

Part Two: Borderline Personality Disorder Its Use in Mitigation

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On May 8, 2013, Jodi Arias was convicted of the first degree murder of her ex-boyfriend, Travis Alexander. Her defense team claimed that Ms. Arias' actions were in self-defense, following a history of domestic violence. Defense experts had diagnosed Ms. Arias with Post-Traumatic Stress Disorder and Battered Woman's Syndrome and, at trial, testified that these disorders explain her behavior. The prosecutor's expert diagnosed Ms. Arias with Borderline Personality Disorder (BPD) and opined that the killing had occurred as a result of the rage she experienced in reaction to her intense fear of being "abandoned." The jury found Ms. Arias guilty and she was ultimately sentenced to life in prison.

When preparing for the sentencing phase of a trial, a defense attorney is faced with several questions: Are there extenuating circumstances for their client's seemingly cold and calculated behavior? If so, how can he/she communicate this to the finder of fact (who has already convicted their client)? What are the mitigating factors that can be presented to counter the aggravating factors? How can he/she present information sufficiently in order to persuade the finder of fact to fully appreciate the unique factors that contributed to their convicted client's behavior?

In order to answer these questions, the authors are suggesting that even psychological disorders that may typically be utilized as aggravating factors may be presented by the defense in a manner that would provide insight into both the defendant and the violent behavior. In our experience, we have come to recognize a link between BPD and violent behavior within our professional careers. Several of our cases have had the following facts in common:

- prior to the offense, the defendant had expressed to others his/her desire to kill the victim;
- the offense, itself, occurred with little regard to the presence of witnesses and without any attempt to remove evidence of the commission of the offense;
- in the immediate aftermath of the offense, the defendant came into contact with the police, either by remaining at the scene or by initiating the contact; and
- the defendant gave an unquestionably voluntary statement that is detailed as to the motive, planning and commission of the offense (and in some cases, made the police aware of pre-offense documents and/or recordings).

It is more likely than not that the prosecution would rely upon the above factors in order to establish premeditation and/or intent and to utilize them as aggravators at sentencing. As counsel, you know that a conviction is all but inevitable. Consequently, the case will be about punishment. We maintain that, rather than challenging the prosecution's reliance upon the defendant's planning and calculation, counsel can accept the fact that there was premeditation. In so doing, it may be possible to separate the defendant from a class of "cold-blooded killers" by explaining the factors of BPD that may, given the right set of circumstances, have predisposed this individual to engage in a violent act.

This article will explore situations in which a diagnosis of BPD could be used as mitigation at a sentencing hearing or during the sentencing phase of a death penalty trial. In Part One of this series of articles, (Recognizing and Understanding Borderline Personality Disorder: A Primer for

Attorneys), two of the authors provided the reader with an introductory course in BPD. With that in mind, we will begin by providing a brief overview of the characteristic features of BPD. Next, we will examine the interface between BPD and violent behavior. Finally, we will discuss the utilization of a BPD diagnosis as mitigation.

Characteristic Features of Borderline Personality Disorder

When evaluating a client for a possible psychiatric disorder, mental health professionals are likely to consult the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5), which is the authoritative treatise for the diagnosis and classification of psychiatric disorders within the mental health field. Along with Histrionic, Narcissistic and Antisocial personality disorders, BPD is considered to be one of the "Cluster B" personality disorders listed in the DSM-5.¹ These disorders are often referred to as the "dramatic," "emotional," or "erratic" disorders.² These diagnoses have been characterized by dysfunctional emotional regulation, anger dyscontrol, high reactivity to stress, and an inability to control aggression.³

DSM-5 Criteria for BPD4

A pervasive pattern of instability of interpersonal relationships, self-image, and affects, and marked impulsivity beginning by early adulthood and present in a variety of contexts, as indicated by five (or more) of the following:

1. Frantic efforts to avoid real or imagined abandonment.
2. A pattern of unstable and intense interpersonal relationships characterized by alternating between extremes of idealization and devaluation.
3. Identity disturbance: markedly and persistently unstable self-image or sense of self.
4. Impulsivity in at least two areas that are potentially self-damaging (e.g., spending, sex, substance abuse, reckless driving, binge eating).

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5. Recurrent suicidal behavior, gestures, or threats, or self-mutilating behavior.
6. Affective instability due to a marked reactivity of mood (e.g., intense episodic dysphoria, irritability, or anxiety usually lasting a few hours and only rarely more than a few days).
7. Chronic feelings of emptiness.
8. Inappropriate, intense anger or difficulty controlling anger (e.g., frequent displays of temper, constant anger, recurrent physical fights).
9. Transient, stress-related paranoid ideation or severe dissociative symptoms.

The Connection Between BPD and Homicide

With the above characteristic features of BPD as a base, we can begin an exploration of the connection between BPD and the emotions that are engendered during a violent act. In general, a strong connection between BPD and violence is well documented in the literature.⁵ An examination of the diagnostic criteria of BPD, alone, reveals that an individual with BPD would likely experience unstable and intense interpersonal relationships, inappropriate and intense anger and stress-related paranoid ideation.⁶ In addition, such an individual would also be likely to have severe deficits in their ability to process and regulate their emotions.⁷ The combination of hostility and an inability to regulate emotions could certainly set the stage for an impulsive, if not, deadly violent act.

Historically, the idea that an individual could act out violently, even to the point of taking the life of another, without apparent provocation has

always fascinated society. Researchers have long sought an understanding of this phenomenon. One of the first was Frederick Wertham. In 1937, he applied his concept of a “catathymic crisis”⁸ in an effort to explain an individual’s murderous actions.⁹ Jealousy, fear, hate, anger/rage, rejection, depression/hopelessness and embarrassment are among the generally recognized emotions that motivate an assault or even a homicidal act.¹⁰ The extent to which BPD may serve to predispose an individual to a violent act is underscored by the work of Marsha Linehan.¹¹ Linehan’s research draws attention to the extent to which individuals with BPD experience severe dysregulation in multiple areas of their daily lives including their emotions, interpersonal relationships, behavior, cognition and the sense of self.¹² These findings suggest that the symptomatology of BPD would enhance the likelihood of someone with this diagnosis to act out violently.

As noted above, individuals with BPD are hypersensitive to rejection, can experience trust issues and have an intense fear of abandonment.¹³ Researchers have found that the cognitive and emotional dysfunction prevalent in BPD predisposes individuals to a delusional thought process which may serve to initiate an emotional crisis as the result of a perceived rejection, a threat to the ego, and/or a psychological insult.¹⁴ Since individuals with BPD have difficulty regulating their emotions, they will frantically attempt to relieve the psychic tension through such defense mechanisms as projection¹⁵ and splitting.^{16 17} Thus by projecting blame for the perceived insult and/or hurt onto the victim, the BPD individual attempts to return to his/her pre-crisis status.¹⁸ At this point, internal psychic/emotional tension builds causing the defendant to become even

more sensitive to any perceived threat to their psyche.¹⁹

Unfortunately, the individual feels little relief from the utilization of these defense mechanisms. As an individual with BPD experiences intensifying cognitive dysfunction (including paranoid ideation, delusions and dissociation) as a result of the intensifying internal crisis, the stage is set for irrationality, poor decision-making, impulsive actions and both self-destructive and violent behavior.²⁰ Very often, that individual is unable to recognize any means of relieving this tension other than suicide and/or murder. In spite of this, the individual typically experiences conflicting thoughts about whether or not to carry out this violent resolution.²¹

The pent-up tension is seemingly released when the violent act occurs. This ends the emotional crisis.²² While BPD individuals are often unable to reconcile/understand their impulsive behaviors, they feel a pervasive sense of calm after engaging in the violent behavior.²³

BPD as Mitigation

In general, a defendant with BPD is rarely amenable to a factual defense. Often, once the emotional tension has been alleviated (due to the offense), the defendant with BPD either chooses to remain at the scene of the crime and/or brings his/her actions to the attention of the police. The individual is also likely to leave physical evidence of their involvement, to have previously made threats and/or had physical altercations with the victim, or to confess immediately after the fact. Similarly, a defendant with BPD is rarely amenable to an affirmative state of mind defense. Although there may be a psychotic component to the emotional

crisis, it is most likely that the individual would have been legally sane at the time of the offense.²⁴ Historically, this violent behavior may have met the criteria for the "irresistible impulse" test in those jurisdictions that allowed that defense. Consequently, the attorney is left with little or no defense for trial.

During sentencing, it is the duty of the defense attorney to present compelling information to the finder of fact as to why their client should not receive the maximum penalty established under law. Central to most litigation schemes is the presentation of the defendant's personal historical information, including events that may have impacted his/her development as a child and, ultimately, his/her resultant adult personality. The presence of developmental trauma, medical, psychological and neurological disorders and experiences of abuse and victimization would be examples of this type of information. Although there is certainly variability among the developmental histories of individuals with BPD, the psychological literature is consistent in documenting certain core themes that are understood to be precursors to the development of BPD.²⁵ Insufficient parenting time, early parental loss, physical and/or sexual abuse are examples of such themes. In one study, BPD individuals were significantly more likely to report having a parent withdraw from them emotionally, treat them inconsistently, deny them their thoughts and feelings, place them in the role of a parent and/or fail to provide them with needed protection.²⁶ Common amongst these themes are the feelings that a young child likely develops in response to these traumatic circumstances, including a damaged sense of self, fear of abandonment, difficulties with trust and an inability to self-soothe.²⁷

We are suggesting that such information, if present, could be an essential component of any effort to provide effective mitigation for a client with BPD at sentencing. The challenge is to present the defendant's circumstances in a manner that allows the finder of fact to understand the overwhelming psychological pressure the BPD defendant was under at the time of the



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offense. Through character witnesses and expert testimony, the attorney will be in the position to bring to life the client’s often horrific developmental experiences as well as the extent to which the client may have suffered throughout his/her lifespan from the debilitating symptoms of BPD.

When applicable, an understanding of how BPD predisposed the defendant to developing the above-described emotional crisis would be essential for any fact finder. In order to accomplish this, a “roadmap” should be presented that lays out the process by which the defendant transitioned through the different stages of the emotional crisis and arrived at the point where he/she considered homicide to be the only available option. A clear and straightforward presentation of the differences between a “reasonable” person’s reaction to the emotional crisis and those of an individual with BPD needs to be established. The presentation must include evidence that the defendant’s behaviors were consistent with what someone with BPD would likely be experiencing during the emotional crisis (e.g., the defendant’s statements prior to the killing may be indicators of the emotional crisis and his/her statements thereafter may be consistent with the relief of pressure experienced once the killing occurs). The presentation should also address one of the unique attributes of the BPD defendant’s offense-related behavior: the failure to develop a post-killing plan. The irresistible “pressure” to commit the killing experienced by defendant during the emotional crisis would likely preclude consideration of anything that would follow the killing. Consistent with this is the defendant’s post-offense seeking out, and cooperating with, the authorities as the “pressure” would have subsided.

In a sense, the finder of fact should be presented with defendant-related information

consistent with what might be presented to the judge at a federal sentencing – evidence that the defendant was suffering from “significantly reduced mental capacity” at the time of the offense. A review of the discovery materials (specifically, witness statements) will likely contain evidence that would support the defendant’s need to relieve his/her psychic tension. Testimony addressing the manner and the degree to which BPD may have contributed to the commission of the offense will be a key component of the sentencing phase.

It is important to be clear that a diagnosis of BPD, in and of itself, does not always explain a defendant’s violent actions in a mitigating manner. This is especially true if the defendant also suffers from other personality disorders or character defects, such as anti-social, narcissistic, or psychopathic traits. Furthermore, it is not just the diagnostic label of BPD that is important, but the accompanying developmental history and circumstances leading up to the crime that has the potential to explain how BPD contributed to the violent act. Each case is unique, as was the Jodi Arias case (referenced at the beginning of this article) which clearly illustrates how a diagnosis of BPD was presented by the prosecution during the guilt phase of her trial in an effort to counter the defendant’s claim of self-defense. Indeed, there are cases in which a diagnosis of BPD may actually be detrimental to the defense and better serve the prosecution’s case.

With the above in mind, we are hopeful that this article has contributed to an understanding of how a diagnosis of BPD may assist in explaining the reasoning (or lack thereof) of a defendant’s violent behavior. Although a diagnosis of Borderline Personality Disorder is often presented as an “aggravating factor,” it can be a mitigating factor by providing a powerful and compelling window into a defendant’s life – both historically, and at the time of the offense. 