

**[J-50-2013][M.O. – Castille, C.J.]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**EASTERN DISTRICT**

COMMONWEALTH OF PENNSYLVANIA,	:	No. 662 CAP
	:	
Appellee	:	Appeal from the Order entered on
	:	6/21/12 in the Court of Common Pleas,
	:	Criminal Division of Lehigh County at
v.	:	No. CP-39-CR-0000058-1994
	:	
	:	
HARVEY MIGUEL ROBINSON,	:	
	:	
Appellant	:	SUBMITTED: May 30, 2013

**CONCURRING OPINION**

**MR. JUSTICE SAYLOR**

**DECIDED: December 27, 2013**

I join Parts I and V of the majority opinion and concur in the result relative to the balance.

With respect to Parts II and III, concerning Appellant’s claim that his penalty counsel performed a deficient mitigation investigation and was ineffective in the presentation of the evidence which he did uncover, I support the majority’s decision to credit the post-conviction court’s finding that Appellant failed to establish sufficient prejudice. I have difficulty, however, to the extent the majority attempts to rationalize penalty counsel’s handling of the mitigation case, including the presentation of life-history witnesses and the opinion testimony from Dr. Sadoff. See, e.g., Majority Opinion, slip op. at 33-35. As to the life-history aspect, the majority recognizes that the defense presentation was “paltry.” See id. at 35. For my part, moreover, I fail to see

that Dr. Sadoff's testimony added much "affirmatively helpful testimony" to the mix, id. at 33, or that the psychiatrist's testimony somehow converted a paltry case of life-history mitigation into a "full human picture of" Appellant, id. at 34. In point of fact, as I read the eight pages of transcript covering Dr. Sadoff's direct examination by penalty counsel, beyond reinforcing the Commonwealth's position that Appellant is a sociopath, the psychiatrist did little more than confirm the unremarkable propositions that substance abuse can affect conduct and that anti-social behavior can be learned. See N.T., Nov. 9, 1994, at 2575-83.

In other words, with or without Dr. Sadoff, the mitigation presentation was paltry, and, in such circumstances, I question the reasonableness of presenting this sort of expert testimony and thus requiring an explanation for the defense's own position that the defendant is a sociopath. See, e.g., Cummings v. Sec'y for Dep't of Corr., 588 F.3d 1331, 1368 (11th Cir. 2009) (observing that "a diagnosis of antisocial personality disorder ... is not mitigating but damaging"). On my review of this record, I see the absence of available strategic choices at the penalty stage as having more to do with the appointment, a month before trial, of a relatively new attorney with no experience in homicide cases as capital penalty counsel, See N.T., Dec. 17, 2010, at 21-22, 25, than with some inherent centrality to the defense mitigation case of the limited psychiatric testimony which counsel adduced.

Regarding Part IV, I support the majority's holding that the post-conviction process is not generally a forum for the innovation of new legal principles. Nevertheless, I am circumspect as to whether this approach should be absolute, particularly since we are now deferring to the post-conviction forum claims which traditionally were considered on direct appeal. See Commonwealth v. Grant, 572 Pa. 48, 813 A.2d 726 (2002).