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Attention Deficit Hyperactivity Disorder (ADHD): A Childhood Diagnosis or a Criminal Defense?

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ATTENTION DEFICIT HYPERACTIVITY DISORDER (ADHD): A CHILDHOOD DIAGNOSIS OR A CRIMINAL'S DEFENSE?

BERTHA NELDA GARZA†

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† St. Mary's University School of Law, J.D. Candidate, May 2002. This comment is dedicated to all individuals within the criminal justice system suffering from ADHD in hopes of providing them a voice and helping others to recognize and acknowledge the effects of this disorder. I would like to thank my editors Norma Ortiz, Erica Benites, and Christopher Tod St. John for their guidance in drafting and editing my comment. In addition, I would especially like to thank my parents, Victor and Adela Garza, for their love and encouragement and instilling in me that one person can make a difference. Finally, I thank the ADHD students I worked with for allowing me the opportunity to learn through their daily struggles the difficulties of this disorder.

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A PORTRAIT OF A.D.D.

Who is this child crying within me?
Which door is she hiding behind?
Where do I search for the missing key?
What locked, hidden secrets will I find?
Is she laughing?
Is she crying?
Is she good or is she bad?
Will I find her happily playing;
Or not knowing why she is so sad?
I dig deep for memories.
Only vague feelings surface.
To what do these fleeting burning
Thoughts in my heart allude?
Is this the beginning of a journey to my inner soul;
Or just an excuse for an insecure, lonely mood?
What am I looking for?! I impatiently shout;
An understanding to this confusion and doubt?
When will this restlessness in my heart cease?
Someday I will find contentment and peace!
Lord, lead me! I pray, My soul cries out!¹

I. INTRODUCTION

First known to the scientific community in 1902, attention deficit hyper-activity disorder (ADHD), a physiological disorder, did not become a

1. Bev Price, *Hear My Cry – Journeys into A.D.D.* (identifying interactions between individuals who have ADHD or have a relationship with an individual who has either been diagnosed with ADHD or exhibits ADHD characteristics), at <http://www.bevkprice.com/> (last visited Nov. 2, 2001).

part of the public discourse until the late 1960s to 1970s.² Throughout its history, the disorder acquired different names.³ Prior to 1980, the disorder was called hyperactive child syndrome, hyperkinetic disorder of childhood, or minimal brain dysfunction.⁴ In 1980, the name changed to attention deficit disorder (ADD), and in 1987 it took its final name of attention deficit hyperactivity disorder (ADHD).⁵ Today, ADHD affects approximately twelve to thirteen percent of the nation's school children,⁶ three to five percent of children around the world,⁷ and is considered one of the most common psychiatric disorders among children.⁸

The historical names given to ADHD indicate it was once considered only a childhood disorder. This belief changed as more adults began to assert that ADHD led to problems within their workplace,⁹ their homes, and contributed to higher divorce rates.¹⁰ With minors, how-

2. See GABRIELLE WEISS & LILY TROKENBERG HECHTMAN, *HYPERACTIVE CHILDREN GROWN UP: EMPIRICAL FINDINGS AND THEORETICAL CONSIDERATIONS* 4-7 (1986); Susy Schultz, *Helping the Hyperactive: Expert Says Illness Is Still Misunderstood*, CHI. SUN-TIMES, Nov. 10, 1996, at 60 (describing an interview with Dr. Russel A. Barclay, who discusses the evolution of the disorder's name), available at 1996 WL 6772284.

3. See WEISS & HECHTMAN, *supra* note 2, at 4-7; Jeffrey Wishik, *Attention Deficit Hyperactivity Disorder and Criminal Responsibility: A Guide for Attorneys*, 43(2) MED. TRIAL TECH. Q. 83, 87-90 (1996). In 1902, George Still, a British pediatrician, was one of the first to observe ADHD and concluded that the children were "overly defiant, emotional, disinhibited and inattentive" due to injury or heredity. Wishik, *supra*, at 87. See also Schultz, *supra* note 2.

4. See WEISS & HECHTMAN, *supra* note 2, at 3-7; Schultz, *supra* note 2.

5. See WEISS & HECHTMAN, *supra* note 2, at 4-7; Schultz, *supra* note 2.

6. See *The Rise and Fall of ADD/ADHD: Hearing Before the House Educ. and the Workforce Comm. Subcomm. on Oversight and Investigations*, FED. NEWS SERV., Sept. 29, 2000 (statement of Fred A. Baughman Jr.), available at <http://web.lexis-nexis.com/congcomp/> (last visited Oct. 22, 2001).

7. See Jim Chandler, *Attention Deficit-Hyperactivity Disorder (ADHD)*, at <http://www.klis.com/chandler/pamphlet/adhd/adhdpamphlet.htm> (last modified Nov. 2, 2001). This pamphlet details the stages of ADHD, beginning with early elementary up to adulthood. See *id.* It also provides information about causes of ADHD, the diagnoses of ADHD or ADD, and prognosis of ADHD. See *id.* Medical interventions such as stimulants, and non-medical interventions such as behavior modifications and social skills interventions are also discussed. See *id.*

8. See *id.*

9. See Robert Herzog, *ADD: Attention Deficit Disorder or an Arbitrator's Disciplinary Dilemma*, 50 DISP. RESOL. J. 20, 22 (1998) (implying that although diagnosed with ADHD as a child, these children can grow up to be working adults with ADHD).

10. See Frances J. Lexcen & N. Dickon Reppucci, *Effects of Psychopathology on Adolescent Medical Decision-Making*, 5 U. CHI. L. SCH. ROUNDTABLE 63, 93 (1998); Lars Noah, *Pigeonholing Illness: Medical Diagnosis as a Legal Construct*, 50 HASTINGS L.J. 241, 280-81 (1999).

ever, the most troublesome manifestation of ADHD is juvenile delinquency.¹¹

In light of the recent recognition of ADHD's behavioral effects on individuals, criminal defendants have begun to assert ADHD as a defense using three different approaches: 1) a mitigating factor asserting mental nonresponsibility; 2) diminished capacity; and 3) the Fifth Amendment.¹² Yet, the criminal justice system is not receptive to an ADHD defense, and routinely dismisses the defense without evaluating expert testimony.

This comment addresses a crucial issue many judges are currently facing—whether or not to allow expert testimony, which is essential to an ADHD defense. Four areas of the intersection of ADHD and the law are examined to help resolve this issue. First, in the realm of education, ADHD children are afforded legal protection under the Individuals with Disabilities Education Act's (IDEA) definition of "other health impairments." This comment contends that the advancement in education law should be emulated within the penal system to prevent individuals from being punished for having a disorder that is causally connected to the crime they committed. Second, this comment suggests that if the defendant's mental state is at issue, a thorough analysis of the defendant's competence should be requested by either the defendant's attorney or the court. Third, this comment argues that in spite of an increase in the number of children and adults diagnosed with ADHD or exhibiting characteristics of ADHD, the criminal justice system does not provide guidance for judges with regard to handling ADHD cases. This lack of guidance has led to inconsistent treatment of ADHD defendants within the judicial system. Fourth, this comment advances that expert testimony with regard to a defendant's culpability should be admissible within the procedural limitations set forth by the court in *State v. Edmon*.¹³ Ultimately, this comment proposes that once the testimony of an expert witness is admissible, the court should then consider the defendant's disorder when determining punishment.

11. See Heather A. Foley et al., *The Relationship of Attention Deficit Hyperactivity Disorder and Conduct Disorder to Juvenile Delinquency: Legal Implications*, 24 BULL. AM. ACAD. PSYCHIATRY L. 333, 333 (1996). Foley states that approximately fifty-five percent of all known crimes are committed by juveniles. See *id.* In 1989, a study conducted of 1,056 delinquents reported that fifty-five percent of the individuals had either ADD or ADHD. See *id.* at 333-34.

12. See Wishik, *supra* note 3, at 85 (asserting that ADHD has been introduced as a mitigating factor and as both a mental nonresponsibility and diminished capacity defense); see also Foley et al., *supra* note 11, at 339.

13. 621 P.2d 1310, 1313-14 (Wash. Ct. App. 1981).

II. DIAGNOSIS OF ADHD

A. *Diagnostic and Statistical Manual of Mental Disorders Guidelines*

The *Diagnostic and Statistical Manual of Mental Disorders (DSM-IV)*¹⁴ guides mental health professionals through the process of diagnosing an individual with ADHD.¹⁵ According to the *DSM-IV*, the criteria for an ADHD diagnosis consists of evaluating three areas: inattention, impulsivity, and hyperactivity.¹⁶ There are three types of ADHD: (1) ADHD, Combined Type; (2) ADHD, Predominantly Inattentive Type; and (3) ADHD, Predominantly Hyperactive Impulsive Type.¹⁷

In classifying the type of hyperactivity disorder presented, the evaluator refers to the diagnostic criteria in the *DSM-IV*.¹⁸ The *DSM-IV* criteria for inattention requires that the individual meet at least six of the nine listed symptoms: lacks attention; makes careless mistakes; difficulty sustaining attention; seems not to listen; fails to complete tasks that require sustained mental effort; difficulty organizing tasks; evades sustained attention tasks; misplaces items; and forgets daily appointments.¹⁹ The *DSM-IV* criteria requires that six or more of the following symptoms be exhibited for hyperactivity-impulsivity: excessive running or climbing on things; difficulty sitting still; extreme fidgeting; difficulty playing or partaking in leisure activities; always “on the go” or acting as if “driven by a motor;” and talking excessively.²⁰ For adolescents and adults, hyperactivity is substituted for feelings of restlessness and helplessness while “engaging in quiet sedentary activity.”²¹ For adolescents, the symptoms for impulsivity are: frequently calling out answers in class; exhibiting impatience; and difficulty awaiting their turn in games or group situations.²²

14. AM. PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-IV)* (4th ed. 1994).

15. *See id.* The *DSM-IV* is a diagnostic tool used to assess psychiatric conditions. *See id.* Individuals are classified based on the characteristics they exhibit. *See id.* While the *DSM-IV* is a diagnostic manual followed by licensed professionals, counselors, therapists, psychologists, and other professionals in the mental health field, an emphasis should be included that these professionals are not licensed medical professionals and are therefore unable to prescribe medications.

16. *See id.* at 78-79 (defining the diagnostic features associated with ADHD).

17. *See id.* at 78.

18. *See id.* at 83-85.

19. *See id.* at 83-84.

20. *Id.* at 78-79, 84.

21. *Id.* at 79, 84.

22. *See id.* at 84.

B. *American Academy of Pediatrics Guidelines*

In May 2000, the American Academy of Pediatrics (AAP) issued guidelines for diagnosing ADHD.²³ According to Dr. James M. Perrin, an associate professor of pediatrics at Harvard Medical School, the guidelines came in response to many requests by the practicing community for the development of a more accurate and reliable method of diagnosis.²⁴ The new guidelines require doctors to routinely evaluate children ages six to twelve who exhibit signs associated with this disorder.²⁵ The guidelines also require the doctor's determination that the child display the symptoms in at least two settings, such as the home and school.²⁶ Finally, to establish a correct diagnosis, the guidelines require that the symptoms interfere with the individual's academic and social environment for at least six months.²⁷ Although implemented for a short period, these new guidelines, in conjunction with the *DSM-IV* guidelines, should assist physicians in properly diagnosing ADHD.²⁸

23. See *Behavioral Pediatrics Child and Family Therapy Before the House Education and Workforce Committee Subcommittee on Early Childhood, Youth, and Family, Would Tom Sawyer Have Been Prescribed Ritalin?*, FED. NEWS SERV., May 16, 2000 (Prepared Testimony of Lawrence H. Diller), available at <http://web.lexis-nexis.com/congcomp> (last visited Oct. 9, 2001) (on file with author); Jane E. Allen, *How Do You Know If It's Attention Deficit/Hyperactivity Disorder?*, L.A. TIMES, May 8, 2000, at S3, available at 2000 WL 2238687.

24. See Allen, *supra* note 23 (noting that "[t]hese guidelines were developed by a panel of medical and mental health experts with training in psychiatry, psychology, neurology, epidemiology, pediatrics, family practice and child development, along with educators"). These guidelines are stringent in order to deter doctors from over-diagnosing or under-diagnosing children with ADHD. See *id.*

25. See *id.* See generally Lexcen & Reppucci, *supra* note 10, at 93. Prior to the new guidelines, patients were not always carefully monitored. See Lexcen & Repucci, *supra*, at 94. A study conducted by Sherman and Hertzog concluded that large portions of one-month prescriptions for stimulants to treat ADHD were not renewed during a one-year period. See *id.* This research led to the inference that physicians were inconsistent in their approach for treating ADHD individuals. See *id.*

26. See Allen, *supra* note 23. Allen states:

Establishing a diagnosis for attention deficit/hyperactivity disorder requires that parents or other caregivers as well as teachers or school professionals provide direct evidence of the major symptoms, as well as the age at which they began, their duration and the degree to which the child's functioning is impaired.

Id.

27. See *id.* See also AM. PSYCHIATRIC ASS'N, *supra* note 14, at 83-85 (requiring that symptoms for ADHD be exhibited for a period of six months within two or more settings).

28. See Allen, *supra* note 23. In addition, the AAP will issue treatment guidelines that "will offer options such as behavioral management, making changes in the child's environment and medications." *Id.*

III. ADHD – THE CHILD

A. ADHD Among Children

ADHD is commonly discovered after a child begins attending school, usually at the age of seven, and only after the child has exhibited ADHD-related symptoms for at least a six-month period.²⁹ However, some individuals are not diagnosed until after they have exhibited the characteristics for many years.³⁰ Some longitudinal studies indicate that children who do not outgrow ADHD-related behavior may display symptoms into adulthood.³¹ ADHD has also been considered a disorder of inhibition defined as a child's inability to censor or inhibit behavior commonly under control by the child's peers.³² Although it manifests itself as an attention problem in young children, ADHD also develops into behavioral disinhibition among adolescents.³³

B. ADHD as a Disability Within the Individuals with Disabilities Education Act (IDEA)

In 1975, Congress enacted the Individuals with Disabilities Education Act (IDEA) in order to allow educators to accurately address the needs of a disabled child.³⁴ In *Honig v. Doe*,³⁵ the Supreme Court described

29. See Rex. R. Schultze, *Reading, Writing and Ritalin: The Responsibility of Public School Districts to Administer Medications to Students*, 32 CREIGHTON L. REV. 793, 795 (1999), quoting Victor W. Henderson, *Stimulant Drug Treatment of the Attention Deficit Disorder*, 65 S. CAL. L. REV. 397, 397-98 (1991) (stating that school districts with drug administration policies should consider medication within the student's individualized education plan); see also AM. PSYCHIATRIC ASS'N, *supra* note 14, at 78, 80-85 (detailing the criteria for ADHD).

30. See AM. PSYCHIATRIC ASS'N, *supra* note 14, at 78. The *DSM-IV* states that clear evidence of "interference with developmentally appropriate social, academic, or occupational functioning" must be shown for an appropriate diagnosis of ADHD. *Id.* Further, such symptoms must be present in the patient before the age of seven. See *id.*

31. See Deborah W. Denno, Comment, *Human Biology and Criminal Responsibility: Free Will or Free Ride?*, 137 U. PA. L. REV. 615, 644 (1988); Lexcen & Reppucci, *supra* note 10, at 93.

32. See William Halikias, *Understanding the Adolescent Offender: The Contributions of Psychology to Juvenile Justice*, 24 VT. B.J. & L. DIG. 22, 23 (1998) (listing ADHD among the recognized disabilities juvenile offenders possess).

33. See Allen, *supra* note 23. See also Halikias, *supra* note 32, at 23 (stating that adolescent delinquents with ADHD experience the disorder as behavioral disinhibition).

34. See 20 U.S.C. § 1400 (2000); Philip T.K. Daniel, *Discipline and the IDEA Reauthorization: The Need to Resolve Inconsistencies*, 142 ED. LAW REP. 591, 591 (2000). When Congress passed the IDEA in 1975, it was known as the Education for the Handicapped Act. Daniel, *supra*. It later took the name of Individuals with Disabilities Education Act in 1990. See *id.* Due to many inconsistencies, there is a preconceived notion that the new amendments to the IDEA will result in much litigation. See *id.* at 591.

35. 484 U.S. 305 (1988).

the IDEA as "a comprehensive system of procedural safeguards designed to ensure parental participation in decisions concerning the education of their disabled children and to provide administrative and judicial review of any decisions with which those parents disagree."³⁶ The IDEA, which emphasizes special education and the unique needs of children, was implemented to ensure that disabled children benefit from a free and appropriate education.³⁷

The IDEA does not specifically list ADD or ADHD as a disability.³⁸ However, its vague phrase "other health impairments," is interpreted to provide protection for children with ADHD.³⁹ The Code of Federal Regulations (CFR) defines "other health impairments" as:

[h]aving limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that - (i) [i]s due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder . . . ; and (ii) [a]dversely affects a child's educational performance.⁴⁰

Implicit within this definition is the notion that ADHD is a disability under the IDEA.⁴¹

The inclusion of ADHD under the IDEA as a protected disability is a crucial development in education because it strengthens the advocates' argument that obtaining an ADHD diagnosis allows students to benefit from IDEA services.⁴² Qualifying ADHD as a disability under the

36. Honig v. Doe, 484 U.S. 305, 308 (1988).

37. See 20 U.S.C. § 1400(d)(1)(A) (1994 & Supp. III 1997) (providing equal treatment for special education children by preparing "them for employment and independent living"); Bridget A. Flanagan & Chand J. Graff, *Federal Mandate To Educate Disabled Students Doesn't Cover Costs*, 47 FED. LAWYER 22, 23 (2000) (reiterating that the importance of the IDEA is to provide disabled children with the right to an equal public education). Children who were previously excluded from attending public school due to inaccessible buildings and because of stereotypes were now afforded an equal education. See Flanagan & Graff, *supra*, at 23. Approximately 6.2 million children from birth to 21-years of age benefited from this Act between 1997 and 1998. See *id.*

38. See ARTHUR L. ROBIN, ADHD IN ADOLESCENTS: DIAGNOSIS AND TREATMENT 153-56 (1998) (discussing the different legal means by which an ADHD child qualifies for services); see also Paolo G. Annino, *The New IDEA Regulations: The Next Step in Improving the Quality of Special Education*, 23 MENT. & PHYS. DIS. L. REP. 439, 439 (1999).

39. See 20 U.S.C. § 1401(3)(A)(i) (1994 & Supp. III 1997); Annino, *supra* note 38, at 439.

40. 34 C.F.R. § 300.7(a)(9) (1999).

41. See S. Res. 1824, 101st Cong. (1990) (enacted).

42. See SANDRA RIEF, THE ADD/ADHD CHECKLIST: AN EASY REFERENCE FOR PARENTS & TEACHERS 228 (1998). See generally Annino, *supra* note 38 (discussing the Department of Education's interpretation of the 1997 Amendments to the IDEA, which includes ADHD as an example of "other health impairments").

IDEA allows for the equal treatment and legal protection of children's rights.⁴³

Before an ADHD child can be disciplined within the educational system, the school district must first determine if the cause of the behavior is connected to the child's disability.⁴⁴ If it is determined that the child's disability is related to the child's behavior, then the student's individual education plan (IEP) and the IDEA requirements would pertain to any proposed change in the child's placement at school.⁴⁵ If the child's behavior is not found to be related to the disability, however, then the child is punished as a child without a disability.⁴⁶ The possibilities of unjust or unfair discipline for an ADHD child are alleviated by a prepared IEP, which provides notice of the child's disability and recommends punishment that coincides with the child's individual needs.⁴⁷

C. *Trouble Within Schools—Drugs or Disruption?*

An ADHD diagnosis carries a stigma.⁴⁸ Many labels are attached to an individual with ADHD throughout his or her life. The first label which usually attaches before a child is diagnosed stems from a teacher's

43. See RIEF, *supra* note 42, at 226-27, 230-31.

44. See Terry Jean Seligmann, *Not as Simple as ABC: Disciplining Children with Disabilities Under the 1997 IDEA Amendments*, 42 ARIZ. L. REV. 77, 88-89 (2000) (stating the child's disability should be considered when determining the proper punishment for a disabled child).

45. See 20 U.S.C. § 1415(k)(4)(C) (1994 & Supp. III 1997); 34 C.F.R. § 300.523(c) (1999). An IEP specifically provides the type of punishment or procedure that needs to be followed when a child is disciplined. See Flanagan & Graff, *supra* note 37, at 25. Flanagan and Graff state:

In 1975, Congress anticipated that IEPs would be only a few pages; however, the statutory requirements now necessitate a sophisticated multi-page document that must include, among other things: descriptions of how each pupil's disability affects his/her involvement and progress in the general curriculum; measurable annual goals and short-term objectives; the specific special education instructions; related services and supplementary aids to be provided to the pupil; program modifications for school personnel; the anticipated frequency, location and duration of the services; and objective criteria and evaluation procedures and schedules to determine whether the goals are being achieved.

Id.

46. See 20 U.S.C. § 1415(k)(5)(A) (1994 & Supp. III 1997); 34 C.F.R. § 300.524(a) (1999).

47. See RIEF, *supra* note 42, at 226-31 (defining the advantages of identifying and qualifying an ADHD child as disabled under IDEA and requiring the school district to provide an education in the "least restrictive environment").

48. See *Hearing Before the House Education and the Workforce Early Childhood, Youth and Family Children and Ritalin*, FED. NEWS SERV., May 16, 2000 (statement of Francisca Jorgensen, Special Educator Arlington County School System), available at <http://web.lexis-nexis.com/congcomp/> (last visited Oct. 22, 2001).

aversion to having a "hyperactive child" in her classroom.⁴⁹ After the child is diagnosed with ADHD, the "learning disabled" label attaches.⁵⁰ Eventually, an individual with self-esteem and self-concept difficulties may be labeled as a "loner."⁵¹ Ultimately, ADHD affects a child's self-esteem by creating feelings of vulnerability, inability, and inadequacy.⁵² Consequently, several studies show that "individuals with ADHD are as much as seven times more likely than others to develop an antisocial personality or drug abuse problem in adulthood."⁵³

In addition to emotional conflicts, the prescription of drugs for children with a physiological disorder is oftentimes at the root of the ADHD controversy.⁵⁴ The symptoms associated with ADHD are curbed through stimulants such as methylphenidate (Ritalin) or dextroamphetamine (Dexedrine).⁵⁵

Stimulant drugs, while temporarily diminishing the effects of ADHD, can lead to addiction.⁵⁶ In May 2000, a fourteen-year-old received five

49. See WEISS & HECHTMAN, *supra* note 2, at 52. An evaluation conducted by teachers rated children in questionnaires which tapped into "social maturity, academic performance, general attitudes and behavior and neuromuscular development. Children in the worst 20% were called hyperactive." *Id.* See also Schultze, *supra* note 29, at 795.

50. See Schultze, *supra* note 29, at 795 (acknowledging that by stereotyping children as learning disabled school personnel produce automatic reactions of special education services and medications).

51. See WEISS & HECHTMAN, *supra* note 2, at 43. A study "demonstrated that hyperactive children as young as 6 and 8 years could be shown to have lower self-esteem than a normal child." *Id.*

52. See ROBIN, *supra* note 38, at 51. In a 1995 study, sixty ADHD males and sixty non-ADHD males in a control group were observed up to age eighteen and again at age twenty-six. *See id.* "The ADHD individuals displayed lower self-esteem and psycho social adjustments by adolescence and lower educational development and occupational status in adulthood." *Id.* See also Richard Welke, Comment, *Litigation Involving Ritalin and the Hyperactive Child*, 1990 DET. COLL. L. REV. 125, 141 (1990).

53. Sam Goldstein, *Attention-Deficit/Hyperactivity Disorder Implications for the Criminal Justice System*, FBI L. ENFORCEMENT BULL., June 1997, at 3, available at 1997 WL 10516545; see also WEISS & HECHTMAN, *supra* note 2, at 85-87.

54. See ROBIN, *supra* note 38, at 225. But see STEVEN R. PLISZKA ET AL., ADHD WITH COMORBID DISORDERS: CLINICAL ASSESSMENT AND MANAGEMENT 42 (1999).

55. Henderson, *supra* note 29, at 406. The stimulant drugs "act to increase the effects of norepinephrine or dopamine released at the axon terminal, primarily by blocking the uptake of the neurotransmitter after it has been released." Chris Sinacola, *Critic of Ritalin Deplores Use of Labels and Drugs*, TELEGRAM & GAZETTE (Worcester, MA), Nov. 3, 1996, at A21. Ritalin, a prescription drug, was approved by the Food and Drug Administration in 1957. *See id.* It is a mild central nervous system stimulant, which is considered a controlled substance by the Drug Enforcement Administration. *See id.* Currently, two to four million children are diagnosed with ADHD, and between 750,000 to 1.6 million children take Ritalin. *Id.*

56. See *Ritalin - The Fourth R in Schools: Discussing the Use of Psychotropic Drugs for Youth: Hearing Before the House Education and the Workforce Committee Subcommittee*

years probation for the attempted sale of Ritalin to fellow students.⁵⁷ The teenager, along with fourteen boys from his school, was implicated in the illegal trading of Ritalin.⁵⁸ In his testimony, the student described Ritalin as a "poor man's cocaine."⁵⁹

Although the long-term side effects of stimulants on a child's developing brain are unknown,⁶⁰ many of the short-term effects are well documented.⁶¹ These consist of loss of appetite and weight, incoherent babbling, paranoia, lethargy, irritability, weakness, uncontrollable screaming, and hallucinations.⁶² Despite the criticism, clinical studies continually show that "[s]timulant drug therapy is one of the most popular and effective methods of treating a hyperactive child."⁶³

D. Residential Placement for Juveniles with ADHD Under the IDEA

A juvenile diagnosed with ADHD who receives services under the IDEA or Section 504 of the Rehabilitative Act may qualify for residential placement.⁶⁴ The purpose of a residential placement is to afford students

tee on Early Childhood, Youth and Families, FED. NEWS SERV., May 16, 2000 (statement of Terrance Woodworth Deputy Director Officer of Diversion Control Drug Enforcement Administration United States Department of Justice), available at <http://web.lexis-nexis.com/congcomp/> (last visited Nov. 16, 2001) [hereinafter *Ritalin – The Fourth R in Schools*].

57. See Rummana Hussain, *Boy Given Probation in Ritalin Theft Try*, CHI. TRIB., May 27, 2000, at 5, available at 2000 WL 3669503.

58. See *id.* See also *Ritalin – The Fourth R in Schools*, *supra* note 56. "From January 1990 to May 1995, methylphenidate ranked in the top ten most frequently reported controlled drugs stolen from registrants. From January 1996 to December 1997, about 700,000 dosage units of methylphenidate were reported to our drug theft database." *Ritalin – The Fourth R in Schools*, *supra* note 56.

59. Hussain, *supra* note 57, at 5; see also *Ritalin – The Fourth R in Schools*, *supra* note 56. Hussain notes that reports from numerous states and local municipalities indicate that "adolescents are giving and selling their methylphenidate medication to friends and classmates who are frequently crushing the tablets and snorting the powder like cocaine." *Id.*

60. See James C. O'Leary, Note, *An Analysis of the Legal Issues Surrounding the Forced Use of Ritalin: Protecting a Child's Right to "Just Say No,"* 27 NEW ENG. L. REV. 1173, 1175 (1993).

61. See WEISS & HECHTMAN, *supra* note 2, at 46-47; O'Leary, *supra* note 60, at 1175 n.17.

62. See WEISS & HECHTMAN, *supra* note 2, at 46-47; O'Leary, *supra* note 60, at 1174.

63. O'Leary, *supra* note 60, at 1175 n.17 quoting RUSSEL A. BARKLEY, HYPERACTIVE CHILD: A HANDBOOK FOR DIAGNOSIS AND TREATMENT 89 (1981); DOROTHEA M. ROSS & SHEILA A. ROSS, HYPERACTIVITY: CURRENT ISSUES, RESEARCH & THEORY 182 (1982); DANIEL J. SHAFER & RICHARD P. ALLEN, HYPERACTIVE CHILDREN: DIAGNOSIS MANAGEMENT 47 (1976); see also ROBIN, *supra* note 38, at 225-28, 234-41 (providing statistical data that the amount of methylphenidate prescribed to children does not appear excessive).

64. See 34 C.F.R. § 300.302 (1999). The CFR states: "if placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must

with disabilities a free and appropriate education that will allow the student to benefit educationally, while providing corrective measures for his conduct.⁶⁵ Rather than placing the offender in a juvenile detention center, where the possibilities for recidivism are greater, residential placement for juvenile offenders provides rehabilitative services for the offender.⁶⁶ In 1991, a study of 144 at-risk children "in a residential setting or at risk of imminent residential care" revealed that thirty-seven percent of the individuals had ADHD.⁶⁷ It is evident by this study that more and more juveniles with disabilities are involved with the judicial system and attorneys need to be well informed of special education laws.

IV. ADHD – THE FORGOTTEN CHILD

A. ADHD Among Adults

While ADHD was once considered a childhood disorder, it has become more prevalent among adults. In the last decade, more adults have been diagnosed with ADHD than any other disorder, even though doctors once assumed ADHD faded with maturity.⁶⁸ According to Russell Barkley, director of psychology and professor of psychiatry and neurology at the University of Massachusetts Medical School, "[a] lot of people were

be at no cost to the parents of the child. *Id.* See also Flanagan & Graff, *supra* note 37, at 26 (stating that regardless of the parent's financial ability, parents are not obligated to contribute financially to residential placement expenses).

65. See Ronald D. Wenkart, *Juvenile Offenders, Residential Placement and Special Education*, 144 W. EDUC. L. REP. 1, 2 (2000).

66. Compare *Capistrano Unified Sch. Dist. v. Wartenberg*, 59 F.3d 884 (9th Cir. 1995) (noting that although the plaintiff did not qualify for residential placement because a conduct disorder does not allow for it, if it is a covered learning disability, then the school district must provide a program for the child), with Wenkart, *supra* note 65 (stating that although the residential placement is an option for juvenile delinquents receiving special education services, this route should not be followed because it would deplete funds from the program and deviate from the purpose, which is not to cure a mental illness or rehabilitate a juvenile offender). The cost of funding these programs for school districts ranges from \$50,000-\$75,000 a year for each child. See Flanagan & Graff, *supra* note 37, at 26. However, according to O. Ivar Lovaas of the University of California at Los Angeles, significant improvements in children have been reported. See *id.*

67. Jack Tichenor, *Community Supervision of Juveniles*, 23 S. ILL. U. L.J. 347, 352 (1998).

68. Compare Kristen L. Aggeler, Comment, *Is ADHD a "Handy Excuse"? Remedying Judicial Bias Against ADHD*, 68 UMKC L. REV. 459, 463-64 (2000) (stating that the prescribed medications for ADHD have risen 500% in the last ten years and the disorder is now being diagnosed in adults), with Bruce M. Familant, *The Essential Functions of Being a Lawyer with a Non-Visible Disability: On the Wings of a Kiwi Bird*, 15 T.M. COOLEY L. REV. 517, 530-31 (1998) (stating that since there are no tests which conclusively determine if an individual has ADHD, an accurate diagnosis lies on an expert's experience).

trained that people outgrew ADHD. We now know that's not true."⁶⁹ He estimates that 15 to 20 percent of children may outgrow ADHD, but 65 to 75 percent will retain symptoms that could "impair them markedly as adults."⁷⁰ Barkley also estimates that between two and five million adults have ADHD.⁷¹

B. *Continual Drug Treatment for Adults*

Dr. Paul H. Wender recently conducted a study of inmates with ADHD and found that about twenty-four percent of male inmates have ADD/ADHD.⁷² Once the study was completed, a program was implemented to provide inmates with medication for ADHD and evaluate the results.⁷³ The researcher believed that "[i]f your ADHD is so disabling that you have found yourself living in a remote walled prison of over 1,000 men, then it is unlikely that you will progress toward rehabilitation without the aid of medication."⁷⁴ The study included a six-month to two-year program which involved providing parolees with a thirty-day supply of medication upon parole, participation in local support groups, and access to counselors and physicians knowledgeable about their condition.⁷⁵ At the end of the program, the recidivism rate for those individuals who completed the program was less than ten percent.⁷⁶ While this study was successful, it seems socially ineffective that these individuals had to be convicted of a crime for a study in prison to address their ADHD diagnosis and treatment.⁷⁷

It is important to note that not all individuals respond well to drug therapy, and those taking medications should be carefully monitored. Most recently in North Dakota, a twenty-six-year-old man, Ryan Ehls,

69. Carolyn Susman, *Knowing Symptoms Key to Controlling Attention Deficit Disorder in Adults*, PORTLAND OREGONIAN, Jan. 28, 2000, available at 2000 WL 5371887.

70. *Id.* See generally BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, IMPROVING THE NATION'S CRIMINAL JUSTICE SYSTEM: FINDINGS AND RESULTS FROM STATE AND LOCAL PROGRAM EVALUATIONS, available at <http://www.ncjrs.org/txtfiles/166822.txt> (last visited Sept. 16, 2001). The study found, among other things, that out of the 715 inmates randomly selected "[p]sychiatric diagnosis included 51 percent antisocial personality, 33 percent attention deficit disorder, and 17 percent depression/dysthymia." *Id.* at 9.

71. Susman, *supra* note 69.

72. T. Dwaine McCallon, M.D., *If He Outgrew It, What Is He Doing in My Prison?*, FOCUS (Nat'l Attention Deficit Disorder Ass'n, Highland Park, IL), Fall 1998 (stating that roughly 600,000 inmates currently exhibit characteristics of ADHD or have been diagnosed with ADHD), available at <http://www.add.org/Focus/prison.htm> (last visited Nov. 8, 2001).

73. See *id.*

74. *Id.*

75. See *id.*

76. See *id.* at 2.

77. See generally *id.* (discussing an ADHD study conducted on prisoners).

was acquitted of the murder of his five-week-old child.⁷⁸ Ehliis, who was diagnosed with ADHD as a child, was attending college and having difficulty with his studies.⁷⁹ In an attempt to help Ehliis, the doctor prescribed Adderall, a drug twice as potent as Ritalin.⁸⁰ Consequently, this drug induced Ehliis into a temporary psychosis which caused him to murder his daughter only ten days after taking Adderall.⁸¹ The case was dismissed after prosecutors and psychiatrists determined that Adderall was responsible for the tragedy.⁸² According to Ehliis' attorneys, Ehliis reported experiencing delusions and hallucinations after taking the drug,⁸³ and believed God was instructing him to send his baby to heaven.⁸⁴ The judge agreed with the prosecutor's and psychiatrist's recommendation for dismissal as long as Ehliis agreed to cease the use of any amphetamines.⁸⁵

The Ehliis case is not unique with regard to the connection between his ADHD and the murder of his child. It is, however, an example of those cases in which an inquiry into someone's potential for having ADHD is essential. It is necessary, therefore, that all criminal defendants be properly evaluated before trial in order to determine whether any mitigating circumstances apply.

V. PROTECTIONS FOR ADULTS AND CHILDREN DIAGNOSED WITH ADHD

A. *ADHD as a Disability Within the Americans with Disabilities Act and the Rehabilitation Act*

In contrast to the IDEA, which specifically addresses the educational needs of disabled students, the Americans with Disabilities Act (ADA)⁸⁶

78. See Sarah Boseley, *Family Sues Drug Firm over Baby Killing*, GUARDIAN, Sept. 23, 2000, available at 2000 WL 27021150. At the time of the interview, Ehliis had plans to sue the manufacturer of Adderall, a prescription drug used to curb the symptoms of ADHD. See *id.*

79. See *id.*

80. See *id.*

81. See *id.* While the doctor limited his prescription for a few days, thereafter Mr. Ehliis followed his doctor's orders and doubled the dosage causing his temporary psychosis. See *id.*

82. See *id.*

83. See *id.* According to the pleadings, Ehliis "felt 'wired,' his pupils were dilated and his eyes were hurt by the light." *Id.*

84. See *id.*

85. See *id.* According to the makers of Adderall, the profile for the drug is extremely good and only fourteen incidents of mild psychosis were reported out of ten million prescriptions. *Id.*

86. Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (1990 & Supp. 1994) [hereinafter Americans with Disabilities Act].

and Section 504 of the Rehabilitation Act (RA)⁸⁷ are designed to help individuals with disabilities in many areas of their daily life.⁸⁸ Title II of the ADA states: “[No] qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”⁸⁹ By ADA standards, a disability is defined as a “physical or mental impairment that substantially limits one or more of the major life activities of an individual.”⁹⁰ Although the definition includes the phrase “major life activities,” Congress has not determined what constitutes “major life activities,” thereby making interpretation of the statutory provision quite difficult.⁹¹

Individuals diagnosed with ADHD are also afforded protection under Section 504 of the Rehabilitation Act, which states:

No otherwise qualified individual with a disability. . . shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.⁹²

87. Rehabilitation Act of 1973, § 504 (codified as amended at 29 U.S.C. § 794 (1994)).

88. Aggeler, *supra* note 68, at 467.

89. Americans with Disabilities Act, 42 U.S.C. at § 12132 (1990 & Supp. 1994); *see generally* Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-467, H.R. Rep. No. 101-544, 1990 U.S.C.C.A.N. 1723, 1728 [hereinafter Education of the Handicapped Act Amendments]. The committee which helped design the amendments stated that its intent was:

to recognize the needs of persons with attention deficit disorder (ADD) by its addition to the list of handicapping conditions under the definition of “handicapped children” designated in the Education of the Handicapped Act. Under the definition, it has been placed within the category of other health impaired conditions

Education of the Handicapped Act Amendments, *supra*.

90. Americans with Disabilities Act, 42 U.S.C.A. § 12102(2)(A) (1990 & Supp. 1994); *see also* Familant, *supra* note 68, at 525-26 (elaborating on the definition of mental impairment and further concluding that an exhaustive list of the disorders is not provided).

91. *See* David W. Lannetti, *Extending Coverage Act of the Americans with Disabilities Act to Individuals with Attention Deficit-Hyperactivity Disorder: A Demonstration of Inadequate Legislative Guidance*, 35 TORT & INS. L.J. 155, 160, 173 (1999). Lannetti stated that “[d]espite the fact that ADHD is not a learning disability—and that the legislative history indicates that a conscious decision was made *not* to include ADHD as an ADA ‘disability’—several courts recently have held that ADHD constitutes such a disability.” *Id.* (emphasis in original).

92. Rehabilitation Act of 1973, § 504 (codified as amended at 29 U.S.C. § 794 (1994)); *see also* ROBIN, *supra* note 38, at 155 (exemplifying the various possible accommodations under a Section 504 plan).

Therefore, while ADHD individuals are provided for under federal disability acts,⁹³ these same individuals are ignored within the criminal judicial system.

VI. ADHD WITHIN THE CRIMINAL JUSTICE SYSTEM

A. *The Link Between ADHD and Criminal Activity*

One of the factors linking juveniles and crime is a learning disability, such as ADHD.⁹⁴ Even though ADHD children were once thought to outgrow ADHD, evidence strongly supports the inference that a substantial number of juveniles with disabilities, such as ADHD, are presently involved, or are at risk of being involved in the judicial system.⁹⁵ An attorney representing a client whose criminal actions were impulsive or violent should inquire into the client's childhood problems, because many adults are not aware that they have not outgrown ADHD, and some have never been diagnosed.⁹⁶ A 1989 study conducted in New York State compared the criminal history of 103 males diagnosed with ADHD to 100 males not diagnosed with ADHD.⁹⁷ The research concluded "that significantly higher percentages of individuals with ADHD had been arrested (39 percent vs. 20 percent), convicted of a crime (28:11), and incarcerated (9:1)."⁹⁸ Because case law is inconsistent in deciding cases with an ADHD defendant, it is uncertain how cases involving biological defenses should be decided.⁹⁹

93. See RIEF, *supra* note 42, at 226-35; Aggeler, *supra* note 68, at 460.

94. See WEISS & HECHTMAN, *supra* note 2, at 56-57; see also Welke, *supra* note 52, at 141. A 1982 study conducted in Los Angeles compared the socioeconomic status and criminal activity in 110 ADHD adolescent boys to 88 adolescent boys who were not diagnosed with ADHD. See WEISS & HECHTMAN, *supra* note 2, at 56-57. The findings consisted of "[t]he percentage of hyperactive adolescents arrested at least once was 53% in the lower class, 36% in the middle class, and 52% in the upper class, compared to 11%, 9%, and 2% for the controls." *Id.* The offenses were classified as serious because minor offenses such as "running away, getting drunk, petty thefts, and possession of less than 1 ounce of marijuana were excluded." *Id.*

95. See Symposium, *Community Supervision of Juveniles*, 23 S. ILL. U. L.J. 347, 351-52 (1999).

96. See Wishik, *supra* note 3, at 90-91 (expressing that ADHD is not a new disorder, and attorneys should inquire into the child's medical history to uncover information that leads to an ADHD defense).

97. Goldstein, *supra* note 53, at 4. The researchers studied males ranging from ages sixteen to twenty-three years. See *id.*

98. *Id.*

99. See Wishik, *supra* note 3, at 106-07; Denno, *supra* note 31, at 642, 667 (stating "no case has established a firm standard for deciding when a particular mental state, short of insanity, constitutes a defense against allegedly criminal behavior").

B. *ADHD and the Suppression of Evidence—Fifth Amendment Implications*

Impulsiveness may be a factor during the commission of the offense and in the investigative stage of the crime for a defendant with ADHD. Thus, it is imperative that a defense attorney raise this defense and evaluate the different stages in which an ADHD defendant has not waived his rights. An ADHD defendant, unlike other defendants, is unable to control his actions and behaviors. If an ADHD individual does not fully comprehend his Fifth Amendment rights and Miranda warnings, then this defendant may unintentionally waive these rights when interrogated by police.¹⁰⁰ Because an ADHD defendant is unable to comprehend his rights, he should not be compelled to give self-incriminating statements. In *Miranda v. Arizona*,¹⁰¹ the Supreme Court ruled that if the Fifth Amendment privilege against compelled self-incrimination was violated, a confession would be inadmissible.¹⁰² For an admission to be valid, the individual must first be read his Miranda rights and there can only be a valid waiver of these rights during custodial interrogation.¹⁰³

Fifth Amendment protection is afforded to an accused during a custodial interrogation, at sentencing, and at a sentencing hearing.¹⁰⁴ In *United States v. Mitchell*,¹⁰⁵ the Supreme Court differentiated between a plea in open court and the privilege to waive the right to silence.¹⁰⁶ The

100. See U.S. CONST. amend. V. Amendment V states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence [sic] to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Id. See also *Miranda v. Arizona*, 384 U.S. 436 (1966).

101. 384 U.S. 436 (1966).

102. See *Miranda*, 384 U.S. at 479.

103. See *id.* at 437. *Miranda* extended Fifth Amendment protections to include: 1) the right to remain silent; 2) the right to speak to an attorney and have the attorney present during interrogation; and 3) if an arrestee cannot afford an attorney, an attorney will be appointed for him if he or she desires. *Id.* In summary, through the constitution and case law, an individual is afforded the protection of not testifying or answering questions related to the incident, which would incriminate the individual.

104. See *Mitchel v. United States*, 119 S. Ct. 1307 (1999) (holding that the privilege against self-incrimination is retained at sentencing, at a sentencing hearing, and at a custodial interrogation).

105. 119 S. Ct. 1307 (1999).

106. See *Mitchel*, 119 S. Ct. 1307; see also *Fifth Amendment-Privilege Against Self-Incrimination—Applicability at Sentencing Hearings*, 113 HARV. L. REV. 244, 247 (1999) (quoting *Rogers v. United States*, 340 U.S. 367, 373 (1951)).

Court held that an individual's Fifth Amendment privilege is not waived even though an individual pleads guilty to a crime.¹⁰⁷

If an ADHD foundation is not established, the court will not consider a Fifth Amendment defense of impulsiveness. In *Baletine v. State*,¹⁰⁸ the defendant was questioned by authorities regarding a sexual abuse incident.¹⁰⁹ During custodial interrogation, the authorities specifically stated to the defendant that there was a likelihood he would only receive treatment, that charges might not be filed by the parents, and that they were not interested in prosecuting the case because of the effect it would have on the seven-year-old.¹¹⁰ Although the defendant had initially maintained his innocence, upon further interrogation the defendant confessed to intentionally touching the child.¹¹¹ After the defendant's confession, the detective provided the defendant with the telephone number of a counselor, who later diagnosed the defendant with ADHD.¹¹² At the suppression hearing, the counselor testified that the defendant's behavior on the videotape was consistent with that of an individual with ADHD.¹¹³ The counselor asserted that due to the stressful situation, the defendant acted impulsively when he confessed.¹¹⁴ The state's psychiatric expert witness provided testimony that the defendant did not suffer from ADHD, and his confession was reliable.¹¹⁵ The Court of Appeals affirmed the trial court's decision that the defendant did not suffer from ADHD and found his statement to be voluntary.¹¹⁶ However, an inference can be drawn from the court's ruling that the court was receptive to evidence presented of an ADHD defense.

Courts evaluate the totality of the circumstances when determining if an ADHD suspect fully comprehends his Miranda warnings. In *Segerstrom v. State*,¹¹⁷ the Supreme Court of Arkansas upheld the conviction

107. See *Fifth Amendment-Privilege Against Self-Incrimination-Applicability at Sentencing Hearings*, *supra* note 106, at 245.

108. 730 So.2d 255 (Ala. Crim. App. 1998).

109. See *Baletine v. State*, 730 So.2d 255, 257 (Ala. Crim. App. 1998). A videotape confession of the defendant was admitted into evidence. See *id.* at 257. According to the defendant's expert witness, a licensed professional counselor, the defendant's behavior on the videotaped confession was consistent with that of someone who has ADHD. See *id.* at 258.

110. See *id.* at 257 (describing the many promises the police made to the defendant in order to obtain a confession).

111. See *id.* at 258.

112. See *id.*

113. See *id.*

114. See *id.*

115. See *id.* at 259.

116. See *id.*

117. 783 S.W.2d 847 (1990).

of a fifteen-year-old defendant who murdered a four-year-old child.¹¹⁸ The evidence indicated that the defendant knowingly waived his Miranda rights prior to confessing.¹¹⁹ Although he was fifteen years old, the defendant had the mental age of a six-year-old, and suffered from ADD and had a learning disability, which made it unlikely that he understood his Miranda warning.¹²⁰ Expert testimony asserted that an ADHD defendant might understand his Miranda warnings if they were repeated slowly with a pause after each right.¹²¹ If the defendant had been advised in this manner, the doctor concluded, he would have understood his rights.¹²² The testimony of police officers provided evidence that the officer slowly read each right, explained each right, and asked questions.¹²³ In addition, the state offered evidence that the defendant had been previously arrested.¹²⁴ Therefore, after reviewing the totality of the circumstances, the court upheld the conviction.¹²⁵

C. ADHD as a Defense—*Sua Sponte* Request for a Competency Hearing

If a defendant fails to request a hearing to determine competency, the court will not provide one *sua sponte*.¹²⁶ Even if a diminished capacity defense is implied, the court will not consider a defense that the defendant acted under extreme mental duress, unless the defendant can provide facts supporting this allegation.¹²⁷

118. See *Segerstrom v. State*, 783 S.W.2d 847, 848 (Ark. 1990).

119. See *id.* at 849.

120. See *id.* at 850.

121. See *id.*

122. See *id.*

123. See *id.*

124. See *id.*

125. See *id.* See also *People v. Kelly*, 800 P.2d 516, 527 (Cal. 1990). During the penalty phase of *Kelly*, the defense introduced evidence that the defendant suffered from learning disabilities, including ADD and impulsivity; therefore, his waiver of his Miranda rights was involuntary. See *id.* at 528. When reviewing if a statement is voluntary the court considers the totality of the facts and circumstances. See *id.* at 527. The court commented that although this evidence was not presented at the suppression hearing, such evidence, standing alone, does not establish that the waiver was involuntary. See *id.* at 528.

126. See *Idaho v. Wilhelm*, 15 P.3d 824, 828 (Idaho Ct. App. 2000) (arguing that the district court had been provided with evidence to doubt the defendant's competence, because the defendant was under psychiatric care for manic depression and ADD); see also BLACK'S LAW DICTIONARY 1437 (7th ed. 1999). *Sua sponte* is a Latin term meaning, "of his or its own will or motion." *Id.* It is also defined as "voluntarily and without prompting or suggesting." *Id.*

127. See *State v. Clemons*, 946 S.W.2d 206, 222 (Mo. 1997) (en banc).

In *Missouri v. Clemons*,¹²⁸ the defendant failed to show that his ADHD diagnosis would be an issue in his trial; thus, the Missouri Supreme Court affirmed the trial court's ruling and denied the defense.¹²⁹ The court also concluded that it would not provide funding for a mental health expert based on unsupported allegations.¹³⁰

D. ADHD as a Mental Nonresponsibility Defense

When reviewing a case of a defendant with ADHD, the court can exercise the option of rendering a mental nonresponsibility verdict. A mental nonresponsibility defense is an affirmative defense that "focuses on the defendant's culpability in relation to [a] mental disease or defect."¹³¹ According to 18 U.S.C. § 17(a),

It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.¹³²

Courts have concluded that failure to request or investigate a lack of mental capacity defense by an attorney is not only grounds for a new trial, but also "[falls] below the level of competence demanded of attor-

128. 946 S.W.2d 206 (Mo. 1997) (en banc).

129. See *Clemons*, 946 S.W.2d at 221.

130. See *id.* at 222 (citing *Ake v. Oklahoma*, 470 U.S. 68, 82-83 (1985)). The defense cited *Ake* to justify the claim that the defendant met the *Ake* standard for diminished capacity. *Ake*, 470 U.S. at 82-83. *Ake* states:

A defendant's mental condition is not necessarily at issue in every criminal proceeding. . . and it is unlikely that psychiatric assistance. . . would be of probable value in cases where it is not. The risk of error from denial of such assistance, as well as its probable value, is most predictably at its height when the defendant's mental condition is seriously in question. . . [W]hen a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist. . . .

Id. (emphasis omitted). The *Clemons* court stated that a learning disability defense or an ADHD defense without supporting evidence was insufficient to be considered a significant factor in determining the criminal culpability of a defendant with a mental condition. See *id.*

131. Wishik, *supra* note 3, at 116.

132. 18 U.S.C. § 17(a) (1988).

neys.”¹³³ In *Commonwealth v. Roberio*,¹³⁴ the defendant was convicted of first degree murder and armed robbery.¹³⁵ The defendant appealed on grounds that he received ineffective assistance of counsel.¹³⁶ He alleged that his attorney failed to pursue a defense based on lack of criminal responsibility after his parents informed the attorney that he had received mental treatment for ADHD and traumatic brain injuries.¹³⁷ The court also determined that defense counsel erred in failing to seek a psychiatric evaluation.¹³⁸ Although the appellate court ruled that a new trial was unwarranted because the psychologist lacked credibility, the Massachusetts Superior Court granted the defendant a new trial, concluding that the defendant received ineffective assistance as a result of his attorney’s failure to assert a lack of capacity defense.¹³⁹

E. *Downward Departures Under the United States Sentencing Guidelines*

In 1984, Congress created the United States Sentencing Commission to address concerns such as inconsistent sentencing of criminals in federal court, abuse by parole boards, and release of criminals after serving only one-third of their sentence.¹⁴⁰ The Commission promulgated federal sentencing guidelines that provided judges with a chart used to determine the number of years a criminal would serve by considering the nature of the offense and the criminal record of the accused.¹⁴¹ While all federal offenses fall within the sentencing guidelines, about thirty percent of states have incorporated a similar guideline sentencing system.¹⁴² Al-

133. *Commonwealth v. Roberio*, 700 N.E.2d 830, 831 (Mass. 1998); *see also, e.g.*, *Commonwealth v. Doucette*, 462 N.E.2d 1084, 1097 (Mass. 1984); *Commonwealth v. Saferian*, 315 N.E.2d 878, 883 (Mass. 1974) (concluding that if counsel believes or raises a reasonable doubt as to the defendant’s mental condition, counsel should introduce an insanity defense).

134. 700 N.E.2d. 830 (Mass. 1998).

135. *See Roberio*, 700 N.E.2d at 830.

136. *See id.* at 831.

137. *See id.* at 831-32 (acknowledging statements the parents disclosed to defense counsel, that prior to this crime and trial, the defendant obtained mental health treatment).

138. *See id.* Evidence provided by a clinical psychologist concluded that the defendant suffered from ADHD and other mental disorders. *See id.* at 832. The psychologist further testified that due to the disorder and the fact he was under the influence of alcohol when the homicide occurred, “he lacked the ability to conform his conduct to the requirements of the law.” *Id.*

139. *See id.* at 832.

140. Coalition for Federal Sentencing Reform, *History of the Guidelines*, at <http://www.sentencing.org/hist.html> (last visited Oct. 19, 2001).

141. *See id.*

142. *See id.*

though federal sentencing guidelines are stringent, the Commission has allowed for downward departures by reducing a criminal's sentence.

The United States Federal Sentencing Commission adopted a downward departure policy for two reasons.¹⁴³ It did so primarily because of the difficulty involved in prescribing a single set of guidelines that encompass the wide range of human behavior that could be potentially relevant in making a sentencing decision.¹⁴⁴ Under this assumption, the Commission monitors courts' departure from the sentencing guidelines and their stated reasons for this departure.¹⁴⁵ This procedure enables the Commission to identify situations that warrant downward departures.¹⁴⁶ Secondly, the Commission believes courts will rarely depart from the guidelines despite having the legal freedom to do so.¹⁴⁷ Federal courts frequently follow the sentencing guidelines, because they take into account factors that would significantly impact the pre-guidelines sentencing practice.¹⁴⁸ Although the sentencing guidelines were intended to assist courts in reducing confusion by providing downward departures, the confusion has increased because the guidelines do not specify how cases should be handled.¹⁴⁹ Therefore, it is imperative that the Federal Sentencing Commission specifically provide for individuals with ADHD in order to prevent inconsistent decisions by the courts.

Although federal judges have the discretion to reduce a defendant's sentence, they are reluctant to follow downward departures within the sentencing guidelines due to inconsistencies in interpretation.¹⁵⁰ Judges are more likely to follow well-established mitigating factors and circumstances specifically allowed under the sentencing guidelines. Further, the Tenth Circuit of the United States Court of Appeals has determined that ADHD is not the "kind of disorder that permits downward departures."¹⁵¹ In order to constitute a downward departure, the disorder would have to diminish the mental capacity of the defendant.¹⁵² Accord-

143. See U.S. SENTENCING GUIDELINES MANUAL § 1A, cmt. Background (1998).

144. *Id.*

145. See *id.*

146. See *id.*

147. See *id.*

148. See *id.*

149. See Shari L. Kaufman, *The Federal Sentencing Guidelines: A Formulaic and Impersonal Approach to Dispensing Justice*, 7 NEV. LAWYER 18, 19 (1999).

150. See *id.* at 19.

151. *United States v. Riley*, 103 F.3d 145 No. 95-6398, 1996 WL 709935, at *2 (10th Cir. Dec. 11, 1996). In this case, an adult was charged with conspiracy to manufacture and distribute Ephedrine and Methamphetamine (Ritalin) and appealed on several grounds including that the trial court did not take into account his diagnosis of ADHD when rendering his sentence. See *id.*

152. See *id.*

ing to the Tenth Circuit, ADHD does not constitute a diminished mental capacity.¹⁵³

If a defense attorney qualifies a juvenile offender under the Federal Juvenile Delinquency Act, then the sentencing guidelines are not applicable.¹⁵⁴ In *United States v. A.R.*,¹⁵⁵ an eighteen-year-old juvenile defendant, diagnosed with ADHD, appealed a trial court's decision rendering him able to stand trial as an adult.¹⁵⁶ The Sixth Circuit evaluated five factors when determining how the case should be adjudicated: 1) age and social background; 2) criminal record; 3) intellectual development and psychological maturity; 4) past treatment efforts and response to such efforts; and 5) any behavioral intervention programs.¹⁵⁷ While the Court noted that past treatment efforts had failed, it found that not all enumerated factors needed to be met in order to sustain the trial court's verdict.¹⁵⁸

Once an individual with ADHD has been convicted of a crime, the judge may refer to 18 U.S.C. § 3553(b), which allows a judge to enforce punishment outside the guidelines if he finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."¹⁵⁹ The court considers the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission when determining whether a circumstance was properly factored into the sentencing.¹⁶⁰ Under 18 U.S.C. § 3553(e), the court is provided with the authority to impose a sentence below a statutory minimum:

153. See *id.* (affirming Riley's conviction by refusing to allow for downward departures due to ADHD); see also Maureen P. Coffey, Note, *The Genetic Defense: Excuse or Explanation?*, 35 WM. & MARY L. REV. 353, 380 (1993) (asserting that diminished mental capacity in delinquents is associated with learning disorders, such as attention deficit disorder). However, "studies indicate that many persistent delinquents suffer from neuropsychological deficits that may seriously impair their capacities for avoidance learning: deficits in ability to comprehend and recall cognitive dysfunctions, impaired vision, lack of ability to sustain levels of concentration and attention, or lack of normal lateralization and specialization in the cerebral hemispheres." Coffey, *supra*, at 380. Some "delinquents have also been shown to have lower IQs than non-delinquents, especially in verbal and reading performance and frequently exhibit disorders such as . . . attention deficit disorders . . ." *Id.*

154. See U.S. SENTENCING GUIDELINES MANUAL § 1B1.12, Policy Statement (1998).

155. 203 F.3d 955 (6th Cir. 2000).

156. See *United States v. A.R.*, 203 F.3d 955, 957-58 (6th Cir. 2000).

157. *Id.* at 960.

158. See *id.* at 961.

159. 18 U.S.C. § 3553(b) (1988).

160. See *id.*

Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.¹⁶¹

The policy reasons for departure are stated in section 5K2.0 of the U.S. Sentencing Guidelines (USSG).¹⁶² Even though this statute provides some guidance as to sentencing, it does not thoroughly analyze all possible exceptions in order to defer discretion to the courts. The judge retains the discretion to determine whether or not the sentence is inadequate or excessive due to unusual circumstances, even though the reasons for departure are analyzed.¹⁶³

F. *ADHD as a Mitigating Factor Due to Diminished Capacity*

Another defense for ADHD defendants is diminished capacity. There are two types of diminished capacity defenses.¹⁶⁴ One type is the partial or diminished responsibility defense, an affirmative defense requiring the defendant to provide evidence that he lacked the requisite intent to commit the crime due to a mental defect or disease.¹⁶⁵ Another type is the strict *mens rea* or mental state defense, which requires the defendant to produce evidence to negate an essential element of the case.¹⁶⁶ Under this approach, if the prosecutor is unable to prove the required intent due to contrary evidence, the defendant will be found not guilty.¹⁶⁷ U.S.S.G. section 5K2.13, allows for downward departure "if the defendant committed the offense while suffering from a significantly reduced mental capacity."¹⁶⁸

161. 18 U.S.C. § 3553(e) (1988).

162. See U.S. SENTENCING GUIDELINES MANUAL § 5K2.0, Grounds for Departure (policy statement) (1998).

163. See *id.*

164. See Wishik, *supra* note 3, at 115 (describing the manner in which ADHD can be used as a diminished capacity defense).

165. See *id.* In this type of diminished capacity defense, the defendant admits to committing the crime, but argues that the requisite intent was lacking.

166. See *id.*

167. See *id.*

168. U.S. SENTENCING GUIDELINES MANUAL § 5K2.13 (1998). Under U.S.S.G. § 5K2.13,

a sentence below the applicable guideline range may be warranted if the defendant committed the offense while suffering from a significantly reduced mental capacity. However, the court may not depart below the applicable guidelines range if: (1) the significantly reduced mental capacity was caused by the voluntary use of drugs or in-

In *United States v. Steele*,¹⁶⁹ the Eleventh Circuit considered downward departure due to mental capacity.¹⁷⁰ The Court explained that the Sentencing Commission strongly urged federal district courts to consider the defendant's mental capacity at the time the offense was committed.¹⁷¹ In spite of this decision, the trend in federal courts is to "affirm upward departures, reverse downward departures, and affirm the district court's decision not to depart downward."¹⁷²

One of the grounds for departure from the federal sentencing guidelines is if the individual provides the government with substantial assistance.¹⁷³ However, should the government rescind the agreement, the court will not depart downward based on an ADHD defense not raised during trial.¹⁷⁴ In *United States v. Lendt*,¹⁷⁵ the defendant was diagnosed with ADHD, but entered into a plea agreement which allowed the judge to render a sentence below the statutory minimum because the defendant provided substantial assistance.¹⁷⁶ However, the government rescinded this agreement because the outcome was not to its satisfaction and the defendant was sentenced within the sentencing guidelines.¹⁷⁷ Even though the trial court judge noted that the minimum sentencing was ap-

toxicants; (2) the facts and circumstances of the defendant's offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence; or (3) the defendant's criminal history indicates a need to incarcerate the defendant to protect the public. If a departure is warranted, the extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense.

Id. The guidelines further define "significantly reduced mental capacity" to mean "the defendant, although convicted, has a significant ability to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power of the reason; or (B) control behavior that the defendant knows is wrongful." *Id.*

169. 178 F.3d 1230 (11th Cir. 1999).

170. *See United States v. Steele*, 178 F.3d 1230 (11th Cir. 1999).

171. *See id.* at 1240.

172. James T. Skuthan & Rosemary T. Cakmis, *Federal Sentencing Guidelines*, 51 MERCER L. REV. 1189, 1236 (2000).

173. *See United States v. Lendt*, No. 93-3905, 1994 U.S. App. LEXIS 31343, at *2 (8th Cir. Nov. 10, 1994) (per curiam). Under section 5K1.1 of the United States Sentencing Guidelines, the Government may request a motion for a downward departure based on substantial assistance. *See id.* at *1. However, after the defendant presented his testimony, the government refused to make the motion for downward departure. *See id.* at *2.

174. *See id.*

175. No. 93-3905, 1994 U.S. App. LEXIS 31343 (8th Cir. Nov. 10, 1994).

176. *See Lendt*, 1994 U.S. App. LEXIS at *3-4. The defendant plead guilty to the charge of conspiracy to distribute and the charge of possession with intent to distribute LSD. *See id.* at *1. Further, his defense counsel did not pursue an ADHD defense. *See id.* at *3.

177. *See id.* at *3-4.

propriate, an ADHD defense will not be considered if the evidence is not presented during the trial.¹⁷⁸

An ADHD defendant is more likely to be granted a diminished capacity defense than a nonresponsibility defense.¹⁷⁹ In a diminished capacity defense, the court considers to what degree the person found guilty of a criminal act should be held responsible for that act.¹⁸⁰ The characteristics that an ADHD individual exhibits, such as inattentiveness, impulsiveness, and hyperactivity, lend themselves to a diminished capacity defense.¹⁸¹ If the act was sudden and unpremeditated, it negates the element of intent.¹⁸²

Even if courts allow evidence that the defendant has ADHD, the ultimate decision as to whether or not the disorder is causally linked to the crime rests with the trier of fact. In *United States v. Welch*,¹⁸³ an unemployed defendant was convicted of threatening to take the life or inflict bodily harm upon the President of the United States.¹⁸⁴ Welch's defense consisted of testimony by a board certified psychiatrist of Welch's ADD diagnosis.¹⁸⁵ The doctor concluded that although Welch possibly knew what he was saying, he was unable to fully understand the context of his words.¹⁸⁶ Welch was examined by another psychiatrist who confirmed the previous psychiatrist's diagnosis.¹⁸⁷ The doctor further stated that due to Welch's substance abuse and lack of medication, he was unable to form the specific intent for his crime.¹⁸⁸ Although the trial court allowed evidence of Welch's ADD to be considered by the trier of fact, the jury convicted him and the Court of Appeals affirmed his conviction.¹⁸⁹

Yet, if the issue of ADHD is uncontroverted, the court maintains its discretion to impose a sentence which does not factor in the defendant's

178. *See id.* at *2-4. The court went on to comment that this was an appropriate case to depart downward because Lendt was only eighteen-years-old when he made the plea agreement; he had been diagnosed with ADHD, he had no prior criminal conviction, and he started drinking heavily at age seventeen. *See id.* at *3. However, the appellate court was precluded from considering these claims because Lendt did not present them to the district court. *See id.*

179. *See Wishik, supra* note 3, at 117.

180. *See id.* at 116.

181. *See id.* at 117.

182. *See id.*

183. 745 F.2d 614 (10th Cir. 1984).

184. *See United States v. Welch*, 745 F.2d 614 (10th Cir. 1984); *see also Wishik, supra* note 3, at 119.

185. *See Welch*, 745 F.2d at 617; *see also Wishik, supra* note 3, at 119.

186. *See Welch*, 745 F.2d at 617; *see also Wishik, supra* note 3, at 119.

187. *See Welch*, 745 F.2d at 617; *see also Wishik, supra* note 3, at 119.

188. *See Welch*, 745 F.2d at 617; *see also Wishik, supra* note 3, at 119.

189. *See Welch*, 745 F.2d at 620; *see also Wishik, supra* note 3, at 119.

ADHD diagnosis. In *State v. Sommer*,¹⁹⁰ the defendant was convicted of aggravated battery.¹⁹¹ After sentencing, the defendant filed a motion to reconsider his sentence due to his diagnosis of adult attention deficit disorder.¹⁹² A psychologist testified that the defendant's crimes were related to his earlier diagnosis of having an attention deficit disorder and his conduct in refusing to be transported could be linked to the need for medication.¹⁹³ The trial judge denied the hearing and commented that, although it was uncontroverted that the defendant had adult attention deficit disorder, he was still a threat to society.¹⁹⁴ The appellate court affirmed the trial court's ruling, but stated that the importance of recognizing the symptoms of an attention deficit disorder in a defendant who has not been diagnosed should be reiterated in order to prevent a similar incident.¹⁹⁵ If it is believed that a defendant suffers from this disorder, then a pre-trial psychiatric or psychological assessment should be conducted.¹⁹⁶

VII. PROPOSAL – ADMISSIBILITY OF EXPERT WITNESS TESTIMONY BASED UPON THE *EDMON* TEST

A. *Expert Testimony*

One element evident in ADHD defenses is whether or not expert testimony substantiating the defense should be admitted. Expert testimony is crucial to establishing the foundation for an ADHD defense because it allows the trier of fact to assess diminished capacity. An evaluation for ADHD may be conducted by anyone possessing a medical degree, but more weight is given to an expert witness with a specialization in this disorder.¹⁹⁷ As stressed by petitioners in *Daubert v. Merrell Dow Pharmaceuticals*,¹⁹⁸ "recognition of a screening role for the judge that allows for the exclusion of 'invalid' evidence will sanction a stifling and

190. 878 P.2d 1007 (N.M. Ct. App. 1994).

191. See *State v. Sommer*, 878 P.2d 1007 (N.M. Ct. App. 1994). Initially, the defendant was convicted of aggravated battery and false imprisonment, but subsequently convicted as a habitual offender. See *id.*

192. See *id.* at 1008.

193. See *id.* The psychologist testified that Sommer's sentencing was greater than the amount of time needed to treat his ADHD. See *id.* The expert witness further testified that ADHD could have contributed to the defendant's refusal to be transported. See *id.*

194. See *id.* The defendant appealed on grounds that the trial judge's ruling was biased due to his failure to appear at the hearing. See *id.*

195. See *id.*

196. See Goldstein, *supra* note 53, at 5.

197. See Wishik, *supra* note 3, at 123.

198. 509 U.S. 579 (1993); see also FED. R. EVID. 702. Rule 702 of the Federal Rules of Evidence states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an

repressive scientific orthodoxy and will be inimical to the search for truth."¹⁹⁹

Because expert testimony for an ADHD defense is essential to establishing that the defendant has ADHD, and this disorder is causally connected to the crime, it is important to have a uniform test when determining the admissibility of expert testimony. The lack of uniformity in admitting ADHD expert testimony has resulted in inconsistent rulings by courts and unequal treatment for ADHD defendants. The test should be composed of criteria that evaluate the causal connection between ADHD and criminal activity, as well as the defendant's inability to form the requisite intent required for the crime.

B. *Applying State v. Edmon*

In *State v. Edmon*,²⁰⁰ the Washington Court of Appeals reviewed the trial court's denial of admitting psychiatric expert testimony relating to the defendant's diminished capacity when he shot his supervisor.²⁰¹ At the time of the incident, Edmon had a blood alcohol content of 0.13 percent and little sleep.²⁰² The psychiatric testimony presented at trial included evidence that the defendant also suffered from anxiety and depression, both "medically recognized mental disorders."²⁰³ Due to these circumstances, the psychiatrist concluded Edmon would most likely be unable to form the requisite intent for this crime.²⁰⁴

The *Edmon* Court, using a hybrid of court rulings, introduced and applied a nine-step foundational requirement for expert testimony in a diminished capacity defense.²⁰⁵ Prior to admitting expert testimony substantiating a diminished capacity defense, the *Edmon* court held that the following requirements must be satisfied by the proponent "to ensure

expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." FED. R. EVID. 702.

199. *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579, 596 (1993).

200. 621 P.2d 1310 (Wash. Ct. App. 1981).

201. *See State v. Edmon*, 621 P.2d 1310, 1312 (Wash. Ct. App. 1981).

202. *See id.* Edmon further stated that he did not recall the incident and rather than contest the shooting, he offered the psychiatric testimony as evidence supporting his defense. *See id.*

203. *Id.* Edmon presented evidence at trial in the form of a hypothetical situation. *See id.* "The hypothetical included the defendant's background, his mental disorders, the difficulties with his supervisors, and the other circumstances surrounding the shooting." *Id.*

204. *See id.*

205. *See id.* at 1313; *see also State v. Martin*, 538 P.2d 873 (Wash. Ct. App. 1975); *State v. Craig*, 514 P.2d 151 (Wash. Ct. App. 1973); *State v. Carter*, 490 P.2d 1346 (Wash. Ct. App. 1971); *State v. Moore*, 377 P.2d 456 (Wash. Ct. App. 1963).

the competency, materiality, and relevancy of the testimony.”²⁰⁶ First, defense counsel must establish that the defendant “lacked the ability to form the specific intent due to a mental disorder not amounting to insanity.”²⁰⁷ Second, the expert must be “qualified to testify on the subject.”²⁰⁸ Third, the expert must be able to examine and diagnose the defendant and be able to “testify to an opinion with reasonable medical certainty.”²⁰⁹ Fourth, the expert’s testimony must be based on “substantial supporting evidence in the record relating to the defendant and the case, or there must be an offer to prove such evidence. The supporting evidence must accurately reflect the record and cannot consist solely of uncertain estimates or speculation.”²¹⁰ The fifth factor requires that “[t]he cause of the inability to form a specific intent must be a mental disorder, not emotions like jealousy, fear, anger, and hatred.”²¹¹ The next factor for consideration is that “[t]he mental disorder must be causally connected to a lack of specific intent, not just reduced perception, overreaction or other irrelevant mental states.”²¹² The seventh factor necessitates that the defendant exhibit “[t]he inability to form a specific intent . . . at a time relevant to the offense.”²¹³ Next, “[t]he mental disorder must substantially reduce the probability that the defendant formed the alleged intent.”²¹⁴ Lastly, “[t]he lack of specific intent may not be inferred from evidence of the mental disorder, and it is insufficient to only give conclusory testimony that a mental disorder caused an inability to form specific intent. The opinion must contain an explanation of how the mental disorder had this effect.”²¹⁵ In applying these rules to the facts of the case at bar, the Washington Court of Appeals reversed on grounds

206. *State v. Spring*, No. 96-8-01926-9, 1998 WL 40061, at *12 (Wash. Ct. App., Feb. 2 1998).

207. *Edmon*, 621 P.2d at 1313; *see generally Martin*, 538 P.2d 873; *State v. Ferrick*, 506 P.2d 860 (Wash. Ct. App. 1973). Although this test applied to specific intent crimes only, it is now also applied to general intent crimes.

208. *Edmon*, 621 P.2d at 1313; *see generally Martin*, 538 P.2d 873.

209. *Edmon*, 621 P.2d at 1313; *see generally Martin*, 538 P.2d 873.

210. *Edmon*, 621 P.2d at 1313.

211. *Edmon*, 621 P.2d at 1313; *see generally State v. Upton*, 556 P.2d 239 (Wash. Ct. App. 1976); *State v. Moore*, 377 P.2d 456 (Wash. Ct. App. 1963); *State v. Cogswell*, 339 P.2d 465 (Wash. Ct. App. 1959).

212. *Edmon*, 621 P.2d at 1313; *see generally Martin*, 538 P.2d 873.

213. *Edmon*, 621 P.2d at 1313; *see generally State v. Craig*, 514 P.2d 151 (Wash. Ct. App. 1973).

214. *Edmon*, 621 P.2d at 1313; *see generally State v. White*, 374 P.2d 942 (Wash. Ct. App. 1962); *State v. Carter*, 490 P.2d 1346 (Wash. Ct. App. 1971).

215. *Edmon*, 621 P.2d at 1313-14; *see generally State v. Ferrick*, 506 P.2d 860 (Wash. Ct. App. 1973).

that the testimony had met the requirements of the nine-step test, and the exclusion of expert testimony denied the defendant a fair trial.²¹⁶

The nine-step foundational requirement has been applied in cases involving ADHD defendants. In *State of Washington v. D.J.P.*,²¹⁷ a thirteen-year-old (D.J.P.) was arrested and charged with intent to do bodily harm.²¹⁸ This incident resulted in burns over fifteen percent of the victim's body.²¹⁹ D.J.P.'s attorney introduced a diminished capacity defense.²²⁰ In support of this defense, the attorney presented evidence from a clinical child psychologist who testified that D.J.P. exhibited moderate signs of ADHD, which would not allow D.J.P. the ability to formulate intent.²²¹ To rebut this testimony, the state presented the testimony of a licensed psychologist.²²² Whenever expert testimony reasonably supports the defense and proves that a mental disorder, other than insanity, played a part in the defendant's ability to formulate the mental culpability for the crime charged, the expert's testimony should be admissible.²²³ The appellate court applied the *Edmon* test when determining whether the expert testimony of the clinical child psychologist should be admissible.²²⁴ The evidence was excluded due to lack of foundation, and D.J.P.

216. See *Edmon*, 621 P.2d at 1313-14. The Court found that offer of proof was sufficient to satisfy the requirements and prevented the defendant from forming the intent to injure. See *id.* at 1314.

217. No. 41459-3-I, 1999 LEXIS 128, at *1 (Wash. Ct. App. Jan. 25, 1999) (not designated for publication).

218. See *State v. D.J.P.*, No. 41459-3-I, 1999 LEXIS 128, at *1 (Wash. Ct. App. Jan. 25, 1999) (not designated for publication). Witnesses testified that D.J.P. and his friends made several attempts to burn the victim. See *id.* First, they flicked lighted matches at the victim's head. See *id.* Then, D.J.P. lit an entire book of matches and placed them under the victim's jacket. See *id.* Finally, they moved the lighted paper closer to the victim until it was directly under his coat. See *id.* They watched the nylon coat melt and ignite in a matter of 20 seconds. See *id.* Witnesses also claimed the boys were "jumping up and down, giggling." *Id.*

219. See *id.* at *2. The victim was hospitalized for about thirty-seven days, had two operations, and required a third operation. See *id.*

220. See *id.* at *3 (arguing that the defendant did not act intentionally, but recklessly because he "had no idea that the jacket would burst into flames as it did and severely burn [the victim]").

221. See *id.* at *2. Dr. Wood tested D.J.P. for four to five hours and also interviewed family members and reviewed D.J.P.'s records. See *id.* She concluded that his symptoms included "inability to sustain attention, being easily distracted, making mistakes, frequently losing things, having difficulty concentrating on school work." *Id.*

222. See *id.* at *3. The State's expert witness, a licensed psychologist, agreed with Dr. Wood's analysis that D.J.P. exhibited moderate signs of ADHD. See *id.*

223. See *id.*

224. See *id.* at *12 (describing the process of factors that need to be satisfied for expert testimony to be admitted).

was found guilty of first degree assault.²²⁵ The case is important because, even though the *Edmon* test was not met in this case, its application to an ADHD defense is a milestone in the development of a single test to determine the admissibility of expert testimony. On appeal, the conviction was upheld because the clinical child psychologist's testimony had not met the last criteria of explaining how D.J.P.'s disorder inhibited his ability to form the required intent.²²⁶ Accordingly, a clear explanation as to how the mental disorder and the ability to formulate intent are causally connected is essential to substantiate a different ruling.²²⁷

If ADHD can be proven to be a mitigating factor, a crime with the *mens rea* of intent or knowledge can be lessened to recklessness.²²⁸ In *State v. Spring*,²²⁹ the Washington Court of Appeals reversed and remanded a decision by a juvenile court, which had not considered the defendant's ADHD diagnosis and its effect on his ability to form intent.²³⁰ Spring was convicted of first degree arson after he set fire to his sister's bed over a dispute.²³¹ A clinical psychologist testified that the defendant suffered from ADHD and explained the causal connection between the diagnosis and his mental capacity.²³² The psychologist further testified that although Spring was capable of recognizing that he was lighting a match, the evidence was inconclusive that Spring knowingly caused the fire;²³³ thus, the defendant lacked the element of knowledge. After the appellate court determined that the expert testimony met the requirements of the *Edmon* test, it ruled the testimony admissible.²³⁴ Once the trial court admits the evidence, the burden to present evidence establish-

225. See *id.* at *11.

226. See *id.* at *10.

227. See *id.* at *3-4; *Criminal Responsibility*, 23 MENTAL & PHYSICAL DISABILITY L. REP. 184, 187 (1999).

228. See Goldstein, *supra* note 53, at 6.

229. No. 39795-8-I, 1998 LEXIS 147, at *24 (Wash. Ct. App. Div.1 Feb. 2, 1998).

230. See *State v. Spring*, No. 39795-8-I, 1998 LEXIS 147, at *24 (Wash. Ct. App. Div.1 Feb. 2, 1998).

231. See *id.* According to studies, those diagnosed with ADHD have a higher likelihood of antisocial behavior such as stealing and fire setting. See Foley et al., *supra* note 11, at 334.

232. See *Spring*, 1998 LEXIS at *10-13. The State of Washington applies the diminished capacity defense in a manner in which it is "essentially a rule of evidence, not an affirmative defense." *Id.* "Expert testimony supporting a diminished capacity defense is admissible whenever it logically and by reasonable inference tends to prove that a mental disorder, not amounting to insanity, impaired the defendant's ability to form the required level of mental culpability for the crime charged." *Id.*

233. See *id.* at *13.

234. See *id.* at *14-15.

ing that the defendant's criminal behavior is not an isolated incident rests on the defense.²³⁵

VIII. CONCLUSION

The inability to control one's actions, the lack of social inhibition, and the hyperactivity associated with ADHD should be factors assessed by an expert witness in determining the extent to which the disorder was causally connected to the crime. ADHD has been known to man for over a century and currently affects millions of adults. The affects of this disorder overlap from childhood into adulthood. Research indicates that not only does ADHD play a major role during childhood, but in adulthood the disorder also affects the person's workplace and personal life.

For quite some time, ADHD has been afforded federal protection through Acts such as: the IDEA, interpreting "other health impairments" to include ADHD children; the ADA, interpreting "major life activity" to include individuals with ADHD; and the Rehabilitation Act, specifying Section 504 as a protection afforded to individuals with ADHD.

Even though the federal disability Acts attempt to shield ADHD individuals from discrimination, such progress has not been made in the criminal justice system. Individuals with ADHD should be protected at each stage of their lives, especially when they are being accused of a crime. Thus, a thorough analysis of the defendant's mental competency is essential. Before this disorder can be recognized as a defense to criminal behavior, however, either the defendant or the court must be permitted to request a competency hearing to review data presented by an expert witness.

Although this proposal is only a small effort to remedy a problem that has existed for decades, for many individuals with ADHD who have found themselves in the confines of the criminal justice system, it is a significant step toward justice.

235. See Wishik, *supra* note 3, at 106.