

OPENING STATEMENT

Pennsylvania House Republican Policy Committee

Hearing on Felony Murder Sentencing Following *Commonwealth v. Lee*

Lancaster, Pennsylvania, September 17, 2026

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Chairman Rowe and members of the Committee, thank you for having me. I am F. Lee Francis, Assistant Professor of Law at Widener University Commonwealth Law School, where I teach Constitutional Law.

At the outset, there is one important point I would like to stress to the committee. The Court's decision in *Commonwealth v. Lee* does not abolish serious punishment for felony murder, and it does not transfer your sentencing power to judges. It requires one thing: that a defendant's individual culpability be considered before the harshest sentence is imposed. You can satisfy that command, and keep both severity and uniformity, with a structured statute. You do not have to build it from scratch.

The majority struck the mandatory sentence, but it replaced it only with an instruction to weigh individual culpability. Justice Brobson, who agreed the mandatory scheme is unconstitutional, warned that this standard, standing alone, is too vague. The same conduct will draw different sentences in different counties. Closing that gap is within the authority of the legislature.

You have already built this framework in another statute: Section 1102.1(d) of the Crimes Code, which this body enacted after *Miller v. Alabama* for juvenile murder sentencing. It lists the factors a court must weigh, and it requires findings on the record before life without parole may be imposed. That structure could be replicated for felony murder. There are a number of factors the legislature could consider, including: whether the defendant was armed, whether he used violence against the victim, whether he could have prevented the killing and did not, whether he threatened anyone, and whether he was present when death occurred. Reserve the

most severe sentences for major participants who acted with reckless indifference to human life, and set a mandatory floor for that tier. That is where Senate Bill 1400's thirty-five-year floor fits.

However, there are two things you should decide expressly, rather than leave to the courts. First, retroactivity. The Court declined to reach it, so the roughly one thousand people already serving these sentences are your responsibility, not the judiciary's. The second is the transition rule for the small group of offenses committed after the Court's stay lapsed but before your new law takes effect. These cases are different from the rest, and it is worth being precise about why. For someone who committed the crime before Lee, the sentence on the books was mandatory life without parole, so a 35-year floor is plainly lighter and raises no concern. But for someone who acted during that gap, the mandatory sentence had already been struck down, and the only law in force was the interim remedy the Court itself created: a life maximum, a minimum set by the judge, and eligibility for parole, with no mandatory floor. Because that interim sentence carried no floor, a new 35-year floor could, for these few defendants, be harsher than the law that governed when they acted. That is the one situation in which applying your fix could raise a real ex post facto problem. The remedy is simple: write the effective-date provision so that, for offenses committed during the gap, the new scheme applies only to the extent it is no more onerous than the interim sentence the Court already put in place.

One practical point, and it bears on cost as much as on law. There is more than one constitutional way to cure this issue, and that not all of them require resentencing. That matters, because a full resentencing hearing for every one of the roughly one thousand people already serving these sentences is the most expensive path, and it is not the only one open to you. You might, for example, make the affected class

parole-eligible by statute and let the parole board perform the individualized review; you might set a presumptive minimum keyed to the culpability factors. For example, the top tier might presume the thirty-five-year floor for a defendant who killed or was a major participant acting with reckless indifference, and lower presumptive minimums descending from there for lesser roles, subject in every case to a judge's power to depart on the record. You might reclassify the least culpable participants and reserve hearings for the contested cases. For example, you might move anyone who was unarmed, not present at the killing, and a minor participant into a lower, parole-eligible category by operation of law, while holding an individual hearing only where the record leaves those facts genuinely in dispute. Each strikes a different balance between individual review and administrability, and balance is yours to strike. The room is there. The task is to use it deliberately, rather than back into the most burdensome remedy by silence.

Thank you again for having me and thank you for your work in this area. I welcome your questions.