

**[J-138-2002]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**EASTERN DISTRICT**

COMMONWEALTH OF PENNSYLVANIA,	:	No. 292 CAP
	:	
Appellee	:	Appeal from the judgment of sentence
	:	entered December 23, 1999 in the Court
v.	:	of Common Pleas, Philadelphia County,
	:	Criminal Division, at No. 9809-238 2/2.
	:	
	:	
KENNETH MILLER,	:	
	:	
Appellant	:	RE-SUBMITTED: June 19, 2002

**CONCURRING AND DISSENTING OPINION**

**MR. JUSTICE SAYLOR**

**DECIDED: September 5, 2002**

I join in the majority's reasoning and disposition of Appellant's claims, save for that involving whether trial counsel rendered ineffective assistance in failing to procure records, arrange a psychological evaluation, and present expert testimony in the penalty phase concerning Appellant's mental health. The majority resolves this issue by noting that counsel presented lay testimony respecting Appellant's mental health history and diagnosis through his mother and concludes that Appellant has not demonstrated how the absence of additional evidence in this regard caused him prejudice. In addition, the majority concludes that such evidence could have had a negative impact on the jury by portraying Appellant as a dangerous murderer who could kill again and, consequently, a reasonable strategic basis existed for counsel's omissions.

While this Court has stated that evidence of certain personality disorders, such as those characterized by sociopathic or impulsive behavior, may be unfavorably viewed by a jury as indicative of future dangerousness, see Commonwealth v. Howard, 553 Pa. 266, 277 n.5, 719 A.2d 233, 238-39 n.5 (1998) (collecting cases), the testimony in Appellant's case indicated that he suffered from an extreme mental impairment, namely, manic depression or bipolar disorder.<sup>1</sup> In my view, therefore, Appellant's mental health evidence is distinguishable from those cases relied upon by the majority. Moreover, expert assistance is often critical to the presentation of mental health mitigation evidence in a capital case. See generally Ake v. Oklahoma, 470 U.S. 68, 80-81, 105 S. Ct. 1087, 1095 (1985); Holland v. Horn, 150 F. Supp. 2d 706, 752 (E.D. Pa. 2001); Christy v. Horn, 28 F. Supp. 2d 307, 322 (W.D. Pa. 1998). In this case, therefore, rather than assuming that trial counsel may have had a strategic or tactical basis for presenting lay as opposed to expert testimony regarding Appellant's psychiatric history and condition, I would remand for an evidentiary hearing.

Mr. Chief Justice Zappala joins this concurring and dissenting opinion in part.

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<sup>1</sup> Notably, although Appellant has not submitted a post-conviction affidavit from a psychiatrist supporting this diagnosis, the fact of Appellant's institutional treatment is undisputed and the testimony of Appellant's mother contains indicia of the diagnosis. Were this case to be remanded for a hearing, presumably, Appellant would present expert testimony from a psychiatrist or other mental health professional. Certainly, the raising of this claim on direct appeal absent the presentation of expert testimony would be disturbing, as such omission is likely to be fatal to the effort to obtain relief and arguably may foreclose collateral review of the mitigating circumstances issue under the doctrine of previous litigation.