizing situations such as Mr. Ward's where new evidence exists, additional legal proceedings may be pursued without setting a date. *Corcoran*, 240 N.E.3d at 702. As this Court noted in *Baird v. State*, 833 N.E.2d 28, 29 (Ind.

2005): “Under our [Ind. Post–Conviction Rule 1(12)], a person who has been convicted of a crime may be permitted additional post-conviction review even after the conclusion of review to which the person is entitled as a matter of right, i.e., direct appeal and a first post-conviction proceeding.” In conjunction with this Court’s *Isom*, *Corcoran* and *Baird* authority, and to maintain uniformity of precedent, this Court should recall the tentative date and permit the previously unavailable second post-conviction proceeding to occur in the regular course of proceedings.

B. The State of Indiana’s abject failure to comply with Indiana’s public records law concerning its execution protocol while at the same time seeking a new execution warrant is shocking and unfair, and the lack of transparency surrounding the execution drugs must be litigated.

The Attorney General engages in a shell game (without a shell) to deny the public and this Court transparency on how this Court’s execution orders are effectuated. Not only has the State refused to turn over documents to which Mr. Ward is entitled, but in no state or federal filing has the State affirmatively stated that it did not violate state or federal laws to obtain execution drugs.

A secrecy statute cannot condone the illegal acquisition of controlled substances. There has been no disclosure regarding the amount of the drug in their possession, whether they are expired, how they are transported and stored, or their potency and sterility. This issue is even more important now that there are substantial questions regarding the efficacy of the drugs utilized given what occurred during the troubling execution of Mr. Ritchie. This Court is responsible for issuing

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death warrants and is ultimately responsible for ensuring Mr. Ward's execution is carried out in compliance with the state and federal constitutions.

Last month Governor Mike Braun admitted that approximately \$1.2 million was spent to acquire four doses of pentobarbital--of which two of those doses expired. Yet it is unclear how the drugs were obtained, how they were stored and transported, and if the drugs utilized in Mr. Corcoran and Mr. Ritchie's executions were expired, degraded or contaminated. It is also unclear how the money utilized to acquire the four doses of pentobarbital was authorized and approved of, as well as if the drugs were properly bid for per I.C. § 5-22-7-1. None of this information is protected under the secrecy statute.

This is the Attorney General's pattern. In Mr. Corcoran's case, very, very limited public records were disclosed, and the cost of the drugs was never disclosed. After depriving Mr. Corcoran and the public of this knowledge, the Attorney General finally disclosed in a lawsuit in Idaho that the State spent \$900,000 on drugs. Given the amount of money spent, Ward requested public documents showing the bidding process was complied with. Again, the State has refused to comply with the request. There is no information regarding any bidding process.

In *Sara McLachlan v. Indiana Department of Correction*, 49D06-2505-PL-022086 the Attorney General has asked for an extension to delay disclosing public records that under a fair reading of the Indiana statute must be produced. Meanwhile, Mr. Ward's public records request pending for months flounder with a lack of response.

This is consistent with Indiana's, and in particular the Indiana Department of Corrections's. previous actions regarding providing information to the public. Indeed, this Court affirmed the imposition of sanctions for the foot-dragging that occurred. *See e.g. A. Katherine Toomey v. Indiana Department of Corrections*, Marion Circuit Court Cause No. 49C01-1501-PL-003142 [Exhibit A] *and Indiana Department of Correction v. A. Katherine Toomey*, 162 N.E.3d 1099 (Ind. 2021). That same pattern seems to be exhibited here.

C. The State of Indiana must comply with the law.

Setting the real date in the manner suggested by the Attorney General will violate a newly enacted statute. The Indiana legislature, with nearly complete bipartisan support, passed Senate Enrolled Act 5 ("S.E.A. 5"), an amended law affecting state government contracts. S.E.A. 5, 110th Gen. Assemb., Reg. Sess. (Ind. 2025) (amending IND. CODE ANN. 4-13-1-29). The bill was signed into law by Governor Braun on May 6, 2025. *Actions for Senate Bill 5*, IND. GEN. ASSEMB. <https://iga.in.gov/legislative/2025/bills/senate/5/details>. Going into effect on July 1st, SEA 5 requires more transparency from state agencies to prevent no-bid contracts and allow the public to access information about state government expenditures. S.E.A. 5. The law applies to contracts between state agencies and contractors. *Id.*

State agencies now must post their contracts online within thirty days of their implementation. *Id.* The chapter applies to contracts that exceed \$500,000, and

exceptions exist to protect contracts “required to be kept confidential under state or federal law to prevent the disclosure of confidential or proprietary business information.” *Id.* All contracts entered into by the state on or after June 30, 2025, are subject to the requirements of the new law. *Id.* These contracts are accessible to the public on the Indiana transparency website, and fully downloadable. *See Indiana Transparency Portal: Contracts*, IND STATE GOV. <https://www.in.gov/itp/contracts/> (Last accessed July 29, 2025).

S.E.A. 5’s “no-bid prohibition” is designed to prevent “nonpublic” contracts entered into by the State without solicitation of proposals. *Id.* Under the new law, state agencies seeking contractors must post requests for proposals online for a minimum of thirty days prior to awarding the contract. *Id.* The new transparency statute bans no-bid contracts except in very limited circumstances that do not apply here, similar to the contract disclosure provisions. *Id.* Therefore, the Department of Correction is required to publicly post their bid for proposals on the Indiana transparency site.

S.E.A. 5 applies only to contracts that have a “maximum contract amount of not less than five hundred thousand dollars (\$500,000) in the initial contract.” S.E.A. 5. However, its provisions apply to contracts that are entered into, amended, or renewed. *Id.* Although there is an existing contract between the Department of Correction and the unknown source of pentobarbital, future changes to this contract are subject to the provisions of S.E.A. 5

Because the initial amount—disclosed to be \$900,000—exceeds the minimum of \$500,000, any amendments must be disclosed under the revised statutory provisions. The Attorney General may claim that any disclosure of information surrounding the purchase of pentobarbital by the Department of Correction would violate Indiana Code § 35-38-6-1, but that is not the case. The statute does not mention the contract itself being confidential material that cannot be subject to discovery. As evidenced by the Indiana Capital Chronicle acquiring the \$900,000 contract entered into by the Department of Corrections, redaction of these documents is possible. *Supra* Casey Smith <https://indianacapitalchronicle.com/2025/03/26/new-document-shows-indiana-paid-900000-for-execution-drug-but-other-details-still-sparse/>. While the full contract itself may be redacted to comport with I.C. § 35-38-6-1, Mr. Ward is certainly entitled to more information than currently available. Regardless, at a minimum the Department of Correction must post a bid for proposals to obtain the drugs necessary for Mr. Ward's execution. To comply with S.E.A. 5, state agencies need to take the thirty days to solicit proposals from contractors to ensure transparency and cost effectiveness.

WHEREFORE, this Court should deny the request to set an execution date, grant Ward's request to file a Successive Post-Conviction Petition and remand for evidentiary proceedings in the post-conviction court.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been delivered through
IEFS to the following, this 30th day of July 2025.

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