IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. ERIC MICHAEL CLARK, Appellant.	1 CA-CR 03-0851 1 CA-CR 03-0985 (Consolidated) DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication - Rule 111, Rules of the Arizona Supreme Court) (Amended by Order filed 5-5-05)

Appeal from the Superior Court in Coconino County

Cause No. CR 2000-0538

The Honorable H. Jeffrey Coker, Judge

AFFIRMED

Phoenix

Terry Goddard, Attorney General
By Randall M. Howe, Chief Counsel,
Criminal Appeals Section
and Michael T. O'Toole, Assistant Attorney General
Attorneys for Appellee

Flagstaff

David Goldberg
Attorney for Appellant

S N O W, Judge

¶1 Eric Michael Clark, appeals from his conviction and sentence for first degree murder, a Class 1 felony. He argues: (1) that substantial evidence did not support his conviction for first degree murder; (2) that the court abused its discretion in finding that he had not proven, by clear and convincing evidence, that he

was insane at the time of the murder; (3) that Arizona Revised Statutes ("A.R.S.") section 13-502(A) (2000) violates the due process and equal protection clauses of the Arizona and United States Constitutions; and (4) that his sentence of life in prison without the possibility of parole for twenty-five years is disproportionate of the crime committed and therefore violates the Eighth Amendment interdiction against cruel and unusual punishment. For reasons set forth below, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 We view the facts in the light most favorable to sustaining the verdict and resolve all inferences against the appellant. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

¶3 In June 2000, a few weeks prior to the murder, Clark commented to some friends having a barbecue in a park in Flagstaff, Arizona, that he wanted to shoot police officers. One friend remembered him saying: "If I came up here with my .22 caliber hand pistol . . . and started firing off, when the police come, I will get them out of their cars and start -- I have rifles and I'll start shooting them in the head." That same friend recalled another instance a month or two before the shooting in which Clark made a comment that suggested that he was angry with police and "wanted to show them."

¶4 Sometime in the early morning of June 21, 2000, Clark went to his parents' house on University Heights Drive South and took the keys to his brother's green Toyota pickup truck. He then began driving around an adjacent neighborhood, blaring loud music from the radio and disturbing the residents. One resident estimated that Clark drove about twenty-two laps around the same block. He called the police to report it around the eighteenth lap.

¶5 Flagstaff Police Officer Jeffrey Moritz responded and located the pickup truck. It started "running from" him, and Moritz activated his emergency lights and made the stop. He informed dispatch that he was going to "be out with him," meaning the driver of the truck. Moments later Moritz radioed, "999[1], I've been hit. 999, I've been hit." Moritz then stumbled towards a nearby home, holding his chest and calling for help, until he collapsed on the ground. Clark abandoned the truck and took off on foot towards his house.

¶6 Residents heard two sets of gun shots: one a series of shots from Clark's .22 caliber handgun; the other, shots from Moritz's .40 caliber service weapon. One resident had also heard a strong voice give several commands to stay inside the vehicle shortly before hearing the shots.

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[1] This is the code for "officer needs assistance immediately."

¶7 Several officers converged on the scene based on Moritz's "999" call. Flagstaff Police Captain Brent Cooper, who lived nearby, also responded after he and his wife heard a police siren and gunfire. He was the first on the scene, arriving within "a couple of minutes" of hearing the gunshots. He found Moritz lying on the ground, twenty feet behind his police car, face up, with a small group of civilians around him. Moritz's service revolver was on the ground to the left of his body. When Cooper saw Moritz's face, he "was afraid he was gone then." All attempts to revive him proved futile.[2]

¶8 Moritz's police car was parked in the street a little behind the Toyota pickup truck. The police car's engine was still running and the overheard emergency lights were activated. The pickup truck's engine was off and its driver's side door was open.

¶9 Based on the truck's registration, police officers proceeded to Clark's parents' home on the adjacent block and set up a perimeter around the house. Clark was not found in the house, and his mother advised officers that he was "missing." At 9:00 p.m. on June 21, a Flagstaff police officer spotted Clark on a sidewalk on University Heights Drive, but Clark ran away with

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[2] The medical evidence at trial was that the blood supply to his brain would have been restricted as two of the four major vessels to the brain had been impaired by the trajectory of the bullet, which would have limited his ability to "mobilize and do much of anything physiologic" within two to four minutes of being shot.

several officers in pursuit. Police subsequently arrested Clark at gunpoint.

¶10 When he was arrested, Clark had gunshot residue on his hands. Police found the .22 caliber handgun Clark used to shoot Moritz in a yard in the vicinity of the shooting. The gun was inside a knit cap, and tests of the gun and the cap disclosed DNA that matched Clark's.

¶11 The state charged Clark with one count of first degree murder, for intentionally or knowingly killing a law enforcement officer who is in the line of duty. A.R.S. § 13-1105(3). The state did not seek the death penalty. On March 28, 2001, the trial court accepted the parties' stipulation that Clark was not competent to stand trial and committed Clark to the Arizona State Hospital for treatment. On May 8, 2003, the trial court found that Clark was competent to stand trial.[3]

¶12 Clark waived his right to a jury trial, and the matter was tried to the court. In addition to other theories, Clark's primary defense was that he was legally insane at time he shot Moritz.[4] At

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[3] The trial court specifically found that Clark was able to understand the nature of the charges, and that he could, "if he chooses, assist his attorney in his defense." The court further found that Clark's "status at this point in time is one of volition; in other words, he is choosing not to cooperate with his attorney at this time as opposed to being unable to."

[4] Defense counsel also argued that Clark was delusional and therefore did not know that Moritz was a police officer or that the shooting might have been the inadvertent result of a struggle over (continued...)

the conclusion of the trial, the trial court rejected Clark's insanity defense and found him guilty of the first degree murder of Officer Moritz.

¶13 On October 2, 2003, the trial court sentenced Clark to life in prison without the possibility of release on any basis until he had served a minimum of twenty-five calendar years. Clark timely appealed. He also filed a motion to vacate the judgment, which the trial court denied. Clark then timely filed a supplemental notice of appeal from the denial of the motion to vacate judgment. Both matters were consolidated on appeal.

¶14 This court has jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and A.R.S. §§ 12-120.21(A)(1) (1992), 13-4031 and 13-4033(A)(1) (2001).

DISCUSSION

(1) *Sufficiency of the Evidence*

¶15 Clark maintains that there was insufficient evidence to support his conviction for first degree murder of a police officer.[5] He rests this argument on his claim that the state presented only circumstantial evidence to show that he (1) intentionally or

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[4](...continued)
the weapon. He therefore asked the court to consider lesser included offenses of second degree murder and manslaughter.

[5] A.R.S. § 13-1105(A)(3) provides in relevant part that a person commits first degree murder if: "Intending or knowing that the person's conduct will cause death to a law enforcement officer, the person causes the death of a law enforcement officer who is in the line of duty."

knowingly caused a death and/or (2) that he intended or knew that he was killing a police officer. He therefore contends the trial court abused its discretion when it denied his motion for directed verdict.[6] We conclude that it did not.

¶16 We review the denial of a Rule 20 motion for an abuse of discretion. *State v. Sullivan*, 187 Ariz. 599, 603, 931 P.2d 1109, 1113 (App. 1996). In so doing, we view the evidence in the light most favorable to supporting the verdict. *Id.* (citations omitted). This court "will not reverse a trial court's determination on grounds of insufficient evidence unless there is a complete absence of probative facts or where the judgement is contrary to substantial evidence in the record." *State v. West*, 173 Ariz. 602, 610, 845 P.2d 1097, 1105 (App. 1992) (citation omitted).

¶17 When reviewing the sufficiency of the evidence, we make no distinction between the probative value of direct and circumstantial evidence. *State v. Bible*, 175 Ariz. 549, 560 n. 1, 858 P.2d 1152, 1163 n. 1 (1993). "Evidence is sufficient if there is more than a scintilla of proof for a reasonable mind to support the conclusion." *West*, 173 Ariz. at 610, 845 P.2d at 1105 (citing *State v. Goswick*, 142 Ariz. 582, 586, 691 P.2d 673, 677 (1984)).

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[6] Ariz. R. Evid. 20(a) provides in relevant part: "On motion of a defendant or on its own initiative, the court shall enter a judgment of acquittal of one or more offenses charged in an indictment, information or complaint after the evidence on either side is closed, if there is no substantial evidence to warrant a conviction."

"If reasonable [persons] may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered substantial." *State v. Jones*, 188 Ariz. 388, 394, 937 P.2d 310, 316 (1997) (quoting *State v. Tison*, 129 Ariz. 546, 553, 633 P.2d 355, 362 (1981)). The evidence at trial and reasonable inferences therefrom support the conclusion that Clark knowingly and intentionally shot Moritz and knew that he was a police officer when he did so.

¶18 The evidence at trial established that Clark was angry with police officers and fantasized about ways to retaliate or "show them," suggesting a motive for his actions. It also showed that, in driving the pickup truck with its radio blaring, Clark had engaged in behavior that would attract law enforcement to the neighborhood. Clark was playing a "rap CD" at the time that contained "many antisocial attitudes" and included lyrics expressing violent attitudes toward police officers.

¶19 Clark was armed with a .22 caliber handgun with which, according to medical evidence, he shot Moritz from a distance of "at least 2 to 2 and a half feet." The trial court was permitted to infer from Clark's use of the weapon that he intended or knew that he would kill Moritz. *State v. Herrera, Jr.*, 176 Ariz. 21, 30-31, 859 P.2d 131, 140-41 (1993). That inference is further supported by the fact that the bullet that killed Moritz entered his body at the back of his left armpit, which was consistent with Clark having

been "to [Moritz's] left and behind him" when he shot him. This permits the inference that Moritz was attempting to move away from Clark when he was shot.[7]

¶20 One witness testified that she first saw Moritz standing alone outside his vehicle and then saw him at the rear of his police vehicle and "almost immediate[ly]" heard "popping sounds" just before she saw him there. This would have been consistent with Moritz's having tried to take evasive action to avoid being shot. That same witness then saw Moritz go away from his police car, towards the spot where he ultimately collapsed, while a person that appeared to be a male, moving "at a real fast walk or a jog," went in the opposite direction, away from the green truck. Evidence of flight from or concealment of a crime usually constitutes an admission by conduct, and may permit the inference of a consciousness of guilt for the crime charged. *Bible*, 175 Ariz. at 592, 858 P.2d at 1195. All of this is sufficient evidence to support the inference that Clark intentionally or knowingly shot Moritz.[8]

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[7] In this regard, it is also noteworthy that Moritz shot with his left hand.

[8] Clark's theory at trial and on appeal is that Moritz and Clark may have been struggling over Clark's gun when it went off, however there is no evidence of this in the record. Clark bases this argument on the time that elapsed relevant to when Moritz got out of his car, when he was heard to command Clark to stay inside, and when the first gun shots were fired. However the radio transmission evidence shows that thirty seconds elapsed from the (continued...)

¶21 Furthermore, there is sufficient evidence to support the inference that Clark knew that Moritz was a police officer when he shot him. Moritz was in full uniform and driving a fully equipped patrol car at the time. Witnesses testified that the police car's siren was activated at the stop and the emergency lights engaged. Although, it was early morning, it was already getting light outside. The fact that Clark pulled over in response to the siren and lights also indicates that he realized he was being stopped by a police officer.

¶22 Based on this evidence, we cannot say that the trial court abused its discretion in denying Clark's Rule 20 motion. *Sullivan*, 187 Ariz. at 603, 931 P.2d at 1113.

(2) *Determination that Clark was Not Insane*

¶23 Clark also argues that the trial court abused its discretion when it determined that he did not prove, by clear and convincing evidence, that he was legally insane at the time he shot Moritz. Our review of the record shows that it did not.

¶24 Section 13-502(A) provides that "[a] person may be found guilty except insane if at the time of the commission of the criminal act the person was afflicted with a mental disease or defect of such severity that the person did not know the criminal

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[8](...continued)
time Moritz likely exited his car, after transmitting the license plate number, and radioed that he was "hit." Based on this evidence, Clark's theory that Moritz may have been recklessly shot during a struggle seems speculative at best.

act was wrong." Legal insanity is an affirmative defense that a defendant must prove by clear and convincing evidence. A.R.S. § 13-502(A), (C) (1996).

¶25 We review for abuse of discretion a trial court's finding that a defendant did not prove an insanity defense by clear and convincing evidence. *State v. Zmich*, 160 Ariz. 108, 111, 770 P.2d 776, 779 (1989). We view the evidence in the light most favorable to supporting the trial court's judgment and presume that the judgment is correct if there is any reasonable evidence in the record to sustain it. *State v. Veatch*, 132 Ariz. 394, 396, 646 P.2d 279, 281 (1982). Furthermore, we will not substitute our discretion for that exercised by the trial court. *Id.*

¶26 To prove an insanity defense, a defendant must establish, first, that he was suffering from a mental disease or defect and, second, that the mental disease or defect was of such severity that it rendered him unable to understand the wrongfulness of his conduct. A.R.S. § 13-502(A). Neither party disputed the fact that Clark was suffering from a mental disease, paranoid schizophrenia, at the time of the murder, and that he had suffered from it for quite some time.

¶27 The trial court agreed that Clark had proven that he was "afflicted with a mental disease or defect" at the time of the shooting, but found that he had failed to prove, by clear and convincing evidence, that this disease or defect prevented Clark

from knowing that shooting Moritz was wrong. In reaching its decision, the trial court specified that it had considered "the facts of the crime, the evaluations of the experts, the Defendant's actions and behavior both before and after the shooting and the observations of those that [sic] knew Eric." The trial court was justified in considering all of these factors and the evidence in the record supports its decision.

¶28 Clark's expert witness, Dr. Morenz, concluded that Clark's mental disease rendered him incapable of appreciating that his conduct was wrong. The State's expert, Dr. Moran, concluded that it did not. To the extent that the trial court may have accepted Dr. Moran's evaluation over Dr. Morenz's, it was entirely within the trial court's province to do so. As the trier of fact in this case, it was free to believe or disbelieve the testimony of either expert, *State v. Sanchez*, 117 Ariz. 369, 373, 573 P.2d 60, 64 (1977), and resolve any conflicts in the psychological testimony. *State v. Mauro*, 159 Ariz. 186, 206, 766 P.2d 59, 79 (1988).

¶29 In reaching its decision that Clark had not proven insanity, it also appears that the trial court gave significant consideration to Clark's own actions both before and after the shooting. For example, its judgment specifically noted Clark's actions in driving through residential neighborhoods with loud music "to attract law enforcement," as well as his behavior in evading capture before his arrest at gunpoint and in disposing of the murder

weapon afterwards. The mode of operation of the mind may be ascertainable from Clark's conduct; therefore Clark's conduct is admissible into evidence as it may indicate sanity or insanity or at least throw light one way or another on the issue. *See State v. Hurles*, 185 Ariz. 199, 205, 914 P.2d 1291, 1297 (1996) (quoting 2 Wigmore on Evidence § 228 (1979)). The trial court in this case correctly considered Clark's pre- and post-crime behavior in concluding that Clark had not proven insanity by a preponderance of the evidence.

¶30 "The rule is not what we would do if we were deciding the case, but whether or not we can say that the trial judge abused [his] discretion in reaching the conclusions [he] did." *Zmich*, 160 Ariz. at 111, 770 P.2d at 779 (citations omitted). Based on the evidence, we find no abuse of discretion in the trial court's determination that Clark did not prove by clear and convincing evidence that he was insane pursuant to A.R.S. § 13-502(A) at the time of the crime.

(3) *Constitutionality of A.R.S. § 13-502(A)*

¶31 At the beginning of the insanity phase of the trial, the trial court asked trial counsel to submit memoranda on the status of Arizona law regarding insanity so that it could "have a clear understanding of your relative positions" before the experts testified. In his memorandum, defense counsel argued that § 13-502(A) was unconstitutional because (1) it did not allow him to

present a "complete defense" under the *M'Naghten*[9] test for insanity to show that he could not appreciate the nature and quality of his acts; (2) it violated his due process by requiring him to prove insanity by clear and convincing evidence; and (3) it shifted the burden of proof to Clark on the specific element of intent.[10] The prosecutor's memorandum focused on our supreme court's decisions in *State v. Mott*, 187 Ariz. 536, 931 P.2d 1046 (1997), and *State v. Casey*, 205 Ariz. 359, 71 P.3d 351 (2003), and the fact that "diminished capacity" is not a recognized defense in Arizona. The trial court concluded that it was bound by *Mott*, but nonetheless permitted Clark to present evidence concerning his ability to form the necessary intent to commit the crime.

¶32 At the end of his case, Clark moved again for a directed verdict, relying on his previous Rule 20 arguments "but now in consideration of all the evidence that's been presented." The trial court denied the motion.

¶33 After trial, Clark moved to vacate his conviction, arguing that: (1) the insanity statute violated due process; (2) the court's

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[9] The *M'Naghten* two-prong test for legal insanity provided that a person was not responsible for his criminal conduct by reason of insanity if at the time of the criminal conduct (1) the person was suffering from such a mental disease or defect as not to know the nature and quality of the act, or (2) if such a person did not know that what he was doing was wrong. *See State v. Mott*, 187 Ariz. 536, 541, 931 P.2d 1046, 1051 (1997).

[10] Defense counsel's memorandum noted that because it was preserving these arguments for the record, it did not request the State to respond.

failure to consider whether, due to his illness, he was unable to form the necessary *mens rea* to commit the offense deprived him of his fundamental right to present a defense; and (3) requiring him to prove insanity by clear and convincing evidence violated his due process rights and his right to equal protection.

¶34 He renews these arguments on appeal. We find them to be without merit.

¶35 We review a challenge to a statute's constitutionality *de novo* as a matter of law. *Casey*, 205 Ariz. at 362, ¶ 8, 71 P.3d at 354. "Statutes are presumed constitutional and the burden of proof is on the opponent of a statute to show that it infringes upon a constitutional guarantee or violates a constitutional principle." *Id.* at ¶ 11 (quoting *State v. Wagstaff*, 164 Ariz. 485, 494, 794 P.2d 118, 127 (1990)).

(a) *Due Process Violation*

¶36 Clark argues that A.R.S. § 13-502(A) violates due process because it does not incorporate the first prong of the *M'Naghten* insanity test, which would also permit him to establish that his mental disease or defect was such that it precluded him from knowing "the nature and quality of the act" he committed.

¶37 First, while the due process clause affords an incompetent defendant the right not to be tried, there is no constitutional requirement that a state recognize an insanity defense. *Medina v. California*, 505 U.S. 437, 449 (1992) (citing *Powell v. Texas*, 392

U.S. 514, 536-37 (1968)). Second, consistent with the general rule that both crimes and defenses are matters of state law, the United State's Supreme Court has recognized that individual states are free to recognize and define the insanity defense as they see fit. *Patterson v. New York*, 432 U.S. 197, 201-02 (1977). Clark therefore fails to prove how eliminating the first prong of the *M'Naghten* test establishes a violation of due process under either the Arizona or United States Constitutions.[11]

¶38 Moreover, as the Supreme Court has noted, the *M'Naghten* test for insanity turns on the finding of "criminal irresponsibility" at the time of the criminal offense. *Foucha v. Louisiana*, 504 U.S. 71, 97-99 (1992). It is difficult to imagine that a defendant who did not appreciate the "nature and quality" of the act he committed would reasonably be able to perceive that the act was "wrong." Therefore, we do not find that the language would add significantly to the test available in the statute. *See also State v. Chavez*, 143 Ariz. 238, 239, 693 P.2d 893, 894 (1984) (holding that jury instruction that erroneously omitted the language of the first prong of the *M'Naghten* test was not error because if the jury believed defendant did not know the nature of his acts it could not have found that he did not know their probable results).

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[11] "The federal and state due process clauses contain nearly identical language and protect the same interests." *Casey*, 205 Ariz. at 362, ¶ 11, 71 P.3d at 354.

(b) *Equal Protection Violation*

¶39 Clark also contends that A.R.S. § 13-502(A) violates his equal protection rights by requiring him to prove insanity by "clear and convincing evidence" when other affirmative defenses may be proven by a "preponderance of the evidence." *See* A.R.S. § 13-205(A).[12] This argument fails as well.

¶40 "The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." *Romer v. Evans*, 517 U.S. 620, 631 (1996) (citations omitted). "[I]f a law neither burdens a fundamental right nor targets a suspect class," reviewing courts will uphold the legislative classification as long as it bears a "rational relation to some legitimate [state] end." *Id.*

¶41 As we note above, the statutory provision concerning the insanity defense does not burden a fundamental constitutional right. *Medina*, 505 U.S. at 452-53; *see also State v. Bethel*, 66 P.3d 840, 841-44, 851 (Kan. 2003) (affirmative defense is creature of 19th Century and not so ingrained in legal system as to constitute fundamental principle of law). Nor does Clark establish that

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[12] This section provides: "Except as otherwise provided by law, a defendant shall prove any affirmative defense raised by a preponderance of the evidence, including any justification defense under chapter 4 of this title."

defendants who propound an insanity defense are a suspect class. Therefore, Clark is not entitled to a strict scrutiny analysis.

¶42 Because insanity is an affirmative defense rather than an element of the crime, the Legislature may allocate to Clark the burden of proving it. *Cf.* State v. Farley, 199 Ariz. 542, 545, ¶ 14, 19 P.3d 1258, 1261 (App. 2001) (may allocate to defendant the burden of proving justification defense). The state has a rational interest in holding citizens responsible for their criminal conduct. Placing a higher burden on those who claim they are completely not responsible for their criminal conduct is a rational means of accomplishing that end. *See also State v. King*, 158 Ariz. 419, 421, 763 P.2d 239, 241 (1988) (rejecting due process and equal protection challenges to insanity statute).

(c) *Ability to Form Mens Rea*

¶43 Clark argues that the trial court erred in refusing to consider evidence of his mental disease or defect in determining whether he had the requisite *mens rea* to commit first-degree murder. However, the record shows that the trial court did not prevent Clark from presenting such evidence, despite our supreme court's decision to the contrary in *Mott*, even going so far as to permit him to make an offer of proof on the issue at the close of the evidence.[13]

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[13] The *mens rea* requirement for this crime was defined statutorily. A.R.S. § 13-1105(a)(3) ("A person commits first degree murder if . . . intending or knowing that the person's conduct will cause death to a law enforcement officer, the person (continued...)

¶44 Aside from the evidence offered to prove his insanity generally, Clark specified no evidence in his offer of proof that demonstrated he was not capable of knowing he was killing a police officer. Even assuming such evidence was sufficient, the trial court was bound by the supreme court's decision in *Mott*, which held that "Arizona does not allow evidence of a defendant's mental disorder short of insanity either as an affirmative defense or to negate the *mens rea* element of a crime."[14] 187 Ariz. at 541, 931 P.2d at 1051. Even assuming we agree with the dissent in *Mott*, we do not have the ability to disregard it as the controlling law in Arizona. *State v. Long*, 207 Ariz. 140, 145, ¶ 23, 83 P.3d 618, 623 (App. 2004) ("This court is bound by decisions of the Arizona Supreme Court and has no authority to overturn or refuse to follow its decisions.").

¶45 Clark acknowledges that we are without authority to overrule *Mott*, but nonetheless argues that it was wrongly decided and should be overruled.[15] *See State v. Foster*, 199 Ariz. 39, 41,

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[13](...continued)
causes the death of a law enforcement officer who is in the line of duty.").

[14] *State v. McKeon*, 201 Ariz. 571, 38 P.3d 1236 (App. 2002), on which Clark relies, dealt with the issue of involuntary intoxication from the *non*-abusive use of prescription medications. It also acknowledges that *Mott* still controls on the insanity defense. *Id.* at 575, ¶ 20 n.2, 38 P.3d at 1240 n.2.

[15] He raises the issue for the purpose of preserving it for further appellate review.

¶ 9 n.1, 13 P.3d 781, 783 n.1 (App. 2000). We do not consider those arguments.

(4) Sentence Violates Eighth Amendment

¶46 Finally, Clark maintains that his sentence to life without the possibility of release until he has served a minimum of twenty-five calendar years is disproportionate and violates the Eighth Amendment prohibition against cruel and unusual punishment. We find that it does not.

¶47 We review *de novo* whether a penalty is unconstitutionally disproportionate to the crime. *See, e.g., In re One Residence at 319 E. Fairgrounds Dr.*, 205 Ariz. 403, 409, ¶ 20, 71 P.3d 930, 936 (App. 2003) (reviewing proportionality of punitive forfeiture). The proportionality analysis of a sentence requires us to compare the "gravity of the offense, understood to include not only the injury caused, but also the defendant's culpability, with the harshness of the penalty." *State v. Davolt*, 207 Ariz. 191, 215, ¶ 102, 84 P.3d 456, 480 (2004) (citations and quotations omitted). The mandatory nature of a sentence does not render it disproportionate. *State v. Jonas*, 164 Ariz. 242, 249, 792 P.2d 705, 712 (1990).

¶48 The first step in a proportionality analysis is to determine if an inference of gross disproportionality between Clark's crime and his sentence can be drawn. *State v. Davis*, 206 Ariz. 377, 384, ¶ 35, 79 P.3d 64, 71 (2003). Even given Clark's mental condition, we find in this case that it cannot. A life

sentence with the possibility of release after 25 years is simply not disproportionate to the crime of first degree murder. *See, e.g., Ewing v. California*, 538 U.S. 11, 20-31 (2003) (twenty-five year sentence for stealing golf clubs under "three strikes law" not constitutionally disproportionate sentence).

CONCLUSION

¶49 For the foregoing reasons, we affirm Clark's conviction and sentence.

G. Murray Snow, Judge

CONCURRING:

Patricia K. Norris, Presiding Judge

Patrick Irvine, Judge