
In the Matter of Byron Case
DOC Number 328416
Crossroads Correctional Center
1115 East Pence Road
Cameron, MO 64429

**PETITION FOR EXECUTIVE CLEMENCY, NON-CAPITAL CASE
BY THE HONORABLE GOVERNOR JEREMIAH NIXON**

Respectfully submitted,
Byron Case

TABLE OF CONTENTS

Statement of the Case _ _ _ _ _ 1

Kelly Moffett

A. Psychiatric History _ _ _ _ _ 15

B. The Voice Stress Test _ _ _ _ _ 19

Tacit Admission

A. Byron and Kelly's Relationship _ _ _ _ _ 22

B. The End Run _ _ _ _ _ 25

C. The Law _ _ _ _ _ 27

Ballistics _ _ _ _ _ 28

Time of Death

A. Rigor Mortis _ _ _ _ _ 30

B. Corneal Cloudiness _ _ _ _ _ 31

C. The Gunshot _ _ _ _ _ 33

Suicide _ _ _ _ _ 34

Conclusion _ _ _ _ _ 41

INDEX TO APPENDICES

Personal Letter and Photos from Byron to Governor Nixon _ _ _ _ _ A

"Manic Depressive Illness in Children and Adolescents,"
 from *Surviving Manic Depression: A Manual on Bipolar Disorder
 for Patients, Families, and Providers*, 2002,
 by E. Fuller Torrey, MD, and Michael B. Knable, DO _ _ _ _ _ B

August 25, 2004, Affidavit by Officer Michael Ramsey _ _ _ _ _ C

Western Missouri Mental Health Center file on Byron Case _ _ _ _ _ D

The Skeptical Juror and the Trial of Byron Case, Book _ _ _ _ _ E

"Eye Changes After Death," Study from the *British Journal of Surgery*,
 1970, Volume 57, Number 1 _ _ _ _ _ F

October 28, 1997, Interview with Robert WitbolsFeugen _ _ _ _ _ G

November 7, 1997, Interview with Betsy Owens _ _ _ _ _ H

PETITION FOR EXECUTIVE CLEMENCY

Comes now Petitioner, Byron Case, and hereby petitions the Honorable Jeremiah Nixon, Governor of the State of Missouri, for a full pardon in light of Petitioner's actual innocence.

At Byron's four-day trial, the State presented the testimony of Byron's ex-girlfriend, Kelly Moffett, who claimed she had seen Byron shoot and kill their friend four years earlier. Kelly had a history of making false claims, particularly against Byron. Evidence of her psychological illness, which would have cast considerable doubt on her credibility, was not allowed to be presented or discussed in front of the jury. Because of the dearth of evidence in the case, the jury was essentially limited entirely to the consideration of testimony in its deliberations.

Critical facts were not able to be presented at trial or in Byron's subsequent post-conviction filings, which expose Kelly's testimony as false. This includes recent developments in one particular area of forensic science largely ignored at the time of trial. Subsequent scientific studies show that Byron could not have committed this crime. For these reasons, he states the following for consideration.

STATEMENT OF THE FACTS OF THE CASE

Anastasia WitbolsFeugen met Justin Bruton in the spring of 1997. Their mutual friend Byron Case introduced them, and they began dating shortly thereafter. Anastasia was a senior at Lincoln College Preparatory Academy. Justin was a student at the University of Missouri at Kansas City. The couple moved in together, sharing Justin's Kansas City condominium, a few months into the relationship. By summer, their plans were to marry.

By the season's end, however, their relationship changed. Justin broke off their engagement and Anastasia moved back into her father's house in Independence. Things between them became tumultuous; one day they were happily together, the next they were arguing and breaking up. This caused Anastasia to become despondent and very needy. She obsessed about the relationship and would constantly call friends to discuss the latest argument or to solicit advice. One of the friends she would call was her former classmate Byron.

Justin spent the weekend of October 17, 1997, at his parents' home in Tulsa, Oklahoma. He had stopped taking his prescribed antidepressant and had dropped out of school without his parents' knowledge or consent, though he did not tell them so that weekend. Justin had also been taking large quantities of hallucinogenic drugs in recent weeks. His parents were unaware of this as well.

While in Tulsa, Justin attended a gun show. He told his stepfather about the show and told him afterward that he did not purchase a gun there. Justin returned to Kansas City on Sunday, October 19, 1997.

Anastasia spent time with Justin either that night or the next. While she was at his condo, she typed a document on his computer and saved it to the hard drive. In part, it read:

I wish I could kill myself. I wanted to do it before but I couldn't because I firmly believed that you would come back to me. I hate life. Life is a big joke to be played on the ones who don't want to feel it. I never wanted to feel life.

Anastasia called her mother, Betsy Owens, that Monday, Tuesday, and Wednesday. That was unusual. Anastasia was depressed and spoke of no longer wanting to live. She had

spoken often about suicide since the previous Christmas, and had cut herself on several occasions. Betsy was concerned about her.

That Wednesday afternoon at around 3:30, on October 22, 1997, Anastasia waited by the door of her father's home, in expectation of stepmother Diane Marshall's return from work. Anastasia had plans to meet Justin in Mount Washington Cemetery, a very large cemetery adjacent to the much smaller Lincoln Cemetery. Anastasia was known to visit cemeteries, sometimes with her family, sometimes with Justin or other friends. She did not own a car and wanted Diane to drive her to Mount Washington. Diane dropped her off there at approximately 4:15 PM.

Fifteen or twenty minutes after Anastasia and Diane left, Justin called their home to speak with Anastasia. Francesca, Anastasia's younger sister, answered the telephone. Justin told Francesca that he was in Lenexa, Kansas, roughly 25 miles away, and had not planned on meeting Anastasia at Mount Washington, as he thought she was unable to get a ride there.

The general manager of Mount Washington, Glen Colliver, saw Anastasia seated by herself at the William Rockhill Nelson Family Memorial around 4:30 or 5:00 PM. Sometime thereafter, Anastasia exited the cemetery and walked across the road to a Dairy Queen restaurant, where she used the pay phone. She then waited in the Dairy Queen and chatted with Dawn Wright, one of the employees. She told Dawn that her boyfriend, with whom she had just spoken on the phone, had broken plans and was instead spending time with his best friend. Anastasia had a seat and made periodic calls from the pay phone. While she was there, she asked Dawn for a tampon or sanitary napkin. Dawn gave her a tampon, which she used in the restroom.

Justin eventually arrived in his car, accompanied by Byron and Byron's girlfriend, Kelly Moffett. As she left the Dairy Queen, Anastasia was arguing, upset with Justin for being late and for bringing their friends along. She wanted to go somewhere she and Justin could talk privately. From the Dairy Queen, the four drove across the road, to Mount Washington. They pulled up in front of the Nelson Memorial, where Anastasia had been sitting earlier in the day. As they got out of the car, Glen Colliver drove up behind them and signaled them to leave by flashing his headlights. He was making his final rounds before closing the cemetery gates. Mount Washington closes at dark; sunset was at 6:30 PM.

Justin, Anastasia, Byron, and Kelly left Mount Washington and drove west on Truman Road, toward Kansas City. The argument between Anastasia and Justin continued. When the car reached a stoplight at Truman Road and Interstate 435, Anastasia asked Justin why he did not love her anymore. He said he did not know. At that point, she opened the passenger-side door and got out of the vehicle. She slammed the door and started walking east, in the direction from which they had driven. Her arguments with Justin often ended with Anastasia storming off alone. The car's remaining occupants continued on their way to Justin's condo a moment later, when the traffic light changed.

The mechanic Don Rand was working at the Amoco service station on Truman Road that evening. From an estimated distance of 100 feet, at dusk or slightly after dark, Don saw a young woman walking east, away from a car at the traffic light at Truman Road and I-435. She was walking fast and seemed angry. The young lady's route took her in the direction of Anastasia's family's home, which was straight past both Lincoln Cemetery and Mount Washington cemetery.

Two days later, a deputy from the Jackson County Sheriff's Department would conduct an area canvass, showing photographs of Anastasia and Justin around at local businesses. Don Rand would indicate that the photo of Anastasia depicted the young woman he saw walking east on Truman Road, on October 22, 1997.

None of Anastasia's family had been home from approximately 6:45 to 9:00 PM that night, then Francesca returned from a church meeting. She received a phone call from Justin shortly after 9:30 PM. When she said Anastasia was not yet home, Justin told her of the couple's argument and that Anastasia had jumped out of the car. Francesca was upset with him for letting her sister walk alone, after dark, in a bad neighborhood.

Robert WitbolsFeugen, Anastasia and Francesca's father, went out looking for her as soon as he realized Anastasia had not returned home. He drove up and down Truman Road, and all around Mount Washington Cemetery. He stopped at police stations in Kansas City and Independence, attempting to file a missing person's report. Sometime after 10:30 PM, Robert pulled his car up to one of the Truman Road gates to Mount Washington and stepped out of it. While he was standing there, he heard a single gunshot ring out from nearby.

On Thursday, October 23, 1997, at 3:44 AM, Jackson County Sheriff's Deputy David Epperson found Anastasia dead in Lincoln Cemetery. She was lying on her back, perpendicular to the road with a large gunshot wound to the area of her nose. She was not carrying any identification.

Anastasia had been shot in the face at a range of less than 6 inches. The Jackson County Medical Examiner, Doctor Thomas Young, believed that the gun was up against her skin when it was fired. The bullet defect was three-eighths of an inch in diameter. A bullet fragment weighing 56 grains was found in her skull, near the exit wound.

That afternoon, authorities released Anastasia's name to the media and her murder was reported on the news.

On October 24, 1997, Byron and Kelly went to the Jackson County Sheriff's Department headquarters to give statements. They told investigators that they had been with Justin, in his car, on October 22, when he picked Anastasia up from the Dairy Queen. After relaying the events of that evening, they informed the investigators that they did not have information about Justin's whereabouts but would tell him to contact the Sheriff's Department when they next saw him.

The next afternoon, October 25, 1997, a Johnson County, Kansas deputy found Justin dead behind an abandoned building. There was massive damage to his head. Investigation would reveal that Justin had driven to a gun store in Overland Park, Kansas, at 10:00 or 10:30 on the morning Anastasia's body was found. There he bought the Remington H70 shotgun and ammunition with which he killed himself.

After the initial meeting on October 24, 1997, Kelly met with Jackson County Sheriff's Department investigators several more times to discuss Anastasia's case. She met with them on November 20, 1997; then on December 10, 1997; then on August 22, 1998; then again on August 25, 1998. Each time, Kelly explained how she saw Anastasia get out of Justin's car at Truman Road and I-435 and walk east. She agreed to undergo a voice-stress test, and did so. Although the machine malfunctioned and delivered inconclusive results, investigators did not pursue another test.

Kelly had serious drug and alcohol problem for a number of years, extending back much earlier than October of 1997. After her breakup with Byron in December of 1998, however, her drug abuse became far worse. She quit school and would sometimes stay away

from home for days at a time. Because of her stealing, lying, and manipulation, her parents ultimately kicked her out of their house. Afterward, Kelly would occasionally call her parents from crack houses, crying and saying that she was sorry for the way she was living. Nevertheless, her parents did not trust her enough to let her live with them again.

Shortly before this eviction, Byron and Kelly got into an argument over the telephone. Having once had a substance abuse problem of his own, Byron did not approve of Kelly's drug and alcohol consumption. He told her he did not want her in his life unless she could get sober, then he hung up on her. When she attempted to call him back, he would not answer. She placed a 911 call. In that call, she reported that her boyfriend was suicidal over their breakup two weeks prior, and that he had threatened to kill himself with an overdose of sleeping pills. Officers from the Kansas City, Missouri Police Department were dispatched to Byron's apartment, where they conducted a brief search for weapons or prescription drugs. Byron had neither. Regardless, he was escorted to Western Missouri Mental Health Center for mandatory 23-hour observation. While there, it was repeatedly noted by the staff that he displayed a bright, alert, and calm affect, and that he did not appear suicidal.

Because Byron was angry with Kelly for her false report, he began actively avoiding her.

On February 8, 1999, the Jackson County Prosecutors Office wrote to Byron's Attorney, Michael Sanders, stating it would not use Byron's statement against him if he agreed once more to speak with investigators about the relationship between Anastasia and Justin. The letter made it clear that Byron was not a target of the investigation. Byron and his attorney consented, and Byron gave a statement outside the presence of his attorney.

A few years passed with Kelly living in crack houses and going in and out of a drug rehabilitation center. She ran away from the center on several occasions. In March of 2000, around 3:00 or 4:00 AM, she called her mother from a crack house and told her that she had seen Anastasia murdered by Justin. Kelly's mother immediately asked her to come home. Kelly did move back into her parents' home, however her drug use continued and she did not talk further about Anastasia's murder.

In June of 2000, Kelly's parents forced her back into rehab at the Mainstream Women's Center. Once again, Kelly ran away. The following month, Kelly's father found her at a crack house and took her home. They returned home around 3:00 or 4:00 AM and her father pressed her to identify Byron as Anastasia's shooter, because he "never believed" her story about Justin's culpability. After Kelly said that Byron had been the one to kill Anastasia, the family again agreed to let her live with them.

Kelly had lied to her parents constantly throughout the years, to the point that her family could not trust her anymore. She would lie to conceal her drug use, in order to be allowed back in the family home; she would lie to get money. "She couldn't really tell me the truth about any of her activity," her mother said. Even though Kelly had implicated Byron, her family remained skeptical. Her mother thought it was "really odd" that Kelly still refused to elaborate on her story. She assumed that Kelly, after telling them "the truth," would want to talk about witnessing such a horrendous act.

Kelly repeatedly tried to contact Byron, despite the fact that they had long since broken up. She would call him on the phone when she was, in her words, "real messed up" on drugs. He often refused to speak with her. Kelly, however, was insistent and would show up uninvited at Byron's apartment or workplace. In September of 2000, she went with her

friend to Byron's apartment. Byron told her when she arrived that he was moving to Saint Louis, partly in an effort to end contact with her once and for all. He refused to give her his new address or phone number, which angered her.

Byron left for Saint Louis on September 13, 2000; Kelly returned to Mainstream Women's Center for a third rehab attempt.

During a one-on-one session, Kelly told her counselor that she had seen Justin shoot Anastasia. The counselor immediately called Kelly's mother, who arrived within the half-hour. In the meeting that ensued, Kelly's mother said, "Kelly, you told Dad it was Byron," at which point Kelly changed her story yet again to implicate Byron.

On September 19, 2000, six days after Byron left Kansas City, Kelly and her attorney met with the Jackson County Prosecutor. Kelly would not testify to this version of events until being granted immunity from prosecution.

Kelly's story was that, on the afternoon of October 22, 1997, Justin and Byron picked her up from her parents' home in Lenexa, Kansas. In the car, she said Justin asked her, "Who is the biggest problem in my life?" and told her it was Anastasia. He then allegedly asked her, "Wouldn't it just be better, easier, if she was gone?" Kelly said that Justin and Byron had been forming a plan all day to kill Anastasia. She said Byron had agreed to do it, since he "had a weird fascination with death and wanted to kill somebody anyway." She said she did not believe the boys were serious, because Justin was always coming up with outrageous schemes he never acted on.

According to Kelly, the boys drove her to a Phillips 66 gas station and had her place a phone call to Anastasia, to lure her out of her home. She said she spoke to Anastasia and set

up the Dairy Queen meeting. She said her previous statements about Justin calling and speaking to Francesca had just been part of their fabricated cover story.

Kelly claimed that when she got back into the car with the boys, they were drinking whiskey and offered some to her. She said they both smelled of alcohol and that Byron was acting drunk. As they drove, Byron allegedly told her he was going to shoot Anastasia with his father's old hunting gun that was in Justin's trunk. Kelly claims Justin and Byron planned to do it in a secluded spot at Mount Washington cemetery.

Kelly said that they drove straight from the Phillips 66 to the Dairy Queen, picked Anastasia up, and drove into Mount Washington, where they parked in front of a "mausoleum-type thing." There, Justin and Anastasia got out of the car. Then another vehicle drove up behind them and flashed its headlights, so Justin and Anastasia got back into the car and the four drove out of the cemetery. Kelly said they were driving around for awhile before finding a dirt road that led into a wooded area. She said they followed this road and parked at a circle drive, where Anastasia and Justin got out again, leaving herself and Byron in the rear seat of the 2-door vehicle. According to her story, Byron sat on the driver's side of the car and she sat on the passenger's side.

Kelly said that Justin and Anastasia were arguing with each other by the driver's side of the car, with Justin standing close to the driver's-side door and Anastasia closer to the rear driver's-side window. She claimed it was then that Byron got out of the car, "popped the trunk," and raised "a big, long hunting gun." When Byron fired the gun, Kelly claimed, she saw smoke, but not a flash, as Anastasia was blown backward. "I could see her feet," Kelly added.

She said that, once the boys got back into the car, Justin was pale, trembling, and crying uncontrollably.

Her story continued with Byron saying that they needed to get rid of the gun, then the trio driving to "some industrial looking-type park with train tracks," where Byron got out of the car and threw the gun. She said this location was a very short drive away. At that point, Justin was said to be too upset to drive, requiring Byron to take over driving duties on the way back to Justin's condo. It was at the condo, according to Kelly, that the three of them came up with the idea to tell authorities that Anastasia had jumped out of the car because of her dispute with Justin.

After telling this story to the Jackson County Prosecutor and, soon thereafter, to the case's lead investigator, Kelly was taken in a car to retrace the route she described the group taking in Justin's car on night of October 22, 1997. The route she indicated was tortuous and ultimately led to a location in Kansas, near Lake Quivira, more than 20 miles away. Kelly told the investigator she could not be sure if this was where Byron threw the gun. A search of that area, a large field, was conducted. Investigators did not find a gun.

Kelly then volunteered to contact Byron by phone and record the conversation, trying to get him to admit to the murder. The Jackson County Sheriff's Department installed a recording device on her phone and gave her Byron's telephone number in Saint Louis. Kelly repeatedly tried to contact Byron, to no avail. In late spring of 2001, investigators told her that Byron had moved back to Kansas City and was living with his mother. Again, she was provided with the telephone number.

On June 4, 2001, Byron was sick in bed at his mother's home. He spoke with his friend Abraham Kneisley on the phone that day. Abraham said Byron seemed "really

delirious and out of it." He advised Byron, who had a fever, to see a doctor. In the early morning hours of June 5, 2001, Kelly reached Byron on the phone.

During that June 5, 2001 conversation, Kelly told Byron that the Sheriff's Department and Anastasia's father were harassing her for information. She told Byron that she was concerned about this, having been addicted for drugs for so long that her memory was bad. Byron advised her, "Just say you don't remember." Referring to the Sheriff's Department, he said, "I'm sure really surprised they called again." According to the transcript, the following exchange took place:

MOFFETT: That they called again. They've called a bunch again. They called while I was in re-hab [sic], they showed up out there. Yeah. I don't understand, like seriously, what all went on or whatever, and I seriously, I hate to say this, but why, seriously, why did you have to kill her? What was the whole big fucking deal? Could you explain that to me? Because I don't get it. Seriously. Justin's dead for no reason, she's dead for no reason. It's just all fucked up. And for some reason they're talking to me, because you won't talk. So I'm fucked. And it makes me look horrible because everybody already knows that I'm a crack-head, that I'm a coke-head, that I'm an alcoholic and I don't remember shit. And if I tried to talk to them, nothing's going to add up. So, I mean, if you could seriously explain to me as to why you actually felt the need to kill her, then that would really help me feel better about the whole fucking thing. I mean, was there seriously any reason to all this?

CASE: We shouldn't talk about this?

MOFFETT: Why?

CASE: Probably because we shouldn't talk about this.

MOFFETT: Of course, we should.

CASE: Except, at least, if I need to talk to you.

Byron went on to explain to Kelly that he had been granted immunity by the Jackson County Prosecutor "[b]ecause [he] told them everything about this." He counseled her to tell the authorities up-front that she could not remember things, if she was concerned with her faulty memory. Kelly insisted she still needed to talk to him further, so they discussed a place to meet the next day. Throughout the conversation, the transcript indicates that Byron's speech is unintelligible. He is very difficult to hear in the recording.

Kelly called Byron again on June 7, 2001, in the presence of Jackson County Drug Task Force detectives, to make a controlled contact. During this conversation, which was also recorded and transcribed, no mention of Anastasia or the night of October 22, 1997 was made, and Byron again informed Kelly that the best advice he could give her was to "start everything with 'I think,' or 'The best I can remember is ...'." Byron made it clear he did not understand why she was pushing the issue. He pronounced Kelly's contacting him "odd." She had not shown up for their previously scheduled meeting, and Byron had strep throat, but Kelly was insistent about meeting him. He agreed to let her call the next day to schedule a different meeting time.

On June 8, 2001, Jackson County Drug Task Force detectives met again with Kelly for a second controlled contact with Byron. Four attempts to call him were made that day, none of which were successful.

Following this last effort to contact Byron, the Jackson County Sheriff's Department issued its probable cause statement, in which was written, "Ms. Moffett witnessed Byron Case shoot Ms. WitbolsFeugen in the face with a long barreled firearm." A warrant for Byron's arrest was issued and a complaint filed, charging him with murder in the first degree and armed criminal action. An indictment was filed on June 21, 2001.

At trial, Kelly testified to her new version of the events of October 22, 1997, telling the jury that Byron killed Anastasia. She also testified about recording her conversations with Byron on June 5 and 7, 2001. The State supplied jurors with transcripts of these conversations, then played the recordings for the jury. The Defense objected to this testimony and evidence, arguing that the conversations were inadmissible because Byron's statements were not, as the State alleged, tacit admissions, and because the tapes' recording quality was poor. In their closing arguments, the State urged the jury three times to request to listen again to the recorded conversations during deliberation. While testifying, Kelly effectively did the same.

The case was submitted to the jury on May 2, 2002. Forty-one minutes into their deliberations, the jury requested the audiotape and associated transcript of Kelly and Byron's conversations, as well as receipts for two shotguns Justin had purchased, photographs of Justin and Byron's cars, all other photographs, and transcripts of Kelly and Francesca's trial testimonies. They were provided all of the admitted visual evidence, but not the audiotapes or testimony transcripts. Over the Defense's objections, transcripts of the June 5 and 7, 2001, phone calls were once again distributed among the jurors, and the recordings were again played in the courtroom. Slightly over three hours later, the jury found Byron guilty of murder in the first degree and armed criminal action.

On April 13, 2004, the Missouri Court of Appeals affirmed Byron's conviction and sentence in *State v. Case*, WD#61626. The Missouri appellate court also affirmed the denial of post-conviction relief by *per curiam* opinion on February 26, 2008, in *Byron Case v. State*, 250 S.W.3d 747.

The United States District Court of Missouri, Western District, denied Byron *habeas corpus* relief on September 29, 2009, then denied him a certificate of appealability on October 30, 2009.

The Eighth Circuit Court of Appeals denied Byron a certificate of appealability on February 26, 2010, then denied him a rehearing on April 6, 2010.

The United States Supreme Court denied Byron's petition for a writ of certiorari on October 4, 2010. The Court also denied his petition for rehearing on November 15, 2010.

KELLY MOFFETT

A. Psychiatric History

Bipolar disorder, often referred to as manic depression, manifests in children through symptoms such as continuous irritability, temper tantrums, hyperactivity, poor frustration tolerance, impulsivity, and aggressive behavior. [Appendix B, p.1] The childhood symptoms most likely to predict development of bipolar disorder later in life include grandiosity, rapid thoughts, hyperactivity, irritability, and suicidality. [Appendix B, p.3] For parents of potentially bipolar children and teens, the National Institute of Mental Health publishes and distributes a version of the Life Chart Method as a diagnostic tool. This tool asks parents to rank the severity of symptoms manifested by their child or teen. These symptoms include, but are not limited to, fighting, excessive risk taking, unreasonable and excessive self-confidence, disregard for authority, trouble with the law, bizarre behavior, inappropriate sexual behavior, lack of remorse, and frequent lying. [Appendix B, pp.4-5]

Kelly Moffett's behavior, from the age of 14 to the present, demonstrates all of these symptoms of bipolar disorder.

Between the tender age of 3 and 5, Kelly was a repeated victim of sexual molestation by an adult male neighbor, which may be at the root of her psychological problems. Her family never reported the incident to authorities, and instead merely packed up and moved to another neighborhood.

At some point between the ages of 12 and 14, Kelly became sexually promiscuous with much older boys. When she was 14, Byron became one of them. When they met, Kelly misled him to believe she was older than she was. She also told him that her father was an alcoholic who physically abused her. Kelly abused alcohol and drugs frequently, before and after meeting Byron. [Appendix A]

When Kelly's parents learned that Byron and Kelly were spending time together, they forbade her from seeing him because they assumed he was far older. Kelly rebelled by running away to stay at Justin Bruton's condo. Her parents filed a missing persons report with the Lenexa, Kansas, Police Department; printed and distributed fliers in Westport, a popular entertainment district Kelly liked in Kansas City, Missouri; and finally hired a private investigator who located Kelly at Justin's condo. At that point, her parents decided to let Kelly see Byron so they could at least know what she was doing and whom she was with.

Byron and Kelly began dating and, after about a year and a half, broke up in December of 1998. But Kelly continued to contact Byron by phone and would show up unannounced at his home. Her alcohol and drug abuse worsened. She quit school and started staying away from home for days at a time, high on crack cocaine. Because of her stealing, lying and manipulation, her parents kicked her out of their home. Afterward, Kelly would try to make them feel guilty by calling them from crack houses, crying and saying she was sorry

for the way she was living. Her parents, however, would not let her move back home, as they did not trust her anymore.

Shortly before being ousted from her family's home, Kelly and Byron got into an argument over the phone. He did not approve of her drug and alcohol abuse, and told her he didn't want her in his life until she stopped. Then Byron hung up on her. When Kelly tried to call back, he would not answer. Kelly called 911 and reported that Byron was upset over their breakup, two weeks earlier, and was threatening to kill himself. Officers from the Kansas City, Missouri, Police Department went to Byron's apartment, where they searched for weapons and prescription drugs. Byron had neither. Nevertheless, he was taken to Western Missouri Mental Health Center for 23-hour observation. The Staff noted that Byron gave no signs of being suicidal. [Appendix D]

After Byron's release from Western Missouri Mental Health center, he actively avoided Kelly.

One night in March of 2000, around 3:00 or 4:00 AM, Kelly called her mother, crying and high on crack cocaine, to say that she had witnessed Justin murder Anastasia. Her mother implored her then to come back home. Kelly did, but continued to abuse alcohol and drugs despite attending counseling and admission into an inpatient rehab program at the Mainstream Women's Center.

In September of 2000, Kelly showed up at Byron's apartment. Byron told her that he was moving to Saint Louis, in part to get away from her. There was another girl there when Kelly arrived, and it was with her that Byron told Kelly he was moving. He refused to give Kelly his contact information.

Less than 6 days after Byron moved, Kelly changed her story to allege that Byron killed Anastasia.

Kelly was arrested by Lawrence, Kansas police on August 25, 2004, for domestic battery against her husband. She was 23, her husband was 46. She had come home drunk and high on drugs, and, when her husband asked her to leave their house, she attacked him. When confronted with physical evidence of having repeatedly struck her husband, Kelly told the police her husband had assaulted her, scratching her shoulder and tearing her bra. The arresting officer saw no marks on Kelly's shoulder, and a jailer later reported that Kelly's bra had not been torn. Marks appeared on Kelly's shoulder only after her arrival at the jail, nearly two hours after her husband allegedly scratched her. It is probable that Kelly scratched herself while in police custody. [Appendix C]

On April 19, 2002, Byron's trial attorney attempted to subpoena Kelly's psychiatric counselor, Doctor Wendy Eaves, to provide testimony about Kelly's mental illness and, possibly, her penchant for lying. The State objected and moved to exclude any inquiry into psychiatric diagnoses or treatment Kelly may have received prior to October 22, 1997.

The Court issued a subpoena for Kelly's records, to do an *in camera* review. It ruled that the subject of Kelly's mental health, both before and after she claimed to have witnessed the murder, were off-limits. The only testimony the Defense was permitted to elicit from Kelly in this area was that she had undergone "some psychiatric counseling." The timing and subject of this counseling remained a mystery to the jury. There were no experts in the field of psychiatry consulted by the Court or Byron's attorney prior to, or during, the trial. Although the Court may be presumed to have an understanding of psychiatric disorders that exceeds that of the layperson, psychiatric questions of such import ought to be answered by

an expert. In this case, it is doubtful the Court fully understood the ways in which bipolar disorder manifests, such as lack of remorse, auditory hallucinations, or frequent lying. As Kelly's testimony essentially made up the whole of the evidence against Byron, questions about her mental health, as related to her ability to tell the truth, were not only relevant but crucial. Without answers, the jury was left with an inaccurate impression that Kelly might have been a credible witness, when in fact she was anything but.

The State's pretrial motion to exclude any inquiry into Kelly's mental health prior to October 22, 1997, evidenced clear concern that the State's sole material witness would be discredited or impeached by her psychiatric history of bipolar disorder. By disallowing the Defense to broach the topic of Kelly's mental illness, the Court lent undeserved credibility to Byron's only accuser. With reason to doubt Kelly's story about witnessing Anastasia's murder, the jury's lack of further evidence upon which to base a guilty verdict would likely have resulted in an acquittal -- Byron would have been found not guilty.

B. The Voice Stress Test

During the course of the investigation into Anastasia's murder by the Jackson County Sheriff's Department, while giving a voluntary statement, Kelly agreed to take a voice stress test. At the time, the substance of her statements was that she had witnessed Anastasia and Justin arguing on the night of October 22, 1997, and that Anastasia got out of Justin's car at the traffic light, located at Truman Road and I-435. She had not yet made any allegation of witnessing Byron, or anyone else, shoot and kill Anastasia.

The machine that was used to administer this voice stress test malfunctioned. The investigator administering the test nevertheless proceeded to ask Kelly questions. Kelly was left with the impression that she had taken and passed the test.

The State, during an April 19, 2002, pretrial hearing, moved to exclude any reference to this test or Kelly's impression of having passed it. The Defense concurred. The Court ruled that any evidence of the taking or passing of a voice stress test was inadmissible.

Kelly testified for the State on April 29, 2002, the first day of Byron's trial. During her testimony, the State asked her how many times she talked with investigators. She testified, "Quite a few. Every time they called me, I would go talk to them." Then Kelly blurted out, "I took a lie detector, too, or voice stress test," in an attempt to bolster her credibility. Defense counsel immediately objected.

The Court stated, "She jumped right into an area that was agreed to by the State that you weren't going to get into. To leave the impression that she passed the test is not particularly fair to the Defendant. That's for sure." The Court offered to issue a curative instruction for the jury to disregard. Defense counsel requested a recess to discuss with Byron the possibility of requesting a mistrial.

Upon returning from recess, the Defense, as a remedy, requested permission to question Kelly further and clarify for the jury that Kelly had actually taken the voice stress test in the early part of the homicide investigation, before she ever made an allegation of witnessing the murder. The Court denied this request and gave the Defense three choices: (1) the Court would say nothing; (2) the Court would issue a simple motion to disregard; or (3) the Court would inform the jury, "There is no witness in this case that has ever taken any test with conclusive results regarding their truthfulness or untruthfulness. Furthermore, such tests are deemed inadmissible and incompetent as evidence in state and federal courts throughout this country. To consider any such evidence in this case, for or against either side, would be

horribly unfair. For that reason, you should disregard such evidence." Defense counsel chose option 3.

The Court's ruling was in error, and it prejudiced Byron's right to a fair trial. At the time Kelly passed the voice stress test, she was consistently reporting the same exculpatory version of the facts that Byron maintained, in all of his statements and in his testimony at trial.

Because Kelly opened the door, the Defense should have been allowed to point out for the jury, during cross-examination, that Kelly appeared truthful at a time when she agreed that Byron was innocent.

The Court's ruling left Byron in a dire situation without proper relief, since the jury heard Kelly claim she took a lie detector test. The collective mind of the jury was left with the impression Kelly was credible because she took such an investigative test. Furthermore, this error occurred at an important juncture in the State's case, as Kelly was the only alleged eyewitness. The State's entire case rested on her credibility, which was improperly bolstered by a failure to introduce the truth, resulting in a miscarriage of justice. *United States v. St. Clair*, 855 F.2d 518 (8th Cir. 1988) states, "To determine whether a curative instruction or a mistrial is the proper response to a polygraph, the Court must consider whether an inference about the result of the test may be critical in assessing the witness' credibility and whether the witness' credibility is vital to the case." *Krulewitch v. United States*, 336 U.S. 440 points out that "[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury all lawyers know to be unmitigated fiction."

According to *Thorp v. Dormire*, 2006 U.S. Dist, the Court committed reversible error because the relief requested by the Defense was appropriate for the circumstances: Police

Officer Schroeder testified that Stephenson, the State's key witness, had agreed to take a polygraph test. Defense counsel moved for a mistrial, arguing that the statement was improper, and noted a pretrial agreement that polygraph evidence would not be mentioned. The prosecutor stated that the State did tell its witnesses at the beginning of the trial not to mention polygraph tests, but that Schroeder might have forgotten. The Court denied the motion for mistrial, but granted counsel's alternate request to allow admission of the fact that the results of Stephenson's polygraph test were inconclusive. Defense counsel elicited this fact on cross-examination of Schroeder.

The error in Byron's case was further compounded by the fact that neither of Byron's court-appointed attorneys briefed or argued this issue on appeal. Had they done so, Byron's wrongful conviction would have been overturned and remanded for a new trial.

TACIT ADMISSION

A. Byron and Kelly's Relationship

After dating for approximately a year and a half, Byron and Kelly broke up around December of 1998. Their separation, however, did not mark the end of their contact with one another. Both intermittently spoke on the telephone or saw each other around the city. As Byron tired of these contacts, he made himself less available to her, by way of active avoidance. Knowing that he did not wish to see or speak with her, Kelly nevertheless persisted in making herself a presence in his life.

Following an early-morning phone argument, at the end of which Byron hung up on her, Kelly placed a 911 call on January 29, 1999. She reported to the operator that her ex-boyfriend was "crying and kind of hysterical" over their breakup and threatened to kill

himself. KCPD officers responded to Byron's apartment and delivered him to Western Missouri Mental Health Center, where Byron underwent an emergency services psychiatric evaluation. As prescribed by law, he was kept for 23-hour observation. The Center's reports [Appendix D] indicate that Byron repeatedly denied being suicidal. He was observed in reports by at least three staff members to be cooperative and calm, evidencing no signs of suicidality or emotional distress.

Against his wishes, Kelly continued thereafter to make contact with Byron, calling his apartment and stopping unannounced at his home and place of employment.

In one such instance, in August of 2000, she and a friend came to his apartment. Kelly was living in a crack house at the time, reportedly without access to running water. Her pretext to see Byron that evening was that she wished to use Byron's shower. Byron informed her that he would soon be moving to Saint Louis and that part of his reason for doing so was to end his contact with her once and for all. He was tired of her lies and destructive behavior. Kelly was upset with the news, but Byron refused to give Kelly his new address or telephone number. He told Jamie Smith, the girl with whom he was moving to Saint Louis, not to give out this information to anyone who might have contact with Kelly, as it could then end up in Kelly's hands.

Kelly implicated Byron in the murder of Anastasia less than 6 days after he left Kansas City. Her attempts to reach him after this were encouraged by the Jackson County Prosecutors Office and Sheriff's Department, who installed a recording device on her telephone in the hopes she could get Byron to confess to the murder. She tried to call Byron in Saint Louis numerous times. Each time, she was informed by Jamie that Byron was out or that she had the wrong number. Kelly left several messages for Byron, but he never returned

her calls. She also tried to reach him in Kansas City, after he moved back. These attempts failed as well.

Byron had a fever and was sick with strep throat on June 5, 2001, when the first of the two recorded telephone conversations took place. Upon hearing Kelly's voice, Byron initially hung up on her. However, Kelly called back immediately and the two had a conversation.

Claiming that she was being harassed on a daily basis by investigators, and that she had been receiving e-mail from Anastasia's "disturbing" father, Kelly expressed to Byron concern about speaking with authorities again. She stated, "I don't know what to do and that's why I called you, because you do realize that I've been a drug addict for sometime [sic], my memory is not that good and they are harassing me about information now, and I don't know what to do about it."

After a brief conversational tangent involving Byron's surprise that Kelly was back in her parents' home, he advised her to be straightforward: "Just say you don't remember." He also expressed puzzlement as to why she was still being contacted by the Sheriff's Department, saying, "I'm sure really surprised that they called again."

Kelly began a rapid speech at that point, bemoaning her addiction problems and the authorities' continued contact with her. In the midst of her rant, Kelly accused Byron of murdering Anastasia, to which Byron replied, "We shouldn't talk about this."

Kelly's many years of harassment and erratic behavior, as described in the previous section, are well established. Rather than a tacit admission, the response Byron gave spoke to his continued reluctance to speak with the ex-girlfriend who had given him so much trouble in the past. The subsequent content of the conversations of June 5 and 7, 2001, bears this out.

Byron went on to say, "I was granted immunity by the lawyer, or by the prosecutor, excuse me, through my lawyer. Because I told them everything about this ... I told my lawyer flat-out that I didn't, I wasn't going to remember things. Told the cops that, too ... And so, basically, I would, you know, tell them up-front, before you go in or agree to meet them, just say, 'I'm not going to remember things'."

Rather than offering an admission of guilt, Byron was advising Kelly in the same manner his own attorney did him, prior to Byron's July 29, 1999 voluntary statement to investigators. The seriousness and unresolved nature of the crime being investigated was cause for prudence and caution. By letting the investigators know in advance that her memory was bad, Kelly could mitigate undue suspicion brought about by her drug-related forgetfulness.

Byron had been sick with strep throat for several days when Kelly called. He was recorded by doctors at KU Medical Center as having a fever of 101.2° Fahrenheit on the morning of June 6, 2001. His agreement to meet with Kelly shortly after his appointment came only after her continued insistence that the two of them discuss the circumstances surrounding the murder, a situation Byron described during their recorded June 7, 2001 conversation as "a little bit on the weird side."

B. The End Run

The "tacit admission rule" states:

A Defendant makes a tacit admission of guilt when the Defendant fails to respond to or significantly acquiesces in the import of an inculpatory statement by making an equivocal, ambivalent, or evasive response when the inculpatory statement was made in the presence and

hearing of the accused, and was sufficiently direct, as would naturally call for a reply.

The Jackson County Prosecutors Office and Sheriff's Department were aware that Byron was unwilling to speak with them without his attorney. In order to obtain a third statement from him, on July 29, 1999 the State promised not to use that statement against him in court, as he was not a target of the homicide investigation. Under these conditions, Byron agreed to give another statement.

After Kelly implicated Byron in the murder, the Prosecutors Office requested that she attempt to call him and tape-record him talking about Anastasia's death. The Sheriff's Department provided and installed the recording equipment in Kelly's family's home and gave her Byron's contact information.

The authorities provided Kelly with Byron's telephone number in Saint Louis, but she was never able to reach him there. When he moved back to Kansas City, the Sheriff's Department informed her and once again supplied Kelly with a telephone number for Byron. The record is unclear as to who was present the first time Kelly reached Byron on the phone on June 5, 2001, but the second recorded conversation was overseen by detectives from the Jackson County Drug Task Force.

The State circumvented Byron's right to due process by using Kelly as an interrogation tool. The undisputed evidence compels the conclusion that the conversations of June 5 and 7, 2001 were intended not to obtain any testimonial commentary but solely to confront Byron with accusatory statements under circumstances designed to discourage Byron from affirmation or denial. The authorities knew Byron had no desire to speak with Kelly and had ended all contact with her. They would not otherwise have had to provide her

with his telephone numbers. The authorities' undisputed purpose was to use Byron's refusal to talk about the murder as a manifestation of consciousness of guilt.

While the agreement by the State may have protected him from affirmative admissions, it gave him no protection against a tacit admission. Byron was tricked into falsely incriminating himself by answering the phone and not wanting to talk with Kelly or discuss Anastasia's death.

C. The Law

The Missouri Court of Appeals, in *State v. Case*, WD#61626, affirmed Byron's conviction and sentence, ruling that the June 5, 2001 recorded conversation constituted a tacit admission, not excluded by hearsay rules.

Byron contested the relevancy and use of the recorded calls as evidence pretrial, during trial, after trial, and in every post-conviction filing he has made. Each time, the theory that his remark, "We shouldn't talk about this," constituted a tacit admission was affirmed.

In his petition for a writ of *habeas corpus* from the Eighth Circuit Court of Appeals, and in his petition for a writ of certiorari from the United States Supreme Court, Byron challenged the legality of the "tacit admission rule." Numerous federal courts of appeal have held that a defendant's pre-arrest silence cannot be used as substantive evidence of guilt. Such courts include the First Circuit, in *Coppola v. Powell*, 878 F.2d 1562; the Second Circuit, in *United States v. Caro*, 637 F.2d 869, 876; the Third Circuit, in *United States ex rel. Smith v. Brierly*, 384 F.2d 992 and *United States ex rel. Staino v. Brierly*, 387 F.2d 597; the Sixth Circuit, in *Combs v. Coyle*, 205 F.3d 269, 283; the Seventh Circuit, in *United States*

ex rel. Savory v. Lane, 832 F.2d 1011, 1017; and the Tenth Circuit, in *United States v. Burson*, 952 F.2d 1196, 1201.

The Eighth Circuit, which governs Missouri, has yet to decide the issue, as has the United States Supreme Court, but Byron's options for relief from the courts are exhausted.

BALLISTICS

When asked their professional opinion as to the type of firearm used to kill Anastasia, expert witnesses for both the Defense and State were unable to say with any degree of certainty. No ballistics expert testified for either side. The 56-grain bullet fragment found at the back of Anastasia's skull was sent to a crime lab by the Jackson County Medical Examiner, Doctor Thomas Young, who conducted Anastasia's autopsy. No one from that lab testified to any findings.

Kelly told the Jackson County Prosecutor that she saw Byron use a shotgun to kill Anastasia. Two days later, she told the Jackson County Sheriff's Department lead investigator the same, adding, "I think it was double-barreled."

At trial, Kelly changed her story for the jury. She told them that the weapon might have been a rifle. Kelly said that, whatever it was, it was long and black.

At deposition, Doctor Chase Blanchard, Jackson County Deputy Medical Examiner, stated that the most likely weapon used was a rifle or handgun. A shotgun, she said, was unlikely. In the course of that deposition, Doctor Blanchard conceded that matters of ballistics were beyond her expertise.

However, during Byron's trial, Doctor Blanchard testified that the autopsy findings were inconsistent with a handgun being the murder weapon. She testified that the likelihood of it being a high-powered rifle was "about the same" as it being a shotgun.

Although Doctor Blanchard testified that she could not rule out the possibility of the murder weapon being a .22-caliber firearm, the size of the bullet fragment makes this impossible. The heaviest commonly used .22-caliber bullet weighs only 40 grains. [Appendix E, p.234]

Doctor Blanchard's trial testimony indicated her belief that a shotgun or high-powered rifle was the likeliest murder weapon, however the 3/8-inch (.375-inch) bullet defect makes this impossible. A 12-gauge shotgun slug has a 3/4-inch (.75-inch) diameter, which is nearly twice the size of Anastasia's wound. The diameter of a contact shotgun wound equates very closely with the internal diameter of the weapon's muzzle. [Appendix E, pp. 237-238]

Rifles and handguns fire bullets of similar size, which are all much smaller in diameter than shotgun slugs. Doctor Blanchard's statement at deposition regarding the weapon most likely used was more accurate than her later testimony. A rifle firing a jacketed bullet would have passed through the wound intact, leaving no fragments of lead in the bullet's path. A rifle firing a lead-nose bullet would have hurled scores, if not hundreds, of fragments scattered along the wound track. [Appendix E, pp.240-241] Given the presence of a single lead fragment, it is unlikely that Anastasia was killed with a rifle firing either a jacketed or unjacketed bullet.

The standard .357 revolver, the standard .38 revolver, and the 9mm semiautomatic pistol all fire bullets with a diameter very near to that of Anastasia's wound. All fire bullets large enough to leave behind a 56-grain fragment. A handgun much larger or more powerful

than these would have created damage far greater than that suffered by Anastasia. [Appendix E, p. 241]

At no time in any of her various statements did Kelly acknowledge the slightest possibility that Anastasia could have been killed with anything but a shotgun or, later, a rifle. It is almost certain, however, that Anastasia was murdered with a handgun.

TIME OF DEATH

A. Rigor Mortis

Anastasia's body was found at 3:44 AM on the morning of October 23, 1997. Boyd Harlan, investigator for the Jackson County Medical Examiner, arrived on the crime scene at 5:05 AM. Mister Harlan assessed Anastasia's state of rigor mortis (the body's stiffening after death) as "2+," which is interpreted as meaning moderately formed and not fully developed. [Appendix E, p.249]

The study relied on by forensic experts to determine rates of rigor mortis progression was performed in 1872 by Doctor P.F. Niderkorn. Based on Doctor Niderkorn's definitive study of bodies observed from the moment of death, rigor mortis develops fully at the rates indicated on the table below.

HOURS SINCE DEATH	ODDS RIGOR IS COMPLETE
2	1%
3	20%
4	40%
5	55%
6	68%
7	77%
8	87%
9	92%
10	96%
11	98%
12	99%
13	100%

[Appendix E, p.249]

Kelly's testimony was that she saw Anastasia shot between 7:00 and 8:00 PM on October 22, 1997. This fixes the time of death a minimum of 9 hours before Mister Harlan's assessment of Anastasia's rigor as moderate. From Doctor Niderkorn's study, it becomes clear that the odds Anastasia's body would have completely stiffened by the time of this assessment are at least 92%.

It is highly unlikely that Anastasia was killed at or near the time alleged by Kelly. Based solely on Anastasia's state of rigor mortis, it is far more probable that the murder took place several hours past 7:00 or 8:00 PM. Kelly and Byron were both at their homes by approximately 10:00 PM.

B. Corneal Cloudiness

Anastasia's eyes were open, with clear corneas, when Mister Harlan wrote his October 23, 1997 report at 5:05 AM. Her body was wrapped in a tarp for transport, then kept refrigerated prior to Doctor Young's autopsy at 9:30 AM on the same day. Doctor Young recorded that the corneas of Anastasia's eyes were still clear at that time.

Corneal clouding is a natural change that occurs after death. The process is at least partly due to drying of the eyes. If the eyes remain closed after death, the corneas cloud over within 12 hours. [Appendix E, p.245] In a large 1968 study performed in Leeds, England, 74% of the 303 bodies observed showed corneal clouding 2 hours after death, whether the eyes of the deceased were open or closed. [Appendix F]

While corneal cloudiness as a postmortem change has been widely recognized by the forensic science community for more than a century, it has very recently become accepted that the speed at which the corneas cloud is accelerated when the eyes of the deceased remain open. Open eyes, exposed to the elements, cloud within 2 to 4 hours of death. This time frame is cited in numerous forensic texts, including *Forensic Pathology of Trauma: Common Problems for the Pathologist*, by Michael J. Shkrum and David A. Ramsey; *Spitz and Fisher's Medicolegal Investigation of Death: Guidelines for the Application of Pathology to Crime Investigation*, by Werner U. Spitz; and *The Handbook of Autopsy Practice*, Third Edition, by Jergen Ludwig. [Appendix E, pp.246-247] Additionally, the Kentucky Coroners Association offers an online resource, at <http://www.coroners.ky.gov>, for determining time of death standard protocol. A section of that website indicates clear corneas point to a death within the last 2 hours, if the deceased's eyes are open. The Louisiana Public Safety Consultants Death Investigation Form, online at <http://www.lapsc.com/Documents/Forms/> indicates the same.

Doctor Michael Baden was the Chief Medical Examiner for New York City. He also served as chief forensic pathologist for the United States House of Representatives Select Committee on Assassination, which reinvestigated the deaths of Martin Luther King Junior and President John F. Kennedy. During a lecture in 2006, Doctor Baden gave a lecture on

time of death and offered a Microsoft PowerPoint presentation. A PDF (Adobe Acrobat format) version of the presentation can be downloaded from http://mail.colonial.net/~mvela/velawebsite/forensicsweb/pdf/Time_of_Death.pdf. Therein, Doctor Baden provides a table indicating that, if the eyes remain open after death, the corneas cloud over within 3 hours. Forensic science experts have since come into widespread agreement on the 3-hour period Doctor Baden found for postmortem corneal clouding in open eyes. [Appendix E, pp.246-247]

At the time of Byron's 2002 trial, the 3-hour period had not yet been recognized or accepted by the forensic science community at large. It is not known what effect the tarp and refrigeration might have had on the rate of Anastasia's corneal clouding, but it is obvious that, at the time of Mister Harlan's report, her open, unclouded eyes preclude the possibility she was murdered 8 or 9 hours before, between 7:00 and 8:00 PM on October 22, 1997 as Kelly alleged. Based on the undisputed clarity of her corneas, it is substantially more likely Anastasia was instead murdered closer to 11:00 PM.

C. The Gunshot

Robert WitbolsFeugen, Anastasia's father, went out looking for Anastasia on the night of October 22, 1997, before he learned she had gotten out of Justin's car. Several hours had passed since she did so. At some point in his search, not long after 10:30 PM, Robert pulled his car up to the south gate of Mount Washington Cemetery, which faces Truman Road. The gate was closed. He parked his car and stepped out. He had been up and down Truman Road a number of times that night and had run out of ideas of where to look for his daughter.

Mount Washington Cemetery sits adjacent to Lincoln Cemetery. The two cemeteries are separated only by Blue Ridge Road, which runs north and south. Both properties have entrances that face Truman Road. Lincoln Cemetery was where Anastasia was killed.

While Robert stood at the cemetery gate, gathering his thoughts, he was startled by a noise: "I hear this shot and an echo ring out. And I'm going, like, well, that speaks to the neighborhood." [Appendix G, pp.18-19] Robert was unable to pinpoint the gunshot's source.

SUICIDE

Anastasia's parents, Robert WitbolsFeugen and Betsy Owens, each gave statements within a few days of their daughter's murder. They talked with investigators at length about her personality and her relationship with Justin.

Anastasia was dealing with significant depression at least as early as Christmas of 1996, when she was still in high school. This depression was such that, on at least one occasion, she cut her wrists badly enough to have to wear gauze bandages. She began talking about suicide, but recognized her mental health problem and requested that her family secure her a prescription for an antidepressant. Her parents declined; they did not want Anastasia taking medication. [Appendix G, pp.40-41]

In April or May of 1997, Anastasia again used razors to cut her wrists. The cuts were not very deep, and Robert mocked her for them. [Appendix H, p.3] He did not consider her cutting to be very serious. [Appendix G, p.37]

Anastasia and Justin began dating in the spring of 1997. About a month after they met, she moved from her father's house into Justin's condo. She was very much in love, and the two of them soon began planning marriage.

As their relationship progressed, though, they began to argue. Betsy stated that her daughter's feelings, whether she was happy or sad, "seemed to be really tied up in Justin." [Appendix H, p.15]

Justin suffered from depression and had a history of suicide attempts. He had for some time been taking the antidepressant Prozac. The couple's close mutual friends, Anna Hunsicker and Byron, had also attempted suicide in the past. Robert opined, "I think that's how this group may have come together is that they had something in common to talk about." [Appendix G, p.37] Betsy described the friends' prior suicide attempts as "the glue that was holding that group together." [Appendix H, p.28] Despite such a support structure, Anastasia, Justin, and Byron had to take Anna to the hospital one night when she tried to kill herself. [Appendix G, pp.39-40]

When the relationship between Anastasia and Justin grew tumultuous, around August of 1997, Justin broke off their engagement and Anastasia moved back in with her father, Robert. She did not want to move back in with him and his wife, but she had few friends and nowhere else to go. [Appendix H, p.7] Of Robert's home, his ex-wife, Betsy, said, "I'll tell you, that house is a depressing house." [Appendix H, p.13] Even though they had officially broken up and Anastasia had moved out, the relationship between her and Justin continued in an on-and-off fashion.

Betsy stated that Anastasia, that August, confided that she had been experimenting with drugs.

She admitted later that she was high, and for someone who is so angry at my husband for being an addict, for her to use any just surprised the hell out of me, and we talked about it later and she, when she admitted using, and then she, well, said she had tried heroin and she had tried

powder cocaine, and she had tried acid and, you know, just trying different things.

[Appendix H, p.18]

Justin, too, was using an abundance of drugs, particularly mescaline and LSD, around September and October of 1997. In the weeks prior to Anastasia's death, he experienced a period of days during which he believed there were people living in fish tanks built beneath his condo floor. He quit going to classes at the University of Missouri at Kansas City and stopped taking the medication prescribed for his depression.

Anastasia became increasingly depressed around this time, also.

She was concerned that Justin's parents were kind of putting the kabosh [sic] on the relationship. Yet she seemed to like his family and she was real pleased when his mom gave her \$80 to go and get her hair done ... but that's, I feel bad now, you know, I'm, well ... I don't want to see you in your casket with black hair. Yeah, because ... back in September she called up and asked if she could come down and have supper, she and Franci [her sister Francesca], and could I make spaghetti. And just the way she was talking, I felt like this was just kind of a last supper, but I didn't vocalize that to her. And she was pretty depressed. She came down wearing pretty much typically her black clothes ... then I took her over to see the new house that we were building, and she said she won't see it completed. I was like, well, sure you're going to see it, you'll be out here to, you know, on Christmas Eve to open Christmas gifts, you'll see it completed. Well, the house was finished a day or two days after she died we closed on it. She never did get to see it completed.

[Appendix H, p.17]

Anastasia asked her parents about getting a prescription for sleeping pills. [Appendix H, p.3] She complained about the quality of her father's razor blades, which she said weren't

good enough to cut her wrists. [Appendix G, p.38] She told her parents how to plan for her funeral, saying, "I don't care what you do with me, just put me in a box in the ground." [Appendix H, p.27] Like Justin, she stopped attending her classes at the University of Missouri at Kansas City, as she was emotionally not in any shape to continue them. [Appendix H, p.2] In her last weeks, Anastasia spent an inordinate amount of time grieving over her relationship with Justin. She had even begun going through her photos and personal effects, putting them in order. [Appendix G, pp.43-45] Although she looked into the possibility of beginning some kind of therapy, she did not follow-up with the idea. [Appendix G, p.38-39]

Justin saw Anastasia on Thursday, October 16, 1997. Then he drove to visit his parents in Tulsa, Oklahoma, the following day. While in Tulsa, he attended a gun show. He returned to Kansas City on Sunday, October 19, 1997, but when he came back he treated Anastasia coldly. This troubled her, so she called her mother. Betsy said she spoke with her daughter that Monday, Tuesday, and Wednesday, and that such frequent calls were unusual. During each of those hour-long telephone conversations, Anastasia was "a little depressed. Not wanting to live, that type of thing." [Appendix H, pp.1-2]

It was common for Anastasia to visit cemeteries. [Appendix G, p. 31 and Appendix H, p.15] On the afternoon of Wednesday, October 22, 1997, she had plans to meet Justin at Mount Washington Cemetery. These plans did not work out, however, so when Justin picked her up, accompanied by their friends Byron and Kelly, she was upset. She was visibly upset when they arrived, and seemed upset when she got out of Justin's car at the traffic light at Truman Road and I-435. Betsy stated, "I can see Stasi [Anastasia] getting pissed off and jumping out of the car, she's been known to do that before." [Appendix H, p.20]

When Robert returned that night and learned Anastasia had not come home after being dropped off at Mount Washington, he was concerned. No one had been at home from approximately 6:00 to 9:00 PM. The wallet she carried had been left on a banister railing. Personal photos were in stacks, and open albums layout across her room, but there was nothing to indicate her plans included an overnight absence. Robert left the house to search for his daughter. [Appendix G, p.9]

Robert drove to Mount Washington, where he knew Anastasia and Justin had originally planned to meet. On the way, he drove slowly, looking up and down cross streets. He flagged down an Independence, Missouri police officer and gave a description of Anastasia. When Robert arrived at Mount Washington, he shined his car's headlights into the gate and shouted Anastasia's name. He did not yet know about her argument with Justin, or about her getting out of the car. [Appendix G, pp.9-11]

Around 9:45 PM, Robert returned home and learned from his other daughter Francesca that Justin had called for Anastasia. She related that Justin had told her about letting Anastasia out of the car. Robert attempted then to call Justin. He left a message on Justin's answering machine, then left the house again, even more concerned than before, to look for Anastasia. He stopped variously at gas stations, an Independence police station, one of Anastasia's friends' houses, then, sometime after 10:30 PM, again at Mount Washington. Having parked at the south gate on Truman Road, he got out of the car to gather his thoughts and peer once again into the dark cemetery. It was then that he heard a nearby gunshot.

Robert returned home from his fruitless searching at about 1:00 AM, October 23, 1997. [Appendix G, pp.11-22] He left a second message on Justin's answering machine later

that morning. An officer with the Jackson County Sheriff's Department called shortly thereafter. [Appendix G, p.28]

When Anastasia's body was found in Lincoln Cemetery, her pockets were found to contain some loose bills and a key chain. Doctor Young, while performing the autopsy, found a sanitary napkin in her underwear. She had no other effects, not even identification. Dental records were requested from Robert and Betsy in order to identify the body. While waiting for word from the authorities, Betsy went to do the final walk-through of the house she and her husband had been building. She learned the body's identity at 1:30 or 2:00 that afternoon. [Appendix H, pp.19-20]

Justin called Byron at approximately 9:00 AM that day. He told Byron he had had trouble sleeping and wanted to meet for breakfast. Byron wanted to sleep in, and told Justin to call him that afternoon.

Justin was the first customer of the day at an Overland Park, Kansas gun store, at 10:00 or 10:30 AM. He purchased a Remington H70 shotgun and a box of 12-gauge rifled slugs. He was not seen for another two days.

On the afternoon of Saturday, October 25, 1997, a two-man patrol unit for the Johnson County, Kansas Sheriff's Department found Justin's body behind an abandoned warehouse-type building in rural DeSoto, Kansas. Justin was lying against the building, one ankle crossed over the other, with the Remington H70 shotgun at his side and massive head trauma. A search of his wallet and nearby car provided his identity. His death was ruled a suicide. Because it had been raining for a long period and the ground beneath Justin and his car was dry, it is believed he killed himself on either October 23 or 24, 1997.

In the subsequent investigation of Anastasia's murder, the Jackson County Sheriff's Department investigator took custody of Justin and Anastasia's computers to search for relevant information that may have been stored there. On Justin's computer, he found a text file that is believed to have been created by Anastasia, the week of her death. In part, it reads:

I wish I could kill myself. I wanted to do it before but I couldn't because I firmly believed that you would come back to me. I hate life. Life is a big joke to be played on the ones who don't want to feel it. I never wanted to feel life.

[Appendix E, p.244]

CONCLUSION

Byron Case is innocent of the murder of Anastasia WitbolsFeugen. The conviction rests entirely on the fabricated testimony of his scorned, mentally ill, crack-addicted ex-lover, Kelly Moffett. It is an outrage that Kelly twisted the truth to manipulate the system, by forcing the State to try this long-unsolved case purely because of her false allegations.

The scientific evidence, which the jury never heard, shows a miscarriage of justice has occurred. Anastasia was not murdered until well after Byron and Kelly were dropped off at their respective residences. In this case, the only person for whose whereabouts no one can account is Justin Bruton, who took steps to end his life, in a modern-day Romeo-and-Juliet fashion, the morning Anastasia's body was found.

The Constitution of the State of Missouri imbues the Honorable Governor Jeremiah Nixon the power, and the facts impart the duty, to remedy this miscarriage. Petitioner hereby implores Governor Nixon to exercise his power and discretion by granting Byron a full pardon and restoring his freedom, based on the foregoing evidence of his innocence.