LETTERS

Editor:

I would like to comment on Drs. Erickson and Ciccone's review (*J Am Acad Psychiatry Law* 32:452–4, 2004) of *Wiggins v. Smith,* 539 U.S. 510 (2003). While I felt that the review was generally excellent, I had a few thoughts that I would like to share.

First, Drs. Erickson and Ciccone write, "In *Wiggins,* the [Supreme] Court tacitly endorsed the need for comprehensive psychiatric evaluations of mentally ill offenders and the need for thorough investigation by counsel of mitigation evidence."

Wiggins v. Smith is a landmark case because it mandates the presentation of a mitigation evaluation and report by a "forensic social worker." Social workers are uniquely qualified for this work, given the discipline's focus on the individual's biopsychosocial background.

The Court was not tacit at all. It overtly recognized the forensic role of social workers in providing consultation in family, criminal, and immigration court cases for many decades. While psychologists and psychiatrists can provide expert testimony about mental illness, the social worker is called on to provide expert assistance in this area and also to inform the court about a wide range of matters that may serve to mitigate a defendant's case. Indeed, there are defendants who present with psychopathology, but the main mitigation questions concern nonpsychopathological issues. And there are defendants who present without psychopathology, yet have strong mitigation evidence, given their biopsychosocial history that the expert forensic social worker must present to the court.

Second, the reviewers state that the ruling pertains to "death penalty cases."

I am not convinced that the Court's ruling is limited to death penalty cases. After all, if the mitigation report had been submitted in a timely and correct manner, *Wiggins* may never have been sentenced to die. I submit that for several reasons mitigation reports should be included in all felony cases. First, the cost of housing a criminal in the penal system is very expensive, and it behooves the courts to invest in a forensic mitigation expert to illuminate all relevant facts about the individual so that the defendant can be directed toward a judgment that is balanced and targets the three goals of the penal system: rehabilitation, deterrence, and punishment. Second, while the rules of evidence disallow many facts about the defendant during trial, the mitigation report permits the trier of fact to consider the defendant through another lens, which serves to humanize the defendant; contextualize his behavior, thoughts, and emotions; and outline all the relevant mitigating evidence at hand.

Finally, many defendants appeal death sentences—a procedure that is very time consuming and expensive. The presentation of a mitigation report to the trial court may serve to direct the trial court to rule in such a manner as to provide the defendant with the satisfaction that all facts that he and his lawyer believe are relevant are presented, making a protracted fight through appeal procedures unnecessary or (legally) moot.

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Editor:

We welcome the opportunity to respond to Dr. Mark S. Silver's letter.

We do not agree with Dr. Silver's claim that the Court in the *Wiggins* case mandated reports by "forensic social workers." Nothing in the opinion of the Court stated that forensic reports must be completed in death penalty cases or that these reports must be completed by social workers. If the Court had decided to embark on such a stringent and novel standard, it would have stated so explicitly.

The Court, citing the American Bar Association's guidelines for representation in death penalty cases, stated that "investigations into mitigating evidence 'should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor'" (*Wiggins* at 524, internal citations omitted, emphasis in the original). The Court, noting that defense counsel "put on a half-hearted mit-

igation case" (*Wiggins* at 520), held that counsel's actions were defective under *Strickland v. Washington* (466 U.S. 688)—that is, ineffective assistance of counsel. Thus, the Court held that counsel has an obligation to investigate mitigating factors in death penalty cases, but it did not set forth a bright-line rule as to how these investigations should occur or who should perform them.

Furthermore, we find nothing in the Court's opinion that mandates a report from a social worker. Contrary to Dr. Silver's contention, psychiatrists and psychologists are also trained to gather, consider, and testify about a defendant's "biopsychosocial history." In fact, the biopsychosocial model was developed here at the University of Rochester by George Engel, himself a physician.[1]

In addition, we do not agree with Dr. Silver's contention that *Wiggins* applies to non-death penalty cases. In our view, if the Court had adopted such an expansive rule, it would have explicitly stated so, given the significant implications, logistically and financially, that such a sweeping precedent would entail for the criminal justice system.

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Reference

1. Engel G. The need for a new medical model: a challenge for biomedicine. Science 1977;196:129–36

Editor:

We would like to return to an exchange of ideas in the *Journal* in 2003 between Drs. Simon[1] and Welner[2] regarding the role of psychiatry's quantifying for the courts as clinical concepts the moralistic notions of depravity and evil. While we applaud Dr. Welner's efforts to measure empirically such concepts, which have long been the domain of philosophy and theology, and though such research may have some heuristic value, we argue that the final results should not be for clinical application in a courtroom.

We agree that respect for the full humanity of the individual compels psychiatry and psychology to inquire into an individual's state of mind at the time of his or her crime, to identify possible mitigating factors against a death penalty. However, we contend that no mental health professional should set out to present an opinion justifying or arguing for the imposition of a death penalty.

Beyond the established role of determining competency or identifying mitigating factors, Dr. Welner[2] invites psychiatry and psychology to an ever more challenging and dangerous role in assessing whether an individual crime is so depraved that the individual who committed it deserves execution. Dr. Welner justifies his position by asserting that "there's far more effort devoted to the question of who a person is or why that person did something rather than just look at what the person did."[3] He wants to simplify the court's struggle when it comes to capital punishment. Either a crime is depraved enough that the individual ought to be executed, or not. His Depravity Scale sets out to quantify the amount of depravity in a crime, to disregard the confusing information about who the person is who committed the crime, and to allow a jury to evaluate merely the criminal's appropriateness for a death penalty based solely on the crime's depravity score.

We most strongly disagree with Dr. Welner's plan to provide to courts—and in particular to juries—a scale of depravity presented with the force of science. The court would receive such a scale ostensibly as an empirically based and authoritative determination of evil and depravity, thereby allowing the jury to impose a death sentence with the erroneous reassurance that science has guided their decision.

Any research that intentionally provides support for an individual to be killed cannot be in the best interest of society and certainly must not come from a field devoted to improving the welfare of individuals. Pellegrino,[3] writing about the complicity of physicians with Hitler during World War II, argued:

> Clearly, protection of the integrity of medical ethics is important for all of society. If medicine becomes, as Nazi medicine did, the handmaiden of economics, politics, or any force other than one that promotes the *good of the patient* (emphasis added),