MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

Defendant, [name], by counsel, hereby submits his Memorandum of Law in Support of his Motion to Dismiss.

FACTS[1]

[names] were high school sweethearts. They married in February 2001 and have four children. Over the course of their relationship, [names] would often drink and smoke marijuana together. Ex. B (interview). When they were younger, they occasionally used harder drugs, including heroin, and struggled with addiction. Ex. A (Husband's interview), 13:07:50; 13:11. Although they had generally stopped using harder drugs as they aged and raised their family, they began using heroin again in the month prior to Wife's death. Ex. A., 13:12. They had used heroin together about six or seven times from May to July, 2017. Ex. A, 13:07. They would purchase the heroin from Al Trimnell, a friend of theirs whom Wife met while working at a restaurant. Ex. A, 13:09:30 Ex. B. If the Walmsleys were going to inject heroin, Nathanial always injected Wife.

On the afternoon of Sunday, July 30, 2017, Husband and Wife were at their home, preparing to have Husband's parents over for a barbeque. The two were drinking and discussed the possibility of also using heroin that day. Ex. A. 13:17 (the Walmsleys discussed how much they wanted to spend on the drug). Based on their mutual decision to use, Husband texted Trimnell and asked for heroin. Ex. A., 13:11.

[1] The Facts are based on Defendant's Exhibits A and B, Interrogations of Husband Walmsley and Al Trimnell, respectively. Walmsley attempts to direct the court's attention to the relevant portions of the interview. However, many of these facts are repeated in different ways throughout the interviews.

Trimnell delivered what the Walmsleys believed to be heroin to the Walmsley residence between 1:00 and 3:00 p.m., when both Wife and Husband were home. Ex. A, 13:10. Trimnell stayed for a few minutes and visited. Ex. B. The Walmsleys paid Trimnell $100 for the heroin. Ex. A. 13:17.

Around 3:45 p.m., Wife and Husband went into the bathroom to use the heroin. Husband had taken a needle from a diabetic client for whom he was remodeling his bathroom. Ex. A, 13:18; 13:20. Husband heated the heroin, and believes he injected Wife. He then injected himself. The drug turned out to contain fentanyl rather than heroin. Because Husband too was overdosing, Husband does not remember much of what happened or how long the couple was in the bathroom. Ex. A., 13:20:40

Wife died from fentanyl and ethanol intoxication. According to the autopsy report, Wife's blood alcohol concentration was .097 g/100mL, slightly above the legal limit. [2]

On November 8, 2017, the State charged Walmsley with Count I: Murder, as follows:

> On or about JULY 30, 2017, HUSBAND WALMSLEY, while committing the crime of Dealing a Narcotic Drug, which is to knowingly or intentionally deliver a narcotic drug, that is: HEROIN (pure or adulterated), did kill another human being, that is Wife Walmsley;
>
> All of which is contrary to the form of the statute in such cases made and provided by I.C. 35-42-1-1, and against the peace and dignity of the State of Indiana.

SUMMARY OF ARGUMENT

As a matter of law, Husband Walmsley did not deal heroin to his wife, Wife. First, nothing the State claims Walmsley did was on the "distribution" side of the deal. Just as they had done six or seven times in the preceding months, the Walmsleys acted

[2] It is unclear whether whole blood or plasma was tested. Results from plasma are higher than those from whole blood.

together to purchase and use heroin. The couple used their money to bring drugs into their house. Joint purchasers and users who do not intend to transfer their drugs to a third party are not dealers.

Second, Husband did not become a dealer by injecting Wife with heroin she already constructively possessed. The heroin Husband injected into Wife and himself was just as much Wife's as it was his. Further, the legislature did not intend to criminalize as dealing the transfer of jointly purchased drugs between a husband and wife. To hold otherwise discourages co-users from seeking medical help for overdosing friends and spouses. Husband was no more of a dealer than Wife. Trimnell dealt to both of them fentanyl rather than heroin. The only difference is that Husband woke up from the overdose, and Wife did not.

Even if this court were to find that Husband could have dealt to Wife, the legislature did not intent to criminalize Wife's overdose as felony murder. Recent legislation evidences the Legislature's knowledge that drug dealers could not be prosecuted for felony murder in an overdose situation. Moreover, such an application of the felony murder is contrary to the plain language of the statute.

ARGUMENT

The State has failed to recite facts that constitute felony murder. The trial court must dismiss an Information that fails to recite facts that constitute an offense. Ind. Code 35-34-1-4(a)(5). "A trial court considering a motion to dismiss need not rely entirely on the text of the charging information but can hear and consider evidence in determining whether or not a defendant can be charged with the crime alleged." State v. Fettig, 884 N.E.2d 341, 343 (Ind.Ct.App. 2008). "The defendant has the burden of proving by a preponderance of the

evidence every fact essential to support the motion." Id. at 344 (quoting Ind. Code 35-34-1-8(a)).

The State has alleged Husband committed felony murder by committing dealing. "A person who . . . kills another human being while committing or attempting to commit: (a) dealing in or manufacturing cocaine or a narcotic drug (IC 35-48-4-1) . . . commits murder, a felony." Ind. Code 35-42-1-1. The State has accused Husband of dealing by delivering heroin to his wife, Wife.

I. The legislature did not intend to treat a husband who purchased, possessed and used drugs with his wife as a dealer.

When a person dies during a drug deal, only the dealer, and not the purchaser, of the narcotic drug commits felony murder. Hyche v. State, 934 N.E.2d 1176 (Ind.Ct.App. 2010). As a matter of law, Husband's act of texting their dealer to bring heroin to he and his wife's home and injecting his wife with that heroin does not constituted dealing.

"A person who . . . knowingly or intentionally: . . . delivers . . . cocaine or a narcotic drug, pure or adulterated, classified in schedule I or II . . . commits dealing in cocaine or a narcotic drug." Ind. Code 35-48-1-1(a)(1)(C). Delivery is defined as: (a) An actual or constructive transfer from one (1) person to another of a controlled substance, whether or not there is an agency relationship; or (2) The organizing or supervising of an activity described in subdivision (1). Ind. Code 35-48-1-11. Black's Law Dictionary defines "delivery" as "the giving or yielding possession or control of something to another." Hyche, 934 N.E.2d at 1179 (quoting BLACK'S LAW DICTIONARY 461 (8th ed. 2004) (emphasis added)).

Although it is assumed that the legislature intends the plain and ordinary meaning of a word, the "plain meaning rule of statutory interpretation 'must be applied in conjunction with the

basic principle that all statutes should be read where possible to give effect to the intent of the legislature.'" State v. Hartman, 602 N.E.2d 1011, 1013 (Ind. 1992) (quoting with approval Judge Baker's dissent in State v. Hartman, 594 N.E.2d 830, 833 (Ind.Ct.App. 1992) from which the Court had granted transfer). The courts "must also strictly construe penal statutes against the State to avoid enlarging them behind the fair meaning of the language used." Hyche, 934 N.E.2d at 1179.

In Hyche v. State, the Indiana Court of Appeals held that the legislature only intended to punish as a dealer a person who knowingly commits an act on the "distribution side" of the deal. Id. at 1179. Hyche, was looking to buy pills. In his effort, Hyche called Smith-Kelsey, who referred him to Rollins who agreed to sell Hyche three pills of ecstacy at a certain time and location. When Rollins and his companion arrived to the meeting location, they were shot. Rollins lived, but his companion died. The State charged Hyche with felony murder with the underlying felony being dealing in a narcotic drug. The State argued that Hyche organized the delivery of drugs by calling a third party who directed him to a dealer and scheduling a time to meet. The State also argued that Hyche financed the delivery of drugs by agreeing to pay $30 for pills. Finally, the State argued that Hyche aided the dealer in dealing by agreeing to purchase the pills.

The Court of Appeals rejected all of the State's arguments. The Court explained:

> [w]e agree with Hyche that he State's interpretation of the dealing statute would "completely blur the distinction between one who possesses a drug and one who distributes it." Reply Br. at 4. Hyche acted only as a purchaser of ecstasy, not as a dealer. To find that his offer to purchase the drug somehow amounts to organizing, financing, or even inducing its delivery, defies logic and cannot reasonably reflect the intent of the General Assembly in enacting these statutes.

Id. at 1180.

Here, like in Hyche, the State is trying to turn a purchaser into a dealer in order to charge felony murder. The State has failed to present any evidence that Husband was on the "distribution side" of dealing. On July 30, 2017, Wife and Husband purchased and used heroin together, like they had done many times in the past. After Husband and his wife decided to purchase and use heroin, Husband texted Trimnell, who then delivered the drug to the couple's home when both were present. The couple used the heroin, as planned, together in the bathroom. They were joint purchasers and users.

Further, the legislature did not intend to punish a married couple who purchases and uses drugs together as dealers simply because they transfer the drugs to one another. In United States v. Swiderski, 548 F.2d 445, 450 (2nd Cir. 1977), an engaged couple purchased cocaine from an informant. The Government charged the couple with possession with intent to distribute. At trial, the defendants, who were now married, testified that the cocaine was for their personal use. In closing argument, the Government responded by arguing, "if the defendants bought the cocaine with a view to sharing it between themselves as users, with each taking some of it for 'snorts' or 'blows,' this proof would be sufficient to establish possession 'with intent to distribute.'" Id. at 448. The trial court instructed the jury that giving the drug to anyone, including a friend or your fiancée, is distribution. Id. at 449. The couple was convicted.

On appeal, Swiderski and his wife argued that the trial court's instruction was an overly broad and erroneous interpretation of distribution. Like Indiana's statue, the federal statute defined "delivery" as "the actual, constructive or attempted transfer of a controlled substance whether or not there exists an agency relationship." Id. at 449. The Second Circuit agreed with Swiderski and reversed the convictions. The Second Circuit explained:

> Congress' reasoning in providing more severe penalties for commercial trafficking in and distribution of narcotics was that such conduct tends to have the dangerous, unwanted effect of drawing additional participants into the web of drug abuse. For this reason the House Report equated "transactions involving others" and "distribution to others" with the harsher penalties provided by §§ 841 and 848. Where only individual possession and use is concerned, on the other hand, the Act prescribes lesser penalties and emphasizes rehabilitation of the drug abuser. Similarly, *where two individuals simultaneously and jointly acquire possession of a drug for their own use, intending only to share it together, their only crime is personal drug abuse - simple joint possession, without any intent to distribute the drug further.* Since both acquire possession from the outset and neither intends to distribute the drug to a third person, neither serves as a link in the chain of distribution. For purposes of the Act they must therefore be treated as possessors for personal use rather than for further distribution. Their simple joint possession does not pose any of the evils which Congress sought to deter and punish through the more severe penalties provided for those engaged in a "continuing criminal enterprise" or in drug distribution.

Id. at 450 (emphasis added).

The Second Circuit also rejected the Government's argument that Congress intended to criminalize the transfer of drugs between co-purchasers because the statute states that a person who transfers drugs delivers them regardless of whether there exists an "agency relationship." The Second Circuit found that the agency relationship language was meant to include "all links in the chain of distribution." Id. at 451. "Purchasers who simultaneously acquire a drug jointly for their own purpose, however, do not perform any service as links in the chain; they are the ultimate users." Id.

This Court should follow the Second Circuit's logic. Punishing Husband as a dealer rather than the purchaser and user serves no purpose. In fact, it is against public policy. Rather than fighting the opioid crisis, it will only worsen the effect of the crisis as it discourages co-users from getting help for their overdosing friends or spouses.

Nothing Husband did promoted the distribution of drugs. He unknowingly injected the same deadly fentanyl is his arm as he did in his wife's arm. The only difference between his wife and him is that somehow he survived. As the Second Circuit noted, our statutes are aimed at rehabilitation for people like Husband, not a lifetime in prison.

In 2016, the Seventh Circuit recently followed Swiderski and rejected the Government's argument that a co-purchaser who injects the drugs in another is dealing. Weldon v. United States, 840 F.3d 865, 867 (7th Cir. 2016).[3] The Court also rejected the Government's argument that a co-purchaser is distributing drugs by exchanging money for the drugs and then handing the drugs to the others. "What matters is that the defendants were participants in the same transaction. No cases require literal simultaneous possession." Id. The Seventh Circuit further illustrated the absurdity of the Government's interpretation of dealing by explaining, "[s]uppose you have lunch with a friend, order two hamburgers, and when your hamburgers are ready you pick them up at the food counter and bring them back to the table and he eats one and you eat the other. It would be very odd to describe what you had done as "distributing" the food to him." Id.

The State's overly broad interpretation of the dealing statute punishes those who use drugs together much more harshly than someone who uses drugs alone. This makes no sense. "We presume that the legislature intended the language used in the statute to be applied logically and not to bring about an unjust or absurd result." Hyche, 934 N.E.2d at 1179 (quoting Murray

[3] See also United States v. Layne, 192 F.3d 556, 569 (6th Cir. 1999); United States v. Hardy, 895 F.2d 1331, 1334-35 (11th Cir. 1990); United States v. Rush, 738 F.2d 497, 514 (1st Cir. 1984); cf. United States v. Mancuso, 718 F.3d 780, 798 and n. 10 (9th Cir. 2013). For a thorough review of how other jurisdictions have treated this issue, see People v. Coots, 968 N.E.2d 1151 (Ill.Ct.App. 2012).

v. State, 798 N.E.2d 895, 902 (Ind.Ct.App. 2003)). As the Court of Appeals made clear in Hyche, a person using or purchasing drugs is not dealing. It is only logical that Hyche applies to married couples.

Finally, the State's broad interpretation of the dealing statute defies the long-standing law of constructive possession. Even when a person does not physically possess drugs, that person constructively possesses drugs if he or she has the "capability and intent to maintain control and dominion over the contraband." Carnes v. State, 480 N.E.2d 581, (Ind.Ct.App. 1985) (citing Thomas v. State, 260 Ind. 1, 290 N.E.2d 557, 558 (1973)). Two people can constructively possess drugs. Here, Wife constructively possessed the heroin the minute Trimnell brought it to the Walmsley's home. Carnes v. State, 480 N.E.2d 581 (Ind.Ct.App. 1985) (fact that marijuana was found in the refrigerator and a packet of drugs were found in the couple's bedroom buttressed the fact that both husband and wife knew of the drugs' presence; if the husband and wife were hiding the drugs from anyone, it would be from their children or a casual visitor).

Other jurisdictions have already held, under the law of constructive possession, co-owners of drugs do not deal drugs by transferring them between one another. "[O]ne cannot acquire something one already possesses. . . . Therefore, as a matter of law, two or more defendants cannot intend to distribute to each other drugs they jointly possess." State v. Lopez, 359 N.J. Super 222, 819 A.2d 486, 492-93 (2003); see also State v. Morrison,, 188 N.J. 2, 902 A.2d 860 (N.J. 2006). In fact, the Minnesota Supreme Court held that a surviving spouse who purchased drugs for the couple's use cannot be prosecuted under Minnesota's felony murder statute for transferring or delivering the drugs that ultimately killed the other spouse. Carithers v. State, 490 N.W.2d 620, 622 (Minn. 1992). "That the absent spouse did not exercise physical

control over the substance at the moment of acquisition is an irrelevancy when there is no question that the absent spouse was then entitled to exercise joint physical possession." Id.

The bottom line is Husband could not transfer heroin that his wife already constructively possessed. Because the undisputed evidence is that Husband and Wife purchased the heroin to use together, Husband did not commit dealing by either setting up the drug deal or by injecting Wife.

II. The legislature did not intend that a drug deal resulting in a drug overdose constitute felony murder

Should the Court conclude that Husband could have committed dealing, the Information should still be dismissed because the Legislature did not intend that a drug deal resulting in an overdose death constitutes Felony Murder. On March 22, 2018, the Indiana Legislature passed House Bill 1359 – Drug Dealing Resulting in Death. As its title indicates, this new legislation holds drug dealers criminally responsible for the overdose death resulting from the delivery of controlled substances. The creation of this new offense precludes application of the felony murder statute to the facts presented in this matter. Additionally, it is illogical to construct from the facts presented in this case a murder charge based on the plain language of Indiana's felony murder statute at Indiana Code § 35-42-1-1(3)(A).

A. The Recent Addition of Crime of Dealing in a Controlled Substance Resulting in Death Precludes Application of Felony Murder Statute to This Matter

The Legislature's recent creation of a new offense – Dealing in a Controlled Substance Resulting in Death – illustrates its intent that dealing resulting in an overdose is not to be punished as Felony Murder. "The legislature is presumed to have existing statutes in mind when it adopts a new law." Freeman v. State, 658 N.E.2d 68, 69 (Ind. 1995). "A fundamental rule of statutory construction is that an amendment changing a prior statute indicates a legislative

intention that the meaning of the statute has changed." State v. Boles, 810 N.E.2d 1016, 1019 (Ind. 2004) (quoting United Nat'l Ins. Co. v. DePrizio, 705 N.E.2d 455, 460 (Ind. 1999)). Added as Indiana Code § 35-42-1-1.5 and effective July 1, 2018, the following is an offense:

> (a) A person who knowingly or intentionally manufactures or delivers a controlled substance or controlled substance analog, in violation of:
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> (1) IC 35-48-4-1 (dealing in cocaine or a narcotic drug);
> (2) IC 35-48-4-1.1 (dealing in methamphetamine);
> (3) IC 35-48-4-1.2 (manufacturing methamphetamine); or
> (4) IC 35-48-4-2 (dealing in a schedule I, II, or III controlled substance);
>
> that, when the controlled substance is used, injected, inhaled, absorbed, or ingested, results in the death of a human being who used the controlled substance, commits dealing in a controlled substance resulting in death, a Level 1 felony.
>
> (b) A person who knowingly or intentionally manufactures or delivers a controlled substance, in violation of IC 35-48-4-3, that, when the controlled substance is used, injected, inhaled, absorbed, or ingested, results in the death of a human being who used the controlled substance, commits dealing in a controlled substance resulting in death, a Level 2 felony.
>
> (c) A person who knowingly or intentionally manufactures or delivers a controlled substance, in violation of IC 35-48-4-4 or IC 35-48-4-10.5, that, when the controlled substance is used, injected, inhaled, absorbed, or ingested, results in the death of a human being who used the controlled substance, commits dealing in a controlled substance resulting in death, a Level 3 felony.
>
> (d) It is not a defense to an offense described in this section that the human being died:
>
> (1) after voluntarily using, injecting, inhaling, absorbing, or ingesting a controlled substance or controlled substance analog; or
> (2) as a result of using the controlled substance or controlled substance analog in combination with alcohol or another controlled substance or with any other compound, mixture, diluent, or substance.

I.C. § 35-42-1-1.5.

Because it is presumed that the legislature was aware of the felony murder statute, it is clear that the legislature did not intend for a dealer whose purchaser dies of an overdose to be charged with felony murder. If such conduct fell within the confines of the felony murder statute, Indiana Code § 35-42-1-1.5 would be redundant and unnecessary.

Moreover, the passage of Ind. Code 35-42-1-1.5 illustrates the uniqueness of Duncan v. State, 857 N.E.2d 955 (Ind. 2006), which is the only Indiana case upholding a conviction for felony murder based on an overdose death. In Duncan, Defendant, Angela Duncan, was home alone with her two (2) grandchildren. Id. at 956. She gave her two-year old grandson one of her prescribed methadone pills. Id. The child died the next day from methadone poisoning. Id. Duncan was charged with multiple charges including felony murder. Id. at 957. She was found guilty of felony murder, class C felony reckless homicide, dealing in a controlled substance and neglect. Id. Duncan appealed her conviction for felony murder.

Although the Indiana Supreme Court upheld the application of the felony murder statute, the Court recognized that the application of the felony murder statute to the facts presented was "unusual." Id. at 958. More pointedly, the Court stated that although the defendant's conduct in administering the methadone to her two year-old grandson satisfied the technical requirements of a dealing conviction, it "seem[ed] at the margins of the conduct targeted by the statute." Id. at 960.

Whereas the victim in Duncan was a two-year old who did not voluntarily elect or choose to ingest methadone, Ind. Code 35-42-1-1.5 contemplates overdose by adults, exercising their own free will. Subsection (d) clarifies that it is not a defense that a human being voluntarily used the controlled substance or used it in combination with alcohol or other drugs. Id. Ind. Code 35-42-1-1.5 was intended to apply to a situation that felony murder does not, i.e., an adult who dies after choosing to use drugs and not a child who was given drugs. Imposition of a felony murder charge on an adult who "administers" a controlled substance to a two year-old is far different from the typical drug transaction where both parties to the transaction have knowledge, choice and responsibility.

B. Logical Application of Indiana's Felony Murder Statute Precludes Felony Murder Charges Against a Drug Dealer as the Result of a Drug Overdose

Even before the passage of Indiana Code § 35-42-1-1.5, there was little notion that a drug dealer could be prosecuted for felony murder based on the overdose death of one of his or her customers. First, as noted above, Duncan is only one Indiana case upholding the application of the felony murder statute to an overdose situation, and that involved the overdose of a two year-old child. The Ripley County Prosecutor, in filing these charges, admitted that this case was his first for a felony murder charge based on an overdose.[4] He even suggested it might be the first in the State of Indiana. Given the opioid epidemic and the number of overdose deaths it has caused, it is difficult to not envision a current flurry of felony murder cases if it was well-accepted that a drug dealer could be charged with Felony Murder following a drug overdose.

To prevail on the pending charge, the State must show that Husband Walmsley killed another human being while committing or attempting to commit dealing a narcotic drug. Ind. Code 35-42-1-1(3)(A).[5] Although it is assumed that the legislature intends the plain and ordinary meaning of a word, this meaning "must be applied in conjunction with the basic principle that all statutes should be read where possible to give effect to the intent of the legislature.'" Hartman, 602 N.E.2d at 1013 (Ind. 1992). The courts must also strictly construe

[4] Following the filing of charges in this matter, the prosecutor held a press conference in which he explained "This is the first felony murder charge based on an overdose case in Ripley County and possibly the first in Indiana .... A lot of people will be watching to see how this case unfolds."
http://www.batesvilleheraldtribune.com/news/local_news/batesville-men-accused-of-murder/article_6e5f6a73-bddd-5b67-ba73-ff6dbedb61d6.html.

[5] Indiana Code 35-42-1-1 states that a "person who: (3) kills another human being while committing or attempting to commit:

(A) dealing in or manufacturing cocaine or a narcotic drug (IC 35-48-4-1);
(B) dealing in or manufacturing methamphetamine (IC 35-48-4-1.1);
(C) dealing in a schedule I, II, or III controlled substance (IC 35-48-4-2);
(D) dealing in a schedule IV controlled substance (IC 35-48-4-3); or
(E) dealing in a schedule V controlled substance . . .commits murder, a felony."

penal statutes against the State to avoid enlarging them beyond the fair meaning of the language used." Hyche, 934 N.E.2d at 1179.

The most obvious application of the Felony Murder statute is to that of the "drug deal gone wrong." It is not likely that the legislature intended for its application to include an overdose. This is illustrated by the plain language of the statute which states that it applies only to situations where a person is killed *during* the commission of dealing not as the result of it. One can envision the circumstances the legislature had in mind – like that presented in Hyche, *supra* -- and had the legislature intended for the statute to include conduct where the drugs themselves caused the death, it would have been drafted to reflect that intent.

The Felony Murder statute punishes the killing of another if the killing occurs during various criminal activities with which violence can be associated. Most of the criminal activities identified in the statute are violent crimes to the person such as robbery and rape, however, these crimes themselves are not inherently likely to cause death. A person only dies during the commission of one of these offenses if there is additional violence. Burglary, one of the enumerated offenses, does not necessarily lead to harm, injury or death. Burglary can occur when no one is home and thus, no one can be harmed. Yet, the legislature saw fit to include it among the felonies eligible for Felony Murder treatment because of the *possibility* someone could be home and someone could be seriously harmed during the course of a burglary.

Similarly, like burglary, drug dealing in and of itself is not an inherently violent crime. Its inclusion in the felony murder statute is likely the legislature's recognition that someone could be killed *during* the drug dealing transaction. This illustrates the unlikelihood that the legislature contemplated the application of felony murder to overdose situations because the statute includes dealing in mild, less addictive, less dangerous controlled substances such as

Schedule V controlled substances. Inclusion of these lower level drug dealing offenses indicates the concern was not the potential overdose death of a user; rarely does an individual overdose on a Schedule V controlled substance. Rather, the concern of the legislature in identifying dealing felonies to include in the Felony Murder statute was that a drug transaction, no matter how mild or lethal the drug, has the potential to result in violence and thus, death. If the legislature intended its felony murder statute to be applied to an overdose situation, it would have only included crimes of dealing involving only those drugs most likely to cause an overdose situation, i.e. heroin.

In addition, Duncan*, supra,* cannot be viewed as authority for the proposition that the felony murder statute can be applied to an overdose situation. Duncan was decided in 2006. If Duncan was intended to give the green light to felony murder charges for drug dealers, Ripley County would not be the first to have filed such a case in 2018. Although, Indiana is squarely in the opioid crisis, drug overdose deaths are not a new phenomenon. Drug overdose deaths pre-exist the current crisis. If anyone accepted that *Duncan* sanctioned felony murder charges against the drug dealer who delivered the deadly product, it is difficult to believe no prosecutor would have acted before now.

The purpose behind the felony murder statute was not to punish the risk of death from drugs but rather the risk of violence associated with dealing drugs. To construe the statute more broadly is to expand its meaning.

CONCLUSION

As a matter of law, Husband did not deal heroin to his wife, Wife. Even if Husband's conduct could be considered dealing, the facts as presented by the State do not constitute felony murder. Based on the foregoing, the Information should be dismissed.

Respectfully submitted,