
APPENDIX

IN THE
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-628

CURTIS CRAIG,
and
CAROLYN WHITENER
d/b/a "The Honk and Holler,"
Appellants,

vs.

Hon. DAVID BOREN, Governor,
State of Oklahoma,
et al.,
Appellees.

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

Jurisdictional Statement Filed October 28, 1975
Probable Jurisdiction Noted January 12, 1976

STATEMENT OF COUNSEL

This Single Appendix has been prepared through the joint efforts of counsel for both sides to this Appeal. In view of Supreme Court Rule 36(2), that the entire Record is always available for inspection, and that a supplemental appendix may be submitted as a safeguard against surprise and to further the interests of justice, this Single Appendix does not, therefore, purport to be a reproduction of the entire Record herein.

By the same token, the inclusion of some particular item or items herein means no more than that one side or the other, not necessarily both, desires to call the Court's attention thereto. Such item's or items inclusion herein does not, therefore, constitute a stipulation that the formal Record herein actually includes such item or items, nor does such inclusion herein constitute a waiver of any objection that either side or the other might have thereto.

The Attorneys

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**ITEM 1 — DOCKET ENTRIES — W.D. OKLA.
CIV-72-867 (EXTRACT)**

- 12-20-72 Filed Complaint
- 1-10-73 Filed dfts' Mtn to Dism for Failure to State Claim w/attached Brf — w/s
- 2-1-73 Filed plfs' Response to dfts' Rule 12 (B)(6) Mtn to Dism — w/s
- 2-14-73 Filed and entered Order of Dismissal — THAT compl. is dism'd as to all parties (findings: Ct w/o jurisd. as compl. does not state claim upon which relief can be granted & state law is valid exercise of State's power) (Chandler) (COB # 98) (Clerk) (copies mailed — ro)
- 3-15-73 (Posted to docket sheet 3-22-73) Plfs' Notice(s) of Appeal and/or Application for Writ of Mandamus from jdgmt entered Feb. 13, 1973, filed Feb. 14, 1973 (record due in CC of A 4-24-73)
- 11-16-73 Rec'd Opinion & Mandate
- 11-16-73 Filed copy of Opinion
- 11-16-73 Filed cert copy of Mandate (order granting mtn to dism is vacated & case remanded for further proceedings consistent w/Opinion; alt. relief req'd by appellants is denied w/observation that our disposition of appeal should not be construed as any indication of our thoughts re merits of case or defenses raised thereto) (Clark, Lewis, & Hill)
- 12-6-73 Filed Order that Court (Three Judge) be constituted as follows: Hon. Wm. J. Holloway, Jr., U.S. Circuit Judge; Hon. Frederick A.

- Daugherty, U.S. Dist. Judge; and Hon. Luther B. Eubanks, U.S. Dist. Judge (dated Dec. 3, 1973) (David T. Lewis, Chief Judge, U.S. Ct. of Appeals = 10th Circuit)
- 12-6-73 Enter Order, case set for pretrial on Mon., Dec. 17, 1973, 3:30 p.m. (Daugherty)
- 12-10-73 Enter Order Plf's Motion for Three Judge Panel is satisfied by such panel being convened (Daugherty) cnsl ntf ve
- 12-13-73 Filed Order overruling defts' Motion to Dismiss; defts to file Ans. on or before 12-14-73 (Holloway, Daugherty & Eubanks) copies to cnsl and judges — ve
- 12-14-73 Filed Answer of defts' w/s copies to judges — ve
- 12-17-73 Ent Pretrial hrg: case pretried; to be tried before 3 judge ct.; deft. to file substitution of parties; plf's mtn to add addl. plf granted; plf's request for atty fee abandoned; plf to file br w/in 5 days re burden of proof; deft to answer 10 days thereafter (Daugherty) ve
- 12-26-73 Filed Plf's Memo. on Burden of Estab. Constit. & tests for Constitutionality w/s/ copies to judges — ve
- 1-2-74 Filed dfts' Memo. on Burden of Proof & Constitutionality of State Statutes — w/s
- 1-11-74 Filed plfs' Reply Memo. on Burdens of Proof & Tests for Constitutionality — w/s
- 2-5-74 Filed First Pretrial Order (Holloway, Daugherty, & Eubanks)
- 5-3-74 Enter Order case set for trial before the Hon. Wm. J. Holloway, Jr., U.S. Circuit Judge,

- Hon. Fred Daugherty, Chief Judge U.S. Dist. Court and Hon. Luther B. Eubanks, U.S. Dist. Judge, on Monday 20, 1974 at 9:30 a.m. in Courtroom No. 1. (Daugherty) cnsl., A.G. and Gov. David Hall ntf by cert. mail) ve
- 5-7-74 Filed Plf's Motion to Add Addl Party Plf w/s
- 5-8-74 Filed Order allowing Curtis Lee Craig to be added as addl party plf (Judges Holloway, Daugherty & Eubanks) copies to cnsl and Judges ve
- 5-14-74 Filed copy of ltr from Court to Counsel advising that burden of proof rests on the dfts (Daugherty) copy to Judges Holloway & Eubanks
- 5-16-74 Filed dfts Motion for Substitution of Parties w/s/
- 5-17-74 Filed Order Substituting Parties Defendant; D. M. Berry, Chairman, L. L. Leininger, Vice Chairman, and J. L. Merrill, Secretary, all officials of the Okla. Tax Comm., are substituted as parties dft (Holloway, Daugherty, & Eubanks) (COB # 103) (Clerk) (copies to parties & to Judges — ve)
- 5-20-74 Ent. Non Jury Trial before 3-Judge Panel: Cnsl announce ready; opening stmts by cnsl; burden rests on dfts. Dfts present case in chief w/test of wtnses and Ex. 1-8 adm. Dfts rest. Plfs move for judgm. mtn denied; Plfs' present case in chief w/test of witnesses and Ex. 2, 3 & 4 being adm. All evidence in. Defts to file brief of authorities w/in 20 days; plfs reply br 15 days thereafter; may have

- further arguments, if so, cnsl will be advised (Holloway, Daugherty & Eubanks) ve
- 6-17-74 Filed Dfts Brief as ordered at trial of 5-20-74 (copies to Judges — afj)
- 7-23-74 Filed Plaintiffs Brief w/s Copies to Judges by wwm
- 8-20-74 Enter Order case set for oral arguments on Fri., Sept. 27, 1974, at 10:00 a.m. (Daugherty) cnsl ntf ve also Judges
- 9-27-74 Enter Hng on Oral Arguments: Arguments presented; dfts to respond to plf's Supplemental Brief w/in 10 days; case ill be consid subm at that time (Holloway, Daugherty & Eubanks) ve
- 9-27-74 Filed Plaintiff's Supplement to Brief w/s (copies to judges — ve)
- 10-3-74 Filed letter to Clerk from Atty for Plfs re status of Bassett v. Bassett (Okla. App., 1974) 521 P.2d 434. Copies to judges — ve
- 10-4-74 Filed Defts' Reply to the Suppl Brief of Plfs w/s/ copies to Judges — AJF
- 5-17-75 Filed and entered Judgment — THAT judg is ent'd adjudging that Okla. statutes in question, 37 OSA 241 and 245 are valid; that all relief sought by complaint is denied & action is dismiss'd (Holloway, Daugherty, & Eubanks) (COB # 108) (Clerk) (copies to parties ve)
- 5-17-75 Filed Memorandum Opinion (Holloway, Daugherty, & Eubanks)
- 5-27-75 Filed Plfs Motion for New Trial w/Memorandum — Motion for Extention of Time to File

- Brief in Support w/s/ (copies to judges wwm)
- 6-24-75 Filed Plfs' Memorandum in Support of Mtn for New Trial w/s/ copy to judges ve
- 7-14-75 Filed Order Overruling Mtn for New Trial by plfs (Holloway, Daugherty, Eubanks) zmc ws
- 7-15-75 Filed dfts' Response to Plfs' Mtn for New Trial — ws
- 8-11-75 Filed plfs' Notice of Appeal to U.S. Sup. Ct. from jdgmt entered May 17, 1975, and order overrlng mtn for new trial July 14, 1975 — w/s (record due in U.S. Sup. Ct. Oct. 10, 1975) Copies to judges — jj
- 1-20-76 Filed cert copy of Supreme Ct's Notice of probable jurisdiction of Appeal (Michael Rodak, Jr., Clerk) (Sup. Ct # 75-628)

**ITEM 2 — COMPLAINT
(ENTIRE)**

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

MARK WALKER,
and
CAROLYN WHITENER
d/b/a "The Honk and Holler,"
Plaintiffs,

vs.

Hon. DAVID HALL,
Governor,
State of Oklahoma,
[et al.],
Defendants.

No. CIV-72-867

FILED

DEC 20 1972

DEX B. HAWES
CLERK, U.S. DISTRICT COURT
BY
Deputy

COMPLAINT

[1] **Jurisdictional Allegations**

1. This is a Federal civil-rights lawsuit brought under 42 U.S.C. 1983 for a declaratory judgment, 28 U.S.C. 2201, to adjudicate as violative of the Equal Protection Clause of the Fourteenth Amendment to the Constitution so much of the statutory scheme established by the Laws of Oklahoma, to wit, 37 O.S. 241-245, whereby male members — and male members *only* — of the class of all persons in the 18 to 21 year old age category are forbidden to be sold and to purchase 3.2% beer; for injunctive relief enjoining the enforcement of the said statutory discrimination imposed only upon male members of the class of all persons 18-21 years of age; for

attorney's fees and costs of this action; and for such further equitable and legal relief as to the Court might appear just and proper.

2. The Plaintiff Mark Walker is a natural person, a citizen of the United States and of the State of Oklahoma, and a resident of Stillwater, Payne County, Oklahoma, within the Western District of Oklahoma. The Plaintiff Walker is a member of the male sex; and was born on November 20, 1952, thereby making him presently twenty years of age, and at all times material herein a member of the class comprised of all persons 18-21 years of age. As appears more fully under the "Substantive Cause of Action" hereto, the Plaintiff Walker desires to purchase 3.2% beer for consumption in private.

3. The Plaintiff Carolyn Whitener is a natural person, a citizen of the United States and of the State of Oklahoma, and a resident of Stillwater, Oklahoma, within the Western District of Oklahoma. The Plaintiff Whitener does business as the "Honk and Holler" at 602 West Sixth Street, Stillwater, Oklahoma, within the Western District of Oklahoma. As appears more fully under the "Substantive Cause of Action" hereto, the Plaintiff Whitener is a licensed vendor of 3.2% beer, [2] and desires to sell 3.2% beer to males as well as other persons from amongst the class of persons 18-21 years of age for consumption off her premises.

4. The Plaintiff Walker, as a desiring and prospective 18-21 year old male purchaser of 3.2% beer, has standing to assert the rights of the Plaintiff Whitener, as a desiring and prospective vendor of 3.2% beer to 18-21 year old males; and vice versa.

5. The Defendant David Hall is a natural person, a

citizen of the United States and of the State of Oklahoma, and a resident of Oklahoma City, Oklahoma, within the Western District of Oklahoma. The Defendant Hall is further the Governor of the State of Oklahoma.

6. The Defendant Larry Derryberry is a natural person, a citizen of the United States and of the State of Oklahoma, and a resident of Oklahoma City, Oklahoma, within the Western District of Oklahoma. The Defendant Derryberry is further the Attorney General of the State of Oklahoma.

7. The Defendants Clarence L. DeWees, Lawton L. Leininger, and M. C. Connors are natural persons, citizens of the United States and of the State of Oklahoma, and residents of Oklahoma City, Oklahoma, within the Western District of Oklahoma. The Defendants DeWees, Leininger, and Connors are further the three members of the [three-man] Oklahoma Tax Commission, and in more particular are, respectively, the Chairman, the Vice-Chairman, and the Secretary thereof.

8. The Defendant Robert L. Hert is a natural person, a citizen of the United States and of the State of Oklahoma, and a resident of Stillwater, Oklahoma, within the Western District of Oklahoma. The Defendant Hert [3] is further the Presiding District Judge of the Ninth Judicial District Court of the State of Oklahoma, which Ninth Judicial District encompasses Payne and Logan Counties, Oklahoma, within the Western District of Oklahoma.

9. The Defendant Charles H. Headrick is a natural person, a citizen of the United States and of the State of Oklahoma, and a resident of Stillwater, Oklahoma, within the Western District of Oklahoma. The Defendant

Headrick is further the District Attorney for the Ninth Judicial District of the State of Oklahoma, which Ninth Judicial District encompasses Payne and Logan Counties, Oklahoma, within the Western District of Oklahoma.

10. The Defendant Rose Jarvis is a natural person, a citizen of the United States and of the State of Oklahoma, and a resident of Stillwater, Oklahoma, within the Western District of Oklahoma. The Defendant Jarvis is further the District Court Clerk of Payne County, State of Oklahoma, within the Western District of Oklahoma.

11. The Defendant Frank Phillips is a natural person, a citizen of the United States and of the State of Oklahoma, and a resident of Payne County, Oklahoma, within the Western District of Oklahoma. The Defendant Phillips is further the Sheriff of Payne County, Oklahoma, within the Western District of Oklahoma.

12. The Defendant Howard W. Hoyt is a natural person, a citizen of the United States and of the State of Oklahoma, and a resident of Stillwater, Oklahoma, within the Western District of Oklahoma. The Defendant Hoyt is further the Chief of Police of the City of Stillwater, Oklahoma, within the Western District of Oklahoma.

[4]

13. As appears more fully under the "Substantive Cause of Action" hereto, the monetary amount in controversy herein is in excess of Ten Thousand Dollars, exclusive of interest and costs; and the territorial situs of the wrongs complained of lies within the Western District of Oklahoma.

14. Jurisdiction over the subject-matter of this lawsuit

is conferred upon the U.S. District Court for the Western District of Oklahoma by 28 U.S.C. 1331, 1343(3), and 1343(4).

15. Venue over the subject-matter of this lawsuit is conferred upon the U.S. District Court for the Western District of Oklahoma by 28 U.S.C. 1391(b).

16. Venue over the Parties to this lawsuit is conferred upon the U.S. District Court for the Western District of Oklahoma by 28 U.S.C. 1391(b), 1392(a), and 1393(b).

17. A requirement to convene a three-judge district court to grant the injunctive relief prayed for by this lawsuit is imposed upon this Court herein by 28 U.S.C. 2281 et seq:

(a) This action seeks, in substantial part, an injunction permanently enjoining various State officers, Defendants herein, from enforcing the unconstitutional discrimination based on sex contained in 37 O.S. 241-245.

(b) The claim of the [un]constitutionality of the age-sex discrimination at bar herein constitutes a “substantial [and meritorious] Federal question” within the Tenth U.S. Circuit. *Lamb v. Brown* (10th Cir., 3/16/72) 456 F.2d 18. See also *Reed v. Reed* (1971) 404 U.S. 71, 30 L.Ed.2d 225, 92 S. Ct. 251.

[5]

(c) No State criminal, quasi-criminal, or administrative prosecutions or proceedings are presently pending or contemplated against any of the Plaintiffs to this lawsuit. See Syl. 2a to *Lake Carriers’ Assn. v. MacMullan* (5/30/72) _____ U.S. _____, 32 L. Ed. 2d 257, 92 S. Ct. 1749.

Substantive Cause of Action

18. All Jurisdictional Allegations are hereby incorporated herein by reference.

19. The Laws of Oklahoma, in relevant part, to wit, 37 O.S. 241 and 245, provide as follows:

“241. Sale barter or gift to minor unlawful. — It shall be unlawful for any person who holds a license to sell and dispense beer and/or any agent, servant, or employee of said license holder to sell, barter or give to any minor any beverage containing more than one-half of one per cent of alcohol measured by volume and not more than three and two tenths (3.2) per cent of alcohol measured by weight. Provided, a parent as regards his own child or children, is excepted from the provisions of this Act.”

“245. “Minor” defined. — A “minor,” for the purposes of Sections 241 and 243 of Title 37 of the Oklahoma Statutes, is defined as a female under the age of eighteen (18) years, and a male under the age of twenty-one (21) years.”

20. Elsewhere within Chapter 2 to Title 37 of the Statutes of Oklahoma, various coercive and intimidatory administrative and criminal sanctions (e.g., revocation or cancellation of license, fine, and imprisonment) are specified for violations of the above-quoted statutory sections.

21. The purpose, intent, and effect of 37 O.S. 245, quoted above, and when taken in conjunction with 37 O.S. 241 and the other relevant portions of Chapter 2 to Title 37 of the Statutes of Oklahoma, is to take [6] the broad class comprised of all persons 18 to 21 years of age, and then to discriminate amongst the

persons included within this broad 18-21 year old class of persons solely upon the basis of their biological sex(es), by denying to members of the unfavored (i.e., male) sex within this age group the equal right to purchase 3.2% beer for private consumption as is freely recognized and allowed to and enjoyed by other persons of the favored (i.e., female) category within the same age group.

22. The State statutory discrimination herein, insofar as it purports to deny to males within the broad 18-21 year old age group the equal right to purchase 3.2% beer for private consumption, is invidious, arbitrary, irrational and capricious, and violates the civil rights of the said males in the broad 18-21 year old age group to the Equal Protection of the Laws as guaranteed by the Fourteenth Amendment to the Constitution, in that the said discrimination is illegally and wrongfully predicated solely upon the legislatively irrelevant, constitutionally impermissible and inherently suspect classification of said aggrieved persons' biological sex and reproductive anatomy, which biological and anatomical bases for legal classification regarding the purchase and consumption of 3.2% beer are totally lacking in all reasonable relationship to any legitimately permissible public policy or legislative end.

23. Because of the foregoing discriminatory State statutory scheme, the Plaintiff Walker, who is a member of the discriminated-against male sub-group of the main class of all persons 18-21 years of age, and is desirous and financially able to purchase 3.2% beer for consumption in private, nevertheless finds himself legally and effectively thwarted in his desire to do so. In particular, the Plaintiff Walker has on numerous occasions heretofore

contacted inter alia the Plaintiff Whitener, a licensed retail vendor of 3.2% beer doing business as the “Honk and Holler” [7] in Stillwater, Oklahoma, with a view towards making purchases of 3.2% beer from the said Plaintiff Whitener, who is personally desirous of selling such 3.2% beer to the Plaintiff Walker, but who nevertheless refuses to do so, to the Plaintiff Walker’s extreme injury.

24. The reasons why the Plaintiff Whitener, although personally desirous to sell 3.2% beer to the Plaintiff Walker for consumption off the premises of the “Honk and Holler,” nevertheless fails and refuses to do so (and likewise fears and declines to make any such sales to other male members of the class of all persons 18-21 years of age) are as follows:

a) The coercive and intimidatory effect against such sales engendered by the assailed discriminatory State statutory scheme outlined above, prohibiting the sale of 3.2% beer to male members of the class of all persons 18-21 years of age, and the administrative and criminal sanctions for violations thereof; and

b) The past, present, and threatened enforcement of the said discriminatory State statutory scheme assailed herein (and of the related administrative and criminal sanctions in support thereof) by the Defendants herein.

25. Regarding the past, present, and threatened enforcement of the assailed statutory discrimination by the Defendants herein, both Plaintiffs would in more particular allege as follows:

a) The Defendant David Hall, as Governor and chief

executive of the State of Oklahoma, executes all Oklahoma laws, including those herein assailed, throughout the State of Oklahoma.

[8]

b) The Defendant Larry Derryberry, as Attorney General and chief law enforcement officer of the State of Oklahoma, enforces all Oklahoma laws, including those assailed herein, throughout the State of Oklahoma.

c) The Defendant Frank Phillips, as Sheriff of Payne County, Oklahoma, enforces all Oklahoma laws, including those assailed herein, throughout Payne County, Oklahoma.

d) The Defendant Howard Hoyt, as Chief of Police of the City of Stillwater, Oklahoma, enforces all Oklahoma laws, including those assailed herein, throughout the said City of Stillwater, Oklahoma.

e) The Defendant Charles Headrick, as District Attorney for the State of Oklahoma within Payne County, Oklahoma, enforces all Oklahoma laws, including those assailed herein, throughout the said Payne County, Oklahoma; and further, the said Defendant Headrick, as District Attorney within Payne County, Oklahoma, also has specific duties under Oklahoma law, as contained more fully in Chapter 2 to Title 37 of the Statutes of Oklahoma, to enforce and administer the discriminatory State statutory scheme assailed herein.

f) The Defendants Clarence DeWees, Lawton Leinger, and M. C. Connors, as the members of the Oklahoma Tax Commission, have specific duties under Oklahoma law, as contained more fully in Chapter 2 to Title 37 of the Statutes of Oklahoma,

to enforce and administer the discriminatory State statutory scheme assailed herein.

[9]

g) The Defendant Robert Hert, as Presiding District Judge within Payne County, Oklahoma, has specific quasi-executive or administrative duties under Oklahoma law, as contained more fully in Chapter 2 to Title 37 of the Statutes of Oklahoma, to enforce and administer the discriminatory State statutory scheme assailed herein.

h) The Defendant Rose Jarvis, as District Court Clerk within Payne County Oklahoma, has specific quasi-executive or administrative duties under Oklahoma law, as contained more fully in Chapter 2 to Title 37 of the Statutes of Oklahoma, to enforce and administer the discriminatory State statutory scheme assailed herein.

26. The injury accruing to the Plaintiff Walker herein solely because of the legally irrelevant and constitutionally impermissible criteria of his biological sex and his reproductive anatomy is both physical and mental, to wit: the cruel denial of the physical benefits derivable from 3.2% beer; and the even crueler mental and emotional humiliation engendered by the degrading and inferior status publicly accorded him simply on the basis of irrelevant biological factors, not unlike those of race, over which he had and has no control. The monetary damage caused by the physical and mental injury herein, through difficult of precise estimation, exceeds Ten Thousand Dollars, exclusive of interest and costs; and because of the imprecise extent and recurring nature of the physical and mental injury herein, remedies at law are inadequate to protect the Plaintiff Walker

in his Federally-guaranteed Equal Protection civil right to purchase 3.2% beer for private consumption free from discrimination based on sex, or upon any other illegal criterion.

[10]

27. The injury accruing to the Plaintiff Whitener from the sexually-discriminatory statute at bar, in addition to the injury to the Plaintiff Walker outlined above and suffered derivatively by the Plaintiff Whitener, consists in the diminishment of her sales to persons in the 18-21 year old category occasioned by the unconstitutional exclusion from said category of the male members thereof as legally permissible vendees and customers — which illegal exclusion of males as permissible vendees and customers within the class of all persons 18-21 years of age has already damaged the Plaintiff Whitener over Ten Thousand Dollars, exclusive of interest and costs, in lost sales of 3.2% beer, and which sexually discriminatory exclusion of males as permissible vendees and customers from the class comprised of all persons 18-21 years of age will, unless enjoined, result in future damages and losses by the diminishment of sales of 3.2% beer, in excess of Ten Thousand Dollars, exclusive of interest and costs.

28. Remedies at law are inadequate to protect the Plaintiff Whitener against the threatened future-occurring violations of her individual and derivative Federally-guaranteed Equal Protection civil rights to sell 3.2% beer to all members of a specified age group irrespective of the unconstitutional criterion of sex; this for the reason that resort to legal remedies as each such threatened, future, and unless enjoined inevitable violation should occur would involve piecemeal, periodic, and repetitive applications to court — thereby resulting in the very

multiplicity of litigation classically enjoined by a court of equity.

WHEREFORE, premises considered, Plaintiffs pray for:

A. A judicial declaration and determination that 37 O.S. 241 and 245, and all statutory sanctions deriving therefrom, be held and adjudicated [11] unconstitutional and void insofar as they purport to prohibit the purchase, possession, and private consumption of 3.2% beer by or the sale thereof to male persons included within the class of all persons 18 to 21 years of age;

B. An injunction enjoining the Defendants, and each of them, jointly and severally, and their subordinates and successors in office, from enforcing and/or attempting to enforce those portions of 37 O.S. 241 and 245, and the ancillary statutory sanctions thereto, which purport to prohibit the purchase, possession, and private consumption of 3.2% beer by or the sale thereof to male persons included within the class of all persons 18 to 21 years of age;

C. All costs of this action, to include a reasonable attorney's fee; and

D. Such further legal and equitable relief as to the Court may seem just and proper.

/s/ Fred Gilbert

FRED P. GILBERT
1401 National Bank of Tulsa Bldg.
Tulsa, Oklahoma
(918) 582-8201

Attorney for Plaintiffs

**ITEM 3 — DEFENDANTS' MOTION TO DISMISS
(EXTRACT)**

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

MARK WALKER,

and

CAROLYN WHITENER

d/b/a "The Honk and Holler,"

Plaintiffs,

vs.

Hon. DAVID HALL,

Governor,

State of Oklahoma,

[et al.],

Defendants.

No. CIV-72-867

**MOTION TO DISMISS FOR FAILURE
TO STATE A CLAIM**

The defendants move the Court as follows:

To dismiss the action because the Complaint fails to state a claim against defendants upon which relief can be granted. Argument and authorities supporting defendants' motion are contained in the brief attached hereto and made a part hereof.

Respectfully submitted,

LARRY DERRYBERRY
ATTORNEY GENERAL OF
OKLAHOMA

/s/ Steven E. Moore
STEVEN E. MOORE
ASSISTANT ATTORNEY
GENERAL

112 State Capitol Building
Oklahoma City, Oklahoma 73105
ATTORNEYS FOR
DEFENDANTS

* * *

[7]

PROPOSITION II

THERE IS A RATIONAL BASIS FOR THE CLASSIFICATION IN THE CHALLENGED STATE LAW, HENCE ITS VALIDITY MUST BE UPHELD.

Although not conceded by the defendants, should the Court conclude that it should determine the reasonableness of the classification in the challenged state law, then the defendants submit that there are reasonable, rational bases for the classification made by the Oklahoma Legislature:

- (1) That there is a difference in the ages of maturity between males and females, with males maturing at an older age.
- (2) That the possibility of males 18-21 years old consuming 3.2% beer to excess, becoming intoxicated, and causing injury to the general public, is greater than females 18-21 years old.

It has been long settled that the burden is on the plaintiff to prove *no* rational, reasonable basis for the challenged legis- [8] lation. If there is *any* reasonable, rational basis for the Legislative classification, then it must be upheld by the courts. *Miskunas v. Union Carbide*, 399 F.2d 847 (7th Cir. 1968); *Eslinger v. Thomas*, 340 F.Supp. 886 (S. Carolina, 1972) (denial of employment based on sex upheld), and *Williams v. McNair*, 316 F.Supp. 134 (S. Carolina, 1970).

The defendants submit that even if the Court con-

cludes that it should determine if there is a reasonable, rational basis for the legislative classification, that several such bases are present. The Court cannot, as a matter of law, decide the non-existence of any such reasonable basis for the classification, hence the complaint must be dismissed.

[signature block and certificate of service omitted]

**ITEM 4 — ORDER OF DISMISSAL
(REFERENCE)**

[The single District Judge's Order of Dismissal, entered on February 13, 1973, and filed February 14, 1973, is unreported, but is reproduced at Appendix E to the Jurisdictional Statement herein.]

**ITEM 5 — BRIEF OF APPELLEES, 10th CIR.,
NO. 73-1267 (EXTRACT)**

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MARK WALKER,
and
CAROLYN WHITENER
d/b/a “The Honk and Holler,”
Appellants,
vs.
Hon. DAVID HALL,
Governor,
State of Oklahoma,
[et al.],
Appellees.

No. 73-1267

BRIEF OF APPELLEES

[15] The appellees urge that Oklahoma’s regulation is not irrational, and that the Legislature could have reasonably concluded that the prohibition of sale of 3.2 beer to males aged eighteen to twenty-one years old would be reasonably related to the ultimate safety and welfare of all of its citizens.

[20] It is obvious that the lower court felt that the complainants below has not sustained the burden in their allegations of showing that the challenged classification was without justification, or in the alternative, that the Oklahoma classification complained of, was not without [21] a rational basis.

[23] It is obvious that the lower court, by its action in

dismissing the claim of the appellants, was able to perceive some reasonable, rational justification for the legislative classification challenged. ° ° ° The appellees urge [24] that the Oklahoma Legislature could have reasonably concluded that the prohibition of the sale of 3.2 beer to males ages eighteen to twenty-one was related to the health, safety, and welfare of all the citizens of Oklahoma.

**ITEM 6 — COURT OF APPEALS, REVERSAL
(REFERENCE)**

[The decision of the United States Court of Appeals for the Tenth Circuit herein, *Walker, et al. v. Hall, et al.*, No. 73-1267, October 23, 1973, vacating the single District Judge's dismissal and remanding for a three-judge panel, is unreported, but is reproduced at Appendix F to the Jurisdictional Statement herein.]

**ITEM 7 — ORDER OF DECEMBER 13, 1973
(ENTIRE)**

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

MARK WALKER,
and
CAROLYN WHITENER
d/b/a "The Honk and Holler,"
Plaintiffs,

vs.

Hon. DAVID HALL,
Governor,
State of Oklahoma,
[et al.],
Defendants.

No. CIV-72-867

F I L E D

DEC 13 1973

Vera Edleman

ORDER

This is an action challenging the constitutionality of the Oklahoma Statutes relating to the sale of 3.2 beer for consumption off the premises. The provisions of 37 Oklahoma Statutes 1973 Supp. §245 which classifies a minor for the purposes of such sales as being a female under the age of 18 and a male under the age of 21 is alleged to violate the equal rights protection clause of the Fourteenth Amendment to the United States Constitution by discriminating against males of the ages 18 to 21 by reason of sex. The action has been brought against multiple state officials seeking to enjoin the enforcement of the law prohibiting the sale of 3.2 beer to minors as same pertains to males from 18 to 21 years of age.

A Three-Judge Panel has been convened in this case pursuant to 28 U.S.C. §§2281 et seq.

Defendants have filed a Motion to Dismiss for Failure to State a Claim. The Motion is supported by a brief and Plaintiffs have filed a Response opposing same.

[2]

In support of their Motion, Defendants urge that the law being challenged relates to the regulation of intoxicating liquors and is permissible under the Twenty-first Amendment to the United States Constitution.

In *California v. LaRue*, 409 U.S. 109, 34 L.Ed. 2d 342, 93 S.Ct. 390 (1972) it is stated at L.Ed. 2d p. 350:

“These decisions did not go so far as to hold or say that the Twenty-first Amendment supersedes all other provisions of the United States Constitution in the area of liquor regulations.”

This would indicate that the Twenty-first Amendment may not bar granting the relief requested in the Complaint.

A motion to dismiss should not be granted unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed. 2d 80 (1957).

Defendants' Motion to Dismiss is overruled. Defendants will file their Answer on or before December 14, 1973.

It is so ordered this 13th day of December, 1973.

/s/ William J. Holloway, Jr. _____

UNITED STATES CIRCUIT JUDGE

/s/ Fred Daugherty _____

UNITED STATES DISTRICT JUDGE

/s/ Luther B. Eubanks _____

UNITED STATES DISTRICT JUDGE

**ITEM 8 — ANSWER
(ENTIRE)**

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

MARK WALKER,
and
CAROLYN WHITENER
d/b/a "The Honk and Holler,"
Plaintiffs,
vs.
Hon. DAVID HALL,
Governor,
State of Oklahoma,
[et al.],
Defendants.

No. CIV-72-867

FILED

DEC 14 1973

REX B. HAWKS
CLERK, U. S. DISTRICT COURT
BY
Deputy

ANSWER

Come now the defendants, David Hall, Governor, State of Oklahoma; Larry Derryberry, Attorney General; Clarence L. DeWees, Chairman, Oklahoma Tax Commission; Lawton L. Leininger, Vice-Chairman, Oklahoma Tax Commission; M. C. Connors, Secretary, Oklahoma Tax Commission; Robert L. Hert, Presiding District Judge, Ninth Judicial District Court; Charles L. Headrick, District Attorney, Ninth Judicial District; Rose Jarvis, District Court Clerk, Payne County; Frank Phillips, Sheriff of Payne County; and Howard W. Hoyt, Chief of Police of the City of Stillwater; and for their answer to the complaint of the plaintiffs do hereby allege and state:

[2]

FIRST RESPONSE

The defendants admit the allegations of the first paragraph of the complaint.

SECOND RESPONSE

The defendants do not have any knowledge of the facts alleged in the second paragraph of the complaint and therefore cannot admit or deny same.

THIRD RESPONSE

The defendants do not have any knowledge of the facts alleged in the third paragraph of the complaint and therefore cannot admit or deny same.

FOURTH RESPONSE

The defendants deny the allegations of the fourth paragraph of the complaint.

FIFTH RESPONSE

The defendants admit the allegations of the fifth paragraph of the complaint.

SIXTH RESPONSE

The defendants admit the allegations of the sixth paragraph of Plaintiffs' complaint.

SEVENTH RESPONSE

The defendants admit that M. C. Connors and Lawton L. Leininger are members of the Oklahoma Tax Commission, holding the positions of Chairman and Vice-Chairman, respectively, and deny that Clarence L. DeWees is presently a member of said Commission.

EIGHTH RESPONSE

The defendants admit the allegations of the eighth paragraph of the complaint.

NINTH RESPONSE

The defendants admit the allegations of the ninth paragraph of the complaint.

TENTH RESPONSE

The defendants admit the allegations of the tenth paragraph of the complaint.

[3]

ELEVENTH RESPONSE

The defendants admit the allegations of the eleventh paragraph of the complaint.

TWELFTH RESPONSE

The defendants admit the allegations of the twelfth paragraph of the complaint.

THIRTEENTH RESPONSE

The defendants deny that any monetary amount in controversy is in excess of \$10,000.00, but admit that the situs of the allegations of the complaint are within the Western District of Oklahoma.

FOURTEENTH RESPONSE

The defendants admit the allegations of the fourteenth paragraph of the complaint.

FIFTEENTH RESPONSE

The defendants admit the allegations of the fifteenth paragraph of the complaint.

SIXTEENTH RESPONSE

The defendants admit the allegations of the sixteenth paragraph of the complaint.

SEVENTEENTH RESPONSE

The defendants admit the allegations of the seventeenth paragraph of the complaint.

EIGHTEENTH RESPONSE

The defendants admit the allegations of the eighteenth paragraph of the complaint.

NINETEENTH RESPONSE

The defendants admit the allegations of the nineteenth paragraph of the complaint.

TWENTIETH RESPONSE

The defendants admit only that other sections in Title 37, Ch. 2 of the Oklahoma Statutes provide administrative and criminal sanctions for violations of the statutes therein and deny other allegations in the twentieth paragraph of the complaint.

TWENTY-FIRST RESPONSE

The defendants deny the allegations of the twenty-first paragraph of the complaint.

[4] **TWENTY-SECOND RESPONSE**

The defendants deny the allegations of the twenty-second paragraph of the complaint.

TWENTY-THIRD RESPONSE

The defendants deny the allegations of the twenty-third paragraph of the complaint.

TWENTY-FOURTH RESPONSE

The defendants admit the allegations of the twenty-fourth paragraph of the complaint.

TWENTY-FIFTH RESPONSE

The defendants admit the allegations of the twenty-fifth paragraph of the complaint, but deny that the statutory scheme involved is discriminatory, and that Clarence DeWees is a member of the Oklahoma Tax Commission.

TWENTY-SIXTH RESPONSE

The defendants deny the allegations in the twenty-sixth paragraph of the complaint.

TWENTY-SEVENTH RESPONSE

The defendants deny the allegations in the twenty-seventh paragraph of the complaint.

TWENTY-EIGHTH RESPONSE

The defendants deny the allegations of the twenty-eighth paragraph of the complaint. The defendants

specifically deny that plaintiffs are entitled to any costs of this action, including a reasonable attorney's fee.

FIRST DEFENSE

The State laws complained of in this case are not unconstitutional.

SECOND DEFENSE

The State laws now challenged regulate the sale and possession of intoxicants within the territorial limits of the State of Oklahoma. As such, the State's regulation comes within the scope of authorized State activity pursuant to the Twenty-first Amendment to the Constitution of the United States of America. Under that Amendment the states have an extraordinary power over the regulation [5] of intoxicants due to their natural tendency to get out of bounds, and to cause harm, both directly and indirectly to the general citizenry of the State. Oklahoma's law herein adopted pursuant to the Twenty-first Amendment to the United States Constitution, is presumed valid.

THIRD DEFENSE

There is no constitutional right to consume intoxicating beverages, and the sale of same is validly subject to strict regulation by the Oklahoma Legislature. No significant constitutional freedoms are jeopardized by the Oklahoma laws complained of.

FOURTH DEFENSE

When a State regulates intoxicants pursuant to power granted to it by the Twenty-first Amendment, such regulations are subject only to minimal requirements of due process or equal protection.

FIFTH DEFENSE

Due to the inherent dangers posed to the general health, safety and welfare of the citizenry of Oklahoma,

involved in the sale and use of intoxicants, the strict regulation of intoxicants, in the interest of protecting the safety of the citizens, is a compelling state interest.

SIXTH DEFENSE

The Oklahoma Legislature could have reasonably concluded that males aged 18 through 21 years consume 3.2% beer in a greater quantity than females in the same age group with the result that that class of males has a greater potential for causing harm while intoxicated to the general citizenry of the State.

WHEREFORE, the defendants urge that the complaint of the plaintiffs be denied, and that the constitutionality of the State laws complained of herein be upheld, and that the defendants be [6] allowed to continue to enforce said duly adopted laws of the Oklahoma Legislature.

Respectfully submitted,

LARRY DERRYBERRY
ATTORNEY GENERAL OF OKLAHOMA

STEVEN E. MOORE
ASSISTANT ATTORNEY GENERAL
ATTORNEYS FOR DEFENDANTS

[certificate of service omitted]

**ITEM 9 — PRE-TRIAL ORDER
(ENTIRE)**

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

MARK WALKER,
and
CAROLYN WHITENER
d/b/a "The Honk and Holler,"
Plaintiffs,
vs.
Hon. DAVID HALL,
Governor,
State of Oklahoma,
[et al.],
Defendants.

No. CIV-72-867

FILED

FEB 5 1974

REX B. HAWKS
CLERK, U. S. DISTRICT COURT
Rex B. Hawks
Deputy

FIRST PRE-TRIAL ORDER

Pursuant to a pre-trial conference held herein on December 17, 1973, under Federal Rule of Civil Procedure No. 16, the following matters were resolved or decided herein:

1. *Burden of Proof.* The parties did not agree as to whether the burden of proving unconstitutionality of the assailed statute lies with the plaintiffs, or whether the burden lies with the defendants to establish constitutionality. The plaintiffs and defendants have submitted their briefs on this issue for the Court's consideration.

2. *Test of Constitutionality.* The parties have both taken the position that the issue that the test of constitutionality to be applied in this case is so intertwined

with questions of law on the merits, that it is incapable of being stipulated to.

The plaintiffs contend that the State's assailed classification can be upheld only if it is necessary to the accomplishment of a compelling state objective, and that no less onerous alternatives exist to solve the problem. The defendants contend that the State's assailed classification must be upheld if it is found to be reasonably and rationally directed toward the regulation of a matter which is a compelling state interest.

3. *Parties.* Counsel for the plaintiffs advised that the plaintiff Mark Walker has passed his 21st birthday, and that [2] the plaintiffs, while not conceding mootness or loss of standing, wish to add as an additional party plaintiff one Curtis Craig, age 18.

Counsel for the defendants advised that Mr. Clarence L. DeWees has been replaced on the Oklahoma Tax Commission by a Mr. J. L. Merrill; that the positions on the Oklahoma Tax Commission have rotated; and that these changes should be duly reflected.

There being no objections, the parties will by proper motion add, substitute, and/or amend their parties.

4. *Stipulations of Fact.* Counsel for the defendants stated the defendants would stipulate to the allegations of personal data regarding the plaintiffs (and the newly-added plaintiff). The plaintiffs will therefore not be required to appear at trial to establish the historical and personal facts alleged in paragraphs 2, 3 and 23 of the Complaint (or of similar allegations concerning the newly-added plaintiff).

Regarding evidence relating to the permissibility vel non of the sexual differentiation herein, the plaintiffs intimated they would have nothing to adduce should the

Court determine that the burden of proving constitutionality is upon the defendants; but indicated that they might wish to adduce appropriate expert physiological and/or psychological testimony if the Court were to rule that the burden of proving unconstitutionality lies with the plaintiffs.

Counsel for the defendants stated that the rationale for the sexual differentiation at bar appears to be that youthful males present a graver driving-while-intoxicated problem than do youthful females, and that counsel intends to offer certain traffic statistics to establish this asserted behavioural difference.

Regarding these statistics, and pending submission of copies thereof to plaintiffs' counsel, counsel for the plaintiffs will make appropriate stipulations in effect waiving proper authentication and the hearsay objections to the government [3] publications offered by defendants, but not waiving other objection as to their relevancy.

The parties agree to exchange a list of the names and addresses of the witnesses to be called by each prior to the tenth day before trial. Summaries of the witnesses' testimony shall also be exchanged on or before the same date.

At the present time, therefore, the question of evidence and testimony on the sexual differentiation at bar is still unresolved; and the parties will promptly advise the Court as to progress in this regard.

5. *Attorney's Fees and Costs.* Counsel for the plaintiffs has abandoned his prayer for attorney's fees, but not for costs.

The foregoing will constitute the first pre-trial order of the Court herein.

/s/ William J. Holloway, Jr.

UNITED STATES CIRCUIT JUDGE

/s/ Fred Daugherty

UNITED STATES DISTRICT JUDGE

/s/ Luther B. Eubanks

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

/s/ Fred Gilbert

FRED P. GILBERT

Attorney for Plaintiffs

LARRY DERRYBERRY

ATTORNEY GENERAL OF OKLAHOMA

By /s/ Steven Moore

STEVEN E. MOORE

ASSISTANT ATTORNEY GENERAL

Attorneys for Defendants

**ITEM 10 — MOTION TO ADD ADDITIONAL
PARTY PLAINTIFF (ENTIRE)**

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

MARK WALKER,
and
CAROLYN WHITENER
d/b/a "The Honk and Holler,"
Plaintiffs,
vs.
Hon. DAVID HALL,
Governor,
State of Oklahoma,
[et al.],
Defendants.

No. CIV-72-867

FILED

MAY 7 1974

REX B. HAWKS
CLERK, U. S. DISTRICT COURT

DEPUTY

**MOTION TO ADD ADDITIONAL
PARTY PLAINTIFF**

Come now Plaintiffs, and pursuant to the Pre-Trial conference and Order herein, respectfully move to add as an additional Party Plaintiff CURTIS LEE CRAIG, a member of the male sex whose date of birth is September 25, 1955 (and who is therefor presently 18 years of age).

Plaintiffs would further allege that the said Curtis Lee Craig is a citizen of the United States and of the State of Oklahoma, and a resident of Cleveland County, State of Oklahoma, within the Western District of Oklahoma, and a full-time student at the Oklahoma State University, at Stillwater, Payne County, Oklahoma, also within the Western District of Oklahoma, where the said Curtis Craig, who is desirous of purchasing 3.2% beer for

off-premises consumption on a parity with like-aged females, has on numerous occasions attempted to purchase such beer from inter alia the Plaintiff Carolyn Whitener, only to be thwarted by the Plaintiff Whitener's unwilling but statutorily coerced compliance with the sexually discriminatory scheme of the assailed 37 O.S. 241-245; and wherefor Curtis Craig adopts and incorporates for himself all corresponding allegations of the Plaintiff Mark Walker in the Complaint herein.

[2]

Plaintiffs would further allege that the prompting for the instant Motion is that the Plaintiff Mark Walker has since the commencement of this litigation passed his 21st birthday; but the Plaintiffs do not by their instant Motion concede that the instant case is moot as to the Plaintiff Walker, see *Roe v. Wade* (1973) 410 U.S. 113, Part IV (A), at 124-125, 93 S.Ct. at 712-713, 35 L.Ed.2d at 161, or that the Plaintiff Whitener's standing (as a prospective vendor) is in any way diminished to assert the rights of 18-21 year old males (as prospective vendees), see *Eisenstadt v. Baird* (1972) 405 U.S. 438, Part I, at 443-446, and *Doe v. Bolton* (1973) 410 U.S. 179, Part III, at 188-189, 93 S.Ct. at 745-746, 35 L.Ed.2d at 210-211.

Wherefore, premises considered, Plaintiffs pray that Curtis Craig be added to the Cause herein as an additional Party Plaintiff.

Respectfully submitted,

/s/ Fred Gilbert

FRED P. GILBERT

1401 National Bank of Tulsa Bldg.

Tulsa, Oklahoma 74103

(918) 582-8201

Attorney for Plaintiffs.

[certificate of service omitted]

**ITEM 11 — ORDER ALLOWING ADDING OF
ADDITIONAL PARTY PLAINTIFF**

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

MARK WALKER,
and
CAROLYN WHITENER
d/b/a "The Honk and Holler,"
Plaintiffs,

vs.

Hon. DAVID HALL,
Governor,
State of Oklahoma,
[et al.],
Defendants.

No. CIV-72-867

FILED

MAY 8 1974

REX B. HAWKS
CLERK, U. S. DISTRICT COURT
TY. *Rex B. Hawks*
Deputy

**ORDER ALLOWING ADDING OF ADDITIONAL
PARTY PLAINTIFF**

NOW, on this 8 day of May, 1974, for good cause shown, and as per the pre-trial conference and Order herein (paragraph 3), Curtis Lee Craig shall be allowed to be added to the Cause herein as an additional party Plaintiff.

IT IS SO ORDERED.

/s/ William J. Holloway, Jr.
UNITED STATES CIRCUIT JUDGE
/s/ Fred Daugherty
UNITED STATES DISTRICT JUDGE
/s/ Luther B. Eubanks
UNITED STATES DISTRICT JUDGE

ITEM 12 — LETTER-ORDER OF MAY 13, 1974

UNITED STATES DISTRICT COURT

NORTHERN, EASTERN AND WESTERN DISTRICTS OF OKLAHOMA

**CHAMBERS OF
FRED DAUGHERTY
JUDGE**

OKLAHOMA CITY 73101

May 13, 1974

Mr. Fred Gilbert
Attorney at Law
National Bank of Tulsa Building
Tulsa, Oklahoma

Mr. Steven E. Moore
Assistant Attorney General
State Capitol Building
Oklahoma City, Oklahoma 73102

Re: No. 72-867, W. D. Okla.
Walker, et al. v. Honorable David Hall, et al.

Gentlemen:

The Court has decided from a consideration of pertinent cases that the burden of proof in the above case rests on the defendants. The parties will proceed accordingly with reference to the May 20 trial.

Very truly yours,
/s/ Fred Daugherty
Fred Daugherty
U. S. District Judge

cc: Honorable William J. Holloway, Jr.
Federal Building
Oklahoma City, Oklahoma
Honorable Luther Eubanks
Federal Building
Oklahoma City, Oklahoma
Clerk, W. D. Oklahoma

**ITEM 13 — TRANSCRIPT OF TRIAL
(ENTIRE)**

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 72-867 Civil

MARK WALKER, ET AL.,
Plaintiffs,

vs.

HONORABLE DAVID HALL, ET AL.,
Defendants.

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FRED P. GILBERT, Attorney at Law, 1401 National Bank of Tulsa Building, Tulsa, Oklahoma, 74103, appearing on behalf of the Plaintiffs.

STEVEN E. MOORE and JAMES R. BARNETT, Assistant Attorneys General, 112 State Capitol, Oklahoma City, Oklahoma, appearing on behalf of the Defendants.

The following proceedings came on for hearing on the 20th day of May, 1974, before the Honorable William J. Holloway, Jr., U. S. Circuit Judge, Fred Daugherty, U. S. District Judge, and Luther B. Eubanks, U. S. District Judge, at Oklahoma City, Oklahoma, as follows:

[3] JUDGE HOLLOWAY: Good morning. Are there Motions for Admission to the Bar?

MR. GILBERT: Your Honor, I don't believe I have ever been formally admitted over here.

JUDGE HOLLOWAY: Well, we will have to ask someone to move you. One of your adversaries here.

MR. MOORE: I will make such a motion.

May it please the Court, my name is Steven Moore. I am a member of the Western District Bar.

JUDGE HOLLOWAY: Very well. Have you applied with the Clerk yet for the papers and submitted them?

MR. GILBERT: No, Your Honor, I have not.

JUDGE HOLLOWAY: Well, we should make that motion.

MR. MOORE: We make that motion, Your Honor, for the purposes of this trial, should we not, under that rule, for your Court?

JUDGE DAUGHERTY: Are you admitted in any Federal Court?

MR. GILBERT: Yes, Your Honor, the Northern District.

JUDGE DAUGHERTY: Under our rules, he can be permanently admitted here is he is a member of another Federal Court. Do you wish permanent admission?

MR. GILBERT: Yes, sir.

[4] JUDGE DAUGHERTY: He is eligible if he is admitted in another Bar.

JUDGE HOLLOWAY: Very well. Motion should be granted. We are happy to have you.

Would you take your oath with the Clerk.

Do you have an oath you give here?

THE CLERK: Yes, I do.

JUDGE HOLLOWAY: Members of the Bar will please rise.

(Thereupon, the oath was duly administered.)

JUDGE HOLLOWAY: Happy to have you.

We have for trial this morning, the case of Mark Walker and others versus the Honorable David Hall and others.

Are the parties ready in this case?

MR. GILBERT: The Plaintiffs are ready, Your Honor.

MR. MOORE: The Defendants are ready, Your Honor.

JUDGE HOLLOWAY: Very well. We have previously advised you that the Court is of the opinion that the burden rests on the Defendants in this matter, which I think the parties are aware of, and for that reason we will proceed in the manner of letting the Defendants put their matters first and carry the burden; evidence and argument- [5] wise both.

At this time, if you wish, we will hear your brief opening statements.

I will advise you, we have all studied your briefs and are aware of your positions.

We will have opening statements at this time.

MR. MOORE: Thank you very much, Your Honor.

May it please the Court. The evidence which the State will present this morning is entirely in the form of statistics from established publications by local reporting systems.

We will have statistics from the Oklahoma State Bureau of Investigation; the Oklahoma Department of Public Safety, as well as other private studies and studies by U. S. Federal Governmental agencies. All statistics which we believe will show that males within the age group of 18 through 21 drive more, drink more and commit more alcohol related offenses.

This will consist of the proof which we offer to you this morning.

That is all I have at this time.

JUDGE HOLLOWAY: Very well. For the Plaintiffs?

MR. GILBERT: Your Honor, very briefly.

We feel that the Defendants will not sustain a burden of defending the discrimination at Bar.

[6] We contemplate that the Court may reject these statistics which they offer, or in any event, will find them unpersuasive.

If the Court does find they have made an arguable defense, we do intend to call two witnesses. Dr. Joseph Ruffin, who is seated at counsel table, and Dr. Ben Jones, of the Oklahoma University Medical School, who will offer expert testimony that there is no rational basis known to medical or psychiatric science for the discrimination in question.

I would advise that the parties, the Plaintiffs themselves, will not personally be present since all facts of relevancy regarding their standing have already been stipulated to.

JUDGE HOLLOWAY: Very well.

The Defendants may proceed.

MR. MOORE: Thank you, Your Honor.

I would like to call Mr. Don Wallock.

DONALD M. WALLOCK, JR.,
having first been duly sworn upon his oath, took the witness stand and testified as follows, to-wit:

DIRECT EXAMINATION

BY MR. MOORE:

Q What is your full name, please?

A Donald M. Wallock, Jr.

[7] Q What is your occupation, sir?

A I am an agent supervisor with the Oklahoma

State Bureau of Investigation. I am a supervisor of the Uniform Crime Reporting Division.

Q And how long have you held that position with the State Bureau?

A Four years.

Q And could you describe precisely, as best you are able, the duties of your specific function within the agency?

A We collect crime statistics from police departments, sheriffs' offices around the State of Oklahoma. These are arrest statistics.

Q Are you required by State law to do that?

A Yes, sir, by the State Statute.

Q Could you describe more particularly, if you are able, the data which you keep?

A I beg your pardon?

Q Could you describe the data, generally, which you keep as a part of your business.

A Okay. We keep the number of crimes, the number of persons arrested for particular crimes, by age, sex and race.

Q For what types of crimes do you keep the statistics?

[8] A All parts of crimes, Part 1 and Part 2 crimes. Part 1 are felony crimes and Part 2 are misdemeanor crimes.

Q Now, I will show you what has been marked as Defendants' Exhibit No. 1 and ask you if you can identify that, please.

A Yes, sir. These are statistics that I gathered relating to alcohol related offenses for males and females, 18 through 21 years of age.

Q Does your signature appear at the bottom of this report?

A It does.

Q Was this report prepared at my request and from your records at the Bureau?

A It was.

Q Where are the original records which gave the basis for this report?

A In my custody at the Bureau.

Q Is this a true and accurate copy of the original records which are now located at the Bureau?

A It is.

Q This report was prepared under your direct supervision?

A That is correct.

Q Now, I notice from looking at the face of the [9] report, that it shows that it is for the months of September, October, November and December of 1973. Why is that?

A At this time, or starting with the month of September, 1973, the Oklahoma Bureau of Investigation assumed the responsibilities for collecting these statistics. Prior to this time, these statistics were collected by the Federal Bureau of Investigation.

Q Do you report these statistics to the Federal Government?

A I do.

Q Do they require such statistics be reported?

A They do.

Q Now, I notice also from the face of the report that this shows persons who are arrested only. Why does this report not show the disposition of those arrests, if you're able to tell the Court?

A This is a new program. The difficulty of obtaining disposition on these cases is tremendous. We will get the disposition on the cases at the end of the year. This is a once-a-year statistic that we do collect. At the

end of 1974 we will collect the disposition of the number of people arrested.

Q But, that has not been done at this time?

A Not at this time.

[10] Q I would ask that Defendants' Exhibit No. 1 be admitted into evidence.

JUDGE HOLLOWAY: The Defendants examined it?

Or the Plaintiffs?

MR. GILBERT: Your Honor, we have waived hearsay objection. I do have an objection regarding relevance. I can either present that at this time or at some future time, according to the Court's convenience.

JUDGE HOLLOWAY: I think you better make your objection now.

MR. GILBERT: Yes, very well. Your Honor, I object to these statistics as being irrelevant for a number of reasons, one of which they are merely arrest statistics and not conviction statistics and the arrests are virtually indistinguishable from the mere accusation,¹ the mere facts that more males, 18 through 21, are accused of drunkenness or alcohol-related offenses, is completely immaterial. What could be material is whether or not they have been convicted more often.

Furthermore, these offenses are not categorized as to whether, as to what kind of liquor they are derived from. Whether this is a hard liquor, in excess of 3.2 percent alcohol, or what is called nonintoxicating liquor, of 3.2 percent or less.

Now, what this case involves is the discrimination, [11] in nonintoxicating liquor. There is no discrimination, as far as I know, in the law books of Oklahoma regarding hard liquor. That is nondiscriminatory. So,

¹"Acquisition" appears in the original.

these statistics could very well be, for all we know, reflecting to the type of liquor which is not involved in this lawsuit.

Furthermore, there is no, unless there is going to be connection up with other evidence, as to show what the percentage of males to females actually driving might be, we don't know whether these statistics are disproportionate or not.

It may be, I just look at the statistics, they seem to show generally that males seem to be accused of alcohol-related offenses about ten times more often than females. Unless there is some showing that there is actually an equal amount of miles driven, we can't tell just from the face of these statistics, whether there is a disproportionality in the sense of this discrimination.

Furthermore, there is another difficulty, Your Honor. For instance, under the driving under the influence, just taking² that as an example, we see total persons arrested. Well, 152 plus 107 plus 168. I have that tabulated here somewhere. I believe it is — yes, okay. Whatever that total comes out to be, 427. We can't tell from these statistics whether, for instance, one person has been arrested 427 times or whether it is 427 different males who have been [12] arrested one time apiece.

If we can't tell that, we just can't really tell what that figure really means. Even assuming it did result in an actual conviction for 3.2 percent alcohol in particular.

Furthermore, I would suggest that there is no showing whether or not there may be a discriminatory attitude or practice of law enforcement personnel to selectively prosecute against males in that teen-age, in that — yes, in that teen-age group as opposed to females. There may be, I submit, a folk myth around that males in that

²“Saying” appears in the original.

age category are naturally rowdy and therefore there may be selective discrimination.

My final objection would be, and perhaps I should reserve this for final argument. I submit that at this time and day, constitutional development in the United States, that it doesn't make any difference if there is some kind of a statistical behavior difference between males and females. The time has come when the equal protection law means that it has been interpreted to mean what it says, no matter how you differentiate it or split the two groups of people. There is always going to be some statistical fluctuation between the two groups.

If you could split between black and white there would be some statistical difference or between [13] Protestants or Catholics or Republicans or Democrats.

JUDGE HOLLOWAY: I believe you have stated your position and we can let you argue further. If those are the grounds of your objections as stated, the Court can rule on those.

Is there any other ground you have not covered yet?

MR. GILBERT: Yes, sir, one.

We don't know that the total population is in this whole group, in this 5400 or this 427 arrests, according to my statistics, since it is statistics, discloses that that figure is just about one percent of the total male population of that age category and is just de minimis, as a matter of law, as a basis of condemning the other 99 percent.

MR. MOORE: Your Honor, may I make an additional statement?

I didn't want to interrupt the Court.

JUDGE HOLLOWAY: I don't believe it will prove necessary. Let us clear some matters up with counsel, if you please, Mr. Moore, and then we will wait and see if you need to respond.

Mr. Gilbert.

MR. GILBERT: Yes, sir.

JUDGE HOLLOWAY: You indicated you were not [14] objecting on the grounds of hearsay and we somewhat interpret that to me you don't object to this form of summary testimony by virtue of the fact that the original records are not here for your examination.

MR. GILBERT: That is correct, Your Honor.

JUDGE HOLLOWAY: The grounds are as stated. Irrelevance, or that it is incompetent under the constitutional standards.

Well, I am not trying to phrase it for you. The grounds that you are indicating, though, you're not objecting to the form of the evidence?

MR. GILBERT: No, I am waiving the hearsay.

JUDGE HOLLOWAY: All right, and summary form that counsel is introducing it by.

What I mean is, he has an accounting summary virtually here.

MR. GILBERT: No, I don't object on that aspect. I am just, my objection is that they're irrelevant rather than incompetent.

JUDGE HOLLOWAY: Very well, the objection will be overruled. The Court is all of the opinion that the evidence should be admitted. It is competent, and considered by the Court. The matters that you have argued going to its weight will be considered.

MR. GILBERT: Very well, Your Honor.

[15] MR. MOORE: Thank you, Your Honor.

I might just point out in passing that the Statute, I believe, which is in point on admissibility of all this evidence is Title 28, United States Code, Section 1732, which sets forth the so-called Shop Book Rule which makes admissible into evidence, official records of governmental agencies, State, Federal and County. If they

are kept in the ordinary course of their functions and business.

I would just state that very briefly.

JUDGE HOLLOWAY: Very well, thank you.

MR. MOORE: Also, the Court Rule, Federal Court Rule, Civil Procedure Rule 44 (A-1).

Q Now, Mr. Wallock, from the records of the department and the report before you, which you have in front of you, very briefly, you have that categorized in terms of three offenses as they relate to alcohol. Is that correct?

A That is correct.

JUDGE HOLLOWAY: Counsel, pardon me, just a moment.

Do you have any copies of this exhibit?

MR. MOORE: Oh, yes, I am very sorry.

JUDGE HOLLOWAY: If you would give them to the Clerk and we could be referring to them.

[16] Do you have other exhibits, Mr. Moore, you will be following with?

MR. MOORE: Yes, sir, I do.

JUDGE HOLLOWAY: Very well.

BY MR. MOORE:

Q The first one of those offenses, I believe is driving under the influence.

Now, that is a violation of Oklahoma Statutes. Is that correct?

A That is correct.

Q And you have these offenses categorized by ages, 18 through 21, respectively. Is that correct?

A That is correct.

Q For the years, for the age 18 years, what were the breakdown of the male and female arrests for the crime of driving under the influence?

A 152 males were arrested, 14 females.

Q And for the age 19 years?

A 107 males, 2 females.

Q And for the age 20 years?

A 168 males, 8 females.

Q And for the age 21?

A 166 males, 13 females.

Q All right, now, the next offense which is described in the report is so-called liquors laws. What does [17] that involve?

A That involves —

MR. GILBERT: Excuse me. May I say another formal objection for the record, Your Honor.

According to the Pre-Trial Order, it was my understanding that the defense of the statute would be based on the statistics regarding to driving while intoxicated.

I think the other two categories of statistics would be irrelevant for that purpose. He has the DWI statistics, I think that is sufficient.

JUDGE HOLLOWAY: Well, are you claiming surprise or any objection because of the pretrial order term?

MR. GILBERT: No, Your Honor.

JUDGE HOLLOWAY: You're just claiming they're irrelevant?

MR. GILBERT: Yes, Your Honor.

JUDGE HOLLOWAY: Well, that question we have considered and do overrule.

MR. GILBERT: All right.

BY MR. MOORE:

Q What are the offenses which come under the heading of liquor laws, please?

A Possession of alcohol by minors, open bottle.

Q Operating an open saloon?

[18] A Operating an open saloon. Working in a saloon.

Q So, this is just kind of a general catchall for all other liquor violations?

A That is correct.

Q Does this include State offenses as well as violations of municipal ordinances?

A Correct.

Q Does the former, driving under the influence—

A Yes, sir.

Q What are the breakdowns for 18 years of age, male and female, for the so-called liquor laws violations?

A 119 males, 21 females.

Q Now, moving on, I will try to expedite this, may it please the Court.

Let's go to the last category, drunkenness. What is the offense which is described there?

A That is being under the influence of intoxicating liquor.

Q The so-called public drunk?

A Public drunk, yes.

Q What is the breakdown, male and female, for the 18 years of age group?

A Male, 340; female, 39.

Q And for the drunkenness category, 19 years?

A 321 males, 33 females.

Q Twenty years?

A 305 males, 30 females.

Q Twenty-one years?

A 377 males, 34 females.

Q Now, just one additional question, Mr. Wallock. What is your population coverage on these statistics?

A 84 percent population coverage.

Q And how many enforcement entities do you have reporting to you on this data?

A 64 sheriffs' departments and 130 police depart-

ments in the State of Oklahoma.

Q So, by your calculation, 84 percent of the Oklahoma population is covered by this statistic which you have here?

A That is correct.

Q I have no further questions at this time.

JUDGE HOLLOWAY: May I ask you, what do you mean by the other 16 percent?

How are they not covered?

A Those are not reporting departments, Your Honor. Those are departments that did not report to us during this particular period.

JUDGE HOLLOWAY: You mean areas of the State, geographical areas?

A Yes, sir.

[20] JUDGE HOLLOWAY: I see.

Any cross examination?

MR. GILBERT: Yes, very briefly.

CROSS EXAMINATION

BY MR. GILBERT:

Q Mr. Wallock, I believe under the heading of Liquor Laws, you said that could include such offenses as illegally working in a beer joint?

A That is correct.

Q Are you not aware, sir, that a female may work in a place which sells 3.2 percent beer at age 18 and a male is prohibited therefrom until 21?

A I am aware of that, yes.

Q And in view of that statutory discrimination, that could affect the way these statistics look from a male and female who do the exact same physical acts?

A That is correct.

Q That is, a female of 19 could work in a bar and this would not reflect as a violation on these statistics,

but a male could be doing the same work in the same bar and that would reflect as a violation?

A That is correct.

Q Do you know to what extent that type of discrimination is affecting, or has affected,³ these statistics?

A I have no way of knowing.

[21] Q I see. No further cross examination.

MR. GILBERT: I would raise what I have just raised as a further objection to Line 2, Liquor Laws.

JUDGE HOLLOWAY: Let me ask you, please.

Do you have the figures available with you about what part of these figures are the violations that counsel is inquiring about?

A There is no breakdown of that, Your Honor, of that particular violation. It is all lumped under Liquor Law Violations. The reports that I receive lump them all under one category.

JUDGE HOLLOWAY: Well, the renewed objection is overruled. The Court, realizing the weakening of the exhibit by the evidence developed, but it, we determine goes to the weight again.

MR. MOORE: Just one very quick additional questions now.

REDIRECT EXAMINATION

BY MR. MOORE:

Q These, all of the classifications are in very broad categories. Who establishes these broad categories? Did you establish them?

A I did not. The FBI established what they, what type of offenses they wanted them for.

Q But, driving under the influence and drunkenness [22] are very specific violations and specific statutes?

³"In effect" appears in the original.

A That is correct.

Q That is all I have for this witness.

JUDGE HOLLOWAY: Anything further from this witness?

MR. GILBERT: Nothing further, Your Honor.

JUDGE HOLLOWAY: May he be excused?

MR. MOORE: Yes, I would ask he be excused.

JUDGE HOLLOWAY: Any objections?

MR. GILBERT: No, Your Honor.

JUDGE HOLLOWAY: You may step down and you are excused from attendance on the court.

MR. MOORE: We will call Phil Ballard, please.

PHIL BALLARD,

having first been duly sworn upon his oath, took the witness stand and testified as follows, to-wit:

DIRECT EXAMINATION

BY MR. MOORE:

Q State your name, please.

A Phillip G. Ballard.

Q And what is your occupation?

A Lieutenant, Oklahoma City Police Department.

Q How long have you worked for the Oklahoma City Police Department?

A Ten years.

[23] Q What is your present position within the department?

A Planning and Research, which covers statistics of our department.

Q Could you be more specific, if you can. Your precise duties as head of the Planning and Statistics Division in the department.

A Well, we record all arrest data and make uniform crime reports to the State which is forwarded to the FBI now.

Q Reports are prepared for the purposes of forwarding to the FBI, Federal Bureau of Investigation?

A Yes, sir.

Q Is that done on a uniform basis?

A Yes, sir.

Q I have set in front of you what has been marked as Defendants' Exhibit No. 2 and ask you if you can identify them.

A Yes, sir.

That is a copy of our form that we sent in to the FBI covering the year 1973.

Q That is a copy of the report which you prepared as a part of the business of your department and function within the department; is that correct?

A Yes, sir.

[24] Q Is it a true and accurate copy of the original report which you prepared?

A Yes, sir, it is.

Q Was a report prepared directly under your supervision?

A Yes, sir, it was.

Q Where is the original copy of that report?

A I, the original copy was sent to Washington.

Q To the Federal Bureau of Investigation?

A Yes, sir.

Q And you retained a copy in your files, is that correct?

A Yes, sir.

Q Does a copy which you have retained in your files, coincide exactly with a copy which is marked Defendants' Exhibit No. 2?

A Yes, sir, it does.

Q So, let me ask you just one more time. Do you identify this report as a true and accurate copy of the original report which you mailed to the FBI?

A Yes, sir.

Q I will ask that Defendants' Exhibit No. 2 be admitted into evidence.

JUDGE HOLLOWAY: Has counsel examined this one?

MR. GILBERT: Yes, Your Honor. I would make the [25] same objections as to the exhibit.

JUDGE HOLLOWAY: Very well. On the same ruling as previously announced, the objection is overruled.

BY MR. MOORE:

Q Now, Lieutenant Ballard, there are numerous categories described upon this report. Before I get into that, what does, from where did the data in this report come?

A They're taken from the booking slips when the person actually booked into the City Jail.

Q Is this a compilation of all the data of arrests made by the Oklahoma City Police Department?

A Yes, sir.

Q And would that, so this would cover all the arrests which took place within the City of Oklahoma City. Is that correct?

A By Oklahoma City Police officers.

Q And for what time frame are we dealing?

A Calendar year, 1973.

Q So, Defendants' Exhibit No. 2 is a record of calendar year 1973, of arrests by the Oklahoma City Police Department?

A Yes, sir.

Q Now, do you know, on Item 21, what is the offense described by that classification?

[26] A Driving under the influence.

Q Is this, as you report the data, is this for a violation of the State laws or the City ordinances, or both?

A Both.

Q Okay. Now, what, generally, did you hear Mr. Wallock testify, would your testimony as to the offenses contained in the liquor laws, would that be the same as Mr. Wallock's?

A Yes, sir.

Q It is a catchall classification?

A Right.

Q And also, drunkenness, is that a violation of both the State laws and the municipal ordinances of Oklahoma City?

A Right.

Q And violations for both would be included in this report?

A Yes, sir.

Q Now, the number of arrests— incidentally, this does show only arrests. Why does it not show dispositions?

A Well, it is—we do make the dispositions, but they're not broken down into age categories. It would be almost impossible for the total work and we have never had the occasion to do it before. And therefore, we do not even [27] attempt to keep dispositions as to age groups.

Q Is this the only data which the FBI requires from you at this time?

A Yes.

Q Now, does your report break down the number of arrests by age and sex groups?

A Yes, sir, it does.

Q Specifically directing your attention to Item No. 21, the age group 18 years of age, what were the number of arrests by male and female offenders?

A Age group 18, there were 47 males and ten females.

Q And age group 19?
A 54 males and one female.
Q Age group 20?
A 72 males and five females.
Q And age group 21?
A 86 males and four females.
Q Now, dropping down to Item No. 23, which is the so-called public drunk violation, what are, what is the male and female breakdown for age group 18?
A 18, 120 males and 18 females.
Q And 19?
A 104 males, 22 females.
Q And age 20?
[28] A 96 males and 19 females.
Q And age 21?
A 146 males and 16 females.
Q That is all the questions I have at this time of this witness.

CROSS EXAMINATION

BY MR. GILBERT:

Q Officer, on my Xerox copy, up at the top where the two pages are joined together, I have a break that is a little hard to read. There is some italicized print in parenthesis that says—would you read that to me, please.

A Yes.

“Includes those released without having been formally charged.”

Q Thank you. Now, Officer, I believe you stated under the heading of Liquor Laws, this is sort of a catchall category which includes everything relating to alcohol that is not either public drunk or DWI.

A Yes, sir.

Q Does that include an Oklahoma City ordinance as well as State statutes?

A Yes.

Q All right. Does Oklahoma City have a possession of beer by a minor ordinance?

[29] A Yes.

Q And what is classified as a minor for possession of beer under that ordinance, if you know, sir?

A I believe it is under 18 for females and 21 for males.

Q And you are aware that there is a State Statute that a female may work in a bar at 18, but a male is prohibited from such work until 21?

A Well, I am aware of the 18. I really can't say I am aware of the one for 21 for the male.

Q I see. Well, under the Oklahoma City Ordinance, the female at 19 could, say, possess beer and that possession would not show up as a violation of the liquor laws, would it?

A That is right.

Q But, if a male, 19, were to possess liquor it would show up as a violation. Is that correct?

A Yes, sir.

Q All right. Do you know, Officer, to what extent this discriminatory statute or ordinance is having an effect upon the seemingly disparate⁴ statistics under Item 22, Liquor Laws?

A I would have no idea.

Q All right. Now, Officer, under Item 21, Driving Under the Influence, I believe you testified for male [30] arrests at 18 was 47; age 19, 54; and age 21, 72. Is that correct?

A Yes, sir.

⁴"Disparaged" appears in the original.

Q All right, Officer, just looking at those statistics, it seems to me as though there is a significant jump at age 21 and beyond for male arrests. Is that correct?

A There is a jump.

Q All right. Do I understand from that, Officer, that as far as your statistics reflect, there is less then a problem of DWI for males 19, 19 and 20, than there is for males 21 and above?

A Well, sir, I wouldn't be able to answer that question without showing or knowing the basis of the population and percentage given.

Q Let's say just on the basis of these statistics.

A There is more arrests for age 21 than there was for 20.

Q Would that indicate that there is more of a problem for male DWI at age 21 than above?

A Sir, I wouldn't necessarily think so.

Q It is possible?

A It is possible.

Q All right. Now, I will ask the same question under Line 23, Drunkenness. I notice, I believe you testified [31] that for a, the offense of public drunk at age 18, you had 102 male arrests and at age 19, 104, and age 20, 96. Is that correct?

A Yes, sir.

Q On my copy of the statistics, I notice a significant jump at age 21 and beyond. Is that correct?

A Yes, sir.

Q Do I understand from these statistics, then, Officer, there is considerably less problem with public drunk among males 18 than there is with males 21 and beyond?

A Sir, all I can say is our statistics jumped from that age category. I couldn't say that there is less of a problem.

A I consider —

A I couldn't say there was less of a problem.

Q It is possible, though?

A It is possible.

Q All right. And I would ask your answer would be the same under Line 22, Liquor Laws? Well, that is a little bit different. Never mind, I will withdraw that question.

I understand that, for instance, let me ask one qualifying question.

Under Line 22, Liquor Laws, I do notice that [32] there seem to be more arrests for males 18 to 20 than for the immediate years beyond. Is it possible, Officer, that that offense of possession by beer, beer by a minor, could be influencing those statistics?

A Yes, sir, that and minor private clubs.

Q All right. No further cross examination, Your Honor.

REDIRECT EXAMINATION

BY MR. MOORE:

Q I would like to clarify one point just very briefly, if I may.

Lieutenant Ballard, is there any age distinction in the offenses of driving while intoxicated? There is no age requirement, you're guilty of the offense if you are five or sixty-five. Is that not correct?

A That is correct.

Q Would the same be true for public drunk?

A Yes.

Q That is all I have of this witness.

JUDGE HOLLOWAY: Anything further?

MR. GILBERT: No, Your Honor.

JUDGE HOLLOWAY: May he be excused?

MR. MOORE: I would request he be excused.

JUDGE HOLLOWAY: Is there any objections?

MR. GILBERT: No objections, Your Honor.

[33] JUDGE HOLLOWAY: You may be excused, Mr. Ballard.

MR. MOORE: Your Honor, that is all of the witnesses which I intend to put on.

There are other items of evidence which I would like to have introduced into evidence, however.

JUDGE HOLLOWAY: Very well.

MR. MOORE: I am kind of uncertain as to the procedure. They do have no supporting testimony, so I would assume that I would just offer the exhibit and make whatever statements I think is appropriate and naturally counsel can respond.

JUDGE HOLLOWAY: Have you furnished counsel with these exhibits?

MR. MOORE: Yes, I have.

MR. GILBERT: Yes, Your Honor.

JUDGE HOLLOWAY: Will there be objections to them?

MR. GILBERT: There will be no hearsay objections. My only other objections will be the same objections regarding relevancy and materiality that I have previously stated.

JUDGE HOLLOWAY: Why don't you make a statement identifying the exhibit by number and tell us in substance what it is and we will make the record here.

MR. MOORE: Thank you very much, Your Honor.

[34] What is marked as Defendants' Exhibit No. 3 which has previously been furnished a copy to counsel, at least a month ago, perhaps longer, is a study made by OMEC, Incorporated. OMEC, Incorporated, is a Norman corporation comprised of four doctors at OU. They have a contract with the Alcohol Safety Action Program, the local ASAP program operated here in

Oklahoma City, to conduct research and evaluate data.

JUDGE EUBANKS: Well, are these the M.D. type doctors?

MR. MOORE: No, sir, they are Ph.D.'s.

JUDGE EUBANKS: All right.

MR. MOORE: Whose statistical backgrounds, and the study by OMEC, Incorporated, is a part of roadside surveys which they conducted as a course of their regular business pursuant to the contract with ASAP.

There is a cover letter with the report which generally describes the procedure which was followed.

Dr. Krenek, the person who extracted this data from the files of OMEC, Incorporated, is out of town and could not be here today and I did not feel it desirable to subpoena him, especially in view of the fact that counsel has had the statistics for many months and has waived his hearsay objections.

I would like to move the admission of Defendants' [35] Exhibit No. 3 into evidence, at which time I would make additional comments.

JUDGE HOLLOWAY: Is there any objections to the Defendants' Exhibit No. 3?

MR. GILBERT: No hearsay objection, Your Honor, but the previous objections would apply to this exhibit also.

JUDGE HOLLOWAY: The Court's ruling is the same. The objection will be overruled.

MR. MOORE: I have furnished the Clerk with three copies. I will wait until they're distributed.

JUDGE HOLLOWAY: The objections as stated is overruled and the Defendants' Exhibit No. 3 is received in evidence and if I did not make the record clear, the Defendants' Exhibit No. 1 and 2 are also received in evidence. The objection is being overruled.

MR. MOORE: Thank you, Your Honor.

As I said, pursuant to their contract with ASAP, OMEC conducted a roadside survey during the years of 1972 and 1973. As you can see from the cover letter there —

JUDGE HOLLOWAY: Counsel, just a minute. I believe your remarks now are getting into argument. In other words, the exhibit is in evidence without objections and the Court will read it. If you want to allude to it [36] during your argument, why, that will be fine. We can proceed with the evidence at this time. Do you have any other exhibits?

MR. MOORE: Yes, sir. I would like to offer into evidence Defendants' Exhibit No. 4 and Defendants' Exhibit No. 5, both documents of which are summaries of the —

JUDGE HOLLOWAY: Well, we better take them one at a time, if you will, and describe it generally for us and then pause for objections.

MR. MOORE: Yes, Your Honor.

Defendants' Exhibit No. 4 is a report published by the Oklahoma Department of Public Safety. During the course of their business they publish these reports yearly. They are distributed to the public, to anyone who requests them and are published pursuant to State Statute as part of their statistical data which they provide for anyone needing the data and to the public at large.

The report is a nine, ten page report which covers all their various breakdowns regarding collection and by age groups and sex groups.

The exhibit and page number which I am particularly interested in is Page 7 of the report, which shows the male and female drivers killed, injured by age group and sex group. It does not show them by levels of intoxication.

[37] My sole purpose for offering this exhibit is to show

the, I think the exhibit is useful in that it shows the number of accidents to which people in this age group are involved, which admittedly, not being specifically on point, I think is relevant and should be considered by the Court along with the other exhibits in the case.

JUDGE HOLLOWAY: Now, you're offering, you mentioned special items in Page 7. You're offering the entire report or just the page?

MR. MOORE: I would offer the entire report.

JUDGE HOLLOWAY: Very well. Is there any objections?

MR. GILBERT: No hearsay objection, Your Honor. I do offer the previous objections. I would also add that statistics regarding injuries are completely irrelevant as to question of culpability.

JUDGE HOLLOWAY: The objection is overruled and the Defendants' Exhibit 4 is admitted in evidence and received in evidence.

MR. MOORE: Defendants' Exhibit No. 4 covers the fiscal year, pardon me, calendar year 1972.

Defendants' Exhibit No. 5 is an identical report for calendar year 1973.

I would ask that it be admitted also.

[38] JUDGE HOLLOWAY: Is there any objections to the Defendants' Exhibit No. 5?

MR. GILBERT: Your Honor, I am sure it will just be the same objections. I haven't received a copy, but I will just make the same objections as before, Your Honor.

JUDGE HOLLOWAY: Very well. The same ruling of the Court applies. The objection is overruled and the Defendants' Exhibit No. 5 is received in evidence.

MR. MOORE: Does the Court desire copies of both of the exhibits?

JUDGE HOLLOWAY: Yes, please. It would be convenient if you have three.

MR. MOORE: Yes, sir, I do.

The next exhibit, the next exhibit, again without supporting testimony, which I would like to offer into evidence, Defendants' Exhibit No. 6, is a report issued by Clarence M. Kelly, the Director of the Federal Bureau of Investigation, a report published by the Bureau and distributed in the course of its business.

Particularly, I would direct the Court's attention to Page 123 and Page 129 of which I have distributed a copy to counsel. I would ask that Defendants' Exhibit No. 6, the report of the Federal Bureau of Investigation be admitted into evidence.

[39] Are you offering the entire report or just the pages you refer to?

MR. MOORE: To expedite it, I would offer the two pages to which I have referred.

JUDGE HOLLOWAY: Perhaps we better have a cover page which shows the date. Isn't there a transmittal letter from those reports, usually, to the President or the Attorney General?

MR. MOORE: No, sir. All I have in my possession is just the report as I have it in my hand.

JUDGE HOLLOWAY: Very well. You maybe better include the cover for identification. Just describe it. I mean, that is what we will say in the record, that you're offering the Pages 123 and 129 and the cover.

MR. MOORE: Yes, sir, that is correct.

JUDGE HOLLOWAY: Very well. Any objections to the Defendants' Exhibit No. 6?

MR. GILBERT: It would be the same objection, Your Honor.

JUDGE HOLLOWAY: I would just inquire of counsel, what it is on Page 123 that he is inviting

attention to. Do you want to indicate to the Court what the relevance of that Page 123 is?

MR. MOORE: Yes, Your Honor.

Well, on Page 123 is Table 129 — I am sorry, I [40] do not have copies to the Court. I have one Xerox and one original. It shows the same classification of the crimes under the Uniform Crime Reporting System as have been testified to by the previous two witnesses.

The offenses of DWI, Liquor Laws and Drunkenness. It shows for the years '67 and '72, it shows the arrest trends from those two years for people under age 18 years of age, not distinguished by sex, to people over 18 years of age.

The exhibit is offered solely for the purposes of showing the trend of crime, if you will, for these offenses over the last five-year period.

JUDGE HOLLOWAY: Very well.

Do you have objections now to Defendants' Exhibit No. 6 consisting of the cover of the report and Pages 123 and 129.

MR. GILBERT: No hearsay objections, Your Honor. My same objection on relevancy.

JUDGE HOLLOWAY: Very well. The objection is overruled and the exhibit consisting of the cover and Pages 123 and 129 of the FBI report — what year was that, please?

MR. MOORE: Year 1972.

JUDGE HOLLOWAY: For 1972, is admitted in evidence.

[41] MR. MOORE: I would apologize to the Court, that is the only copy I have. I would be more than happy to leave this with the Court if they desire.

JUDGE HOLLOWAY: Well, we will have to have — oh, you have made Xerox copies of the pages?

MR. MOORE: Yes, Your Honor. I have one copy.

JUDGE HOLLOWAY: Well, all of us of the Court have that report, I believe, so we will be all right.

MR. MOORE: Okay. Fine.

JUDGE HOLLOWAY: Thank you.

MR. MOORE: The next exhibit I would like to offer is Defendants' Exhibit No. 7 is a report published by the Department of Public Safety, which bears the emblem and seal of the Department with specific reference to Table 4 at Page 7 of the report, which shows driver fatalities by a function of blood alcohol concentration, sex and age.

The sole purpose for requesting the admission of the Minnesota⁵ report, is to show that the Oklahoma statistics are at least in line with statistics in other states.

JUDGE HOLLOWAY: Very well. Is there any objections to the Defendants' Exhibit No. 7?

MR. GILBERT: Just the same objections as before, Your Honor.

JUDGE HOLLOWAY: The objection is overruled and the Exhibit No. 7 is received in evidence.

[42] MR. MOORE: Defendants would next like to have admitted in evidence Defendants' Exhibit No. 8. It is a publication entitled, Proceedings of Joint Conference on Alcohol Abuse and Alcoholism. A study financed under the auspices of the U. S. Department of Health, Education and Welfare, U. S. Department of Justice and U. S. Department of Transportation.

There are statistics in the documents which I believe might be relevant to the case at Bar.

The document makes reference to several studies conducted within the last 20 years.

I would specifically invite the Court's attention to Pages 124 through 127, which is a commentary on the study conducted in the State of Michigan where certain

⁵"Minimum" appears in the original.

graphs were made from the data.

JUDGE HOLLOWAY: Well, we don't want to be obliged to read the entire book. If you don't have an interest in it for evidence — what is it, are those just the only pages you're concerned with, 124 to 127?

MR. MOORE: That is correct, Your Honor.

JUDGE HOLLOWAY: Why don't you just offer those parts of it and the cover, so that we are not obliged to examine any further.

MR. MOORE: Very fine. I would ask that Defendants' Exhibit No. 8 be the cover page and Pages 124 [43] through 127 of the report of the Federal Government. I would ask it be admitted into evidence.

JUDGE HOLLOWAY: Is there any objections to Defendants' No. 8?

MR. GILBERT: Same objections as before, Your Honor.

JUDGE HOLLOWAY: Very well, the ruling is the same. The objection is overruled and the Defendants' Exhibit No. 8, consisting of the cover and Page 124 to 127 of the exhibit is received in evidence.

MR. MOORE: Your Honor, I do not have the extract Xeroxed. May I request leave of the Court to substitute a Xerox extraction, in lieu of the complete document.

JUDGE HOLLOWAY: Yes, You may do that.

MR. MOORE: Thank you. Your Honor, that is all the evidence I wish to present at this time. The Defendants rest.

JUDGE HOLLOWAY: Very well. You may proceed.

MR. GILBERT: Your Honor, I am not quite certain how to style the motion or the argument I wish to make.

In plain English, it would be Motion to Demur.

JUDGE HOLLOWAY: We call that a Motion to

Dismiss under Rule 42.

MR. GILBERT: Well, it wouldn't be to dismiss, [44] because we are Plaintiffs.

JUDGE HOLLOWAY: That is right.

MR. GILBERT: Let's call it a Motion for Judgment.

JUDGE HOLLOWAY: Very well.

MR. GILBERT: To outline the argument, the Court may indicate it would prefer to consider this after the conclusion of all evidence.

To outline the argument, I would show that the statistics, even interpreting them in the worst light to the Plaintiffs, that arrests mean convictions and that the figure, 427, means 427 separate individuals, et cetera, et cetera — still, it indicates that at most, there is a population, there is a problem with no more than about 2 percent of the male population, 18 to 20.

Further, that the statistics which the Defendants themselves have introduced, show that there is a jump or an increase of alcohol related problems with males once they achieve 21 and/or older.

I would argue that on the basis of modern constitutional law, it is improper and impermissible to condemn an entire sex because of a characteristic displayed by so few as 2 percent of the population.

Furthermore, it is irrational to discriminate [45] against males 18 to 21 when by the very statistics relied upon by the State, that age category displays the less amount of problem related to alcohol.

If we are going to discriminate against some class of males, it should be males 21 and above, not males 18 to 20.

In support of the argument I will just cite a couple of very recent cases.

In the case of Cleveland Board of Education versus LaFleur, which was decided by the Supreme Court just

this January. Now, that is the pregnant teacher's case. The Supreme Court said the mere fact that some women, when pregnant, are physically incapacitated from teaching school, does not mean that all women are incapacitated from teaching school and that any statute which imposes a sexual stereotype upon the entire class or upon an entire group of people for purely biological or anatomical reasons, just blanket⁶, without any regard to individual capabilities, is unconstitutional as a violation of the due process.

JUDGE HOLLOWAY: Counsel, just a moment.

The Court is aware of the case law and of your position which you have made perfectly clear. The motion will be overruled. The Court will permit you to develop your authorities and your arguments actually after the [46] evidence is heard, but we feel we should hear your evidence, if you wish to present it, and the Motion for Judgment is by the entire panel overruled.

MR. GILBERT: Very well.

Your Honor, I would call as the Plaintiffs' first witness, Dr. Joseph Ruffin, M.D.

DR. JOSEPH RUFFIN, M.D.,
having first been duly sworn upon his oath, took the witness stand and testified as follows, to-wit:

DIRECT EXAMINATION

BY MR. GILBERT:

Q Would you state your name and address to the Court, please.

A Joseph Ruffin, 400 Northwest 16th, Oklahoma City.

Q And what is your business, trade or profession, sir?

A I am a physician, specifically a psychiatrist.

⁶"Blank" appears in the original.

Q And how long have you been practicing the profession of medicine or psychiatry, sir?

A Well, practicing medicine since 1953, psychiatry, in private practice since 1965.

Q Are you licensed to practice medicine by the State of Oklahoma?

A Yes, sir.

[47] Q Would you state your academic degrees and qualifications, Doctor?

A A Bachelor's Degree from the University of Illinois. Primarily in the areas of biology and chemistry. An M.D. from the School⁷ of Medicine, Loyola University in Chicago, in 1953.

Q Where did you do your internship, sir?

A At William Beaumont Hospital in El Paso, in 1953.

A All right. Were you an Army doctor?

A For a period of three years, yes, sir.

A All right. Have you ever, have you ever undergone any residency?

A Oh, yes. Two. One is a subspecialty of preventive medicine called Occupational Medicine and Industrial Hygiene, and then subsequent to that I came here to Oklahoma from 1962 to 1965, I was training in psychiatry.

Q Doctor, in your course of scientific studies, have you ever had occasion to study what is commonly called organic chemistry?

A Oh, yes.

Q All right. And, Doctor, in your studies and qualifications to be a doctor, a preventive physician and a psychiatrist, have you ever studied a phenomenon or disease known as alcoholism?

⁷"Strict" appears in the original.

[48] A Quite a bit.

Q Are you familiar with the causes, symptoms and treatments and social problems caused by the disease of alcoholism?

A Very much.

Q Doctor, in your course of studies, have you ever taken courses involving the study of the sexual hormones or the difference between the respective sexes?

A Yes, sir. That comes up quite frequently.

Q And have you ever studied the psychiatry or the psychology of the adolescent and the young adult?

A Yes.

Q May it please the Court, subject to cross voir dire, I would move to have this witness qualified as an expert witness, competent to express his expert opinion on matters of a biological and psychological nature.

JUDGE HOLLOWAY: Very well. Are the qualifications admitted?

MR. MOORE: Yes, sir, they are.

BY MR. GILBERT:

Q Doctor, to commence your testimony in chief now, are you familiar with the substance known as ethyl alcohol?

A Yes, sir.

Q Would you tell the Court generally what ethyl [49] alcohol is and what its significance to human society is.

A Well, ethyl alcohol is, oh, ethyl alcohol is one of the simpler short-chain alcohols, I mean having two carbons.

Q Feel free to make a drawing.

A Two carbons, and what distinguishes an alcohol is its so-called hydroxyl. There are many, many alcohols, but this is ethanol.

Q All right. Could you state some other common

names for ethyl alcohol as we understand them in English?

A Well, you want generally speaking, when we talk about alcohol, this is what we are referring to, ethanol.

A All right, now, is that the same alcohol as alcoholism?

A This is the alcohol of alcoholism, yes. The alcohol that is common to intoxicating beverages.

Q All right, Doctor. Would you explain you your expert language the effect of alcohol upon the human body.

A Okay. Let me say to begin with, that the effect that I am discussing and talking to are those effects upon the central nervous system, central nervous system specifically being the brain and spinal cord, and for the purposes of our discussion, I am discussing effects upon brain or brain tissue.

[50] Central nervous system tissue, this into peripheral nerves that innervate⁸ muscles and nerves which sensory impulses originate and are transmitted, so we are talking about central nervous system brain tissue.

MR. MOORE: May I make an objection as to the relevancy of this line of testimony?

JUDGE HOLLOWAY: The objection is overruled.

MR. GILBERT: All right. Your Honor, I think maybe — excuse me, Dr. Ruffin, of course, what we will be driving to later, understand, is the question of sexual differences in the ingestion of alcohol.

A Yes.

Q So, your discussion will be oriented towards that ultimate end, so with that view in mind, explain it to the Court as you feel best.

⁸“Innovate” appears in the original.

A Okay. I guess the first thing I am aware of is that my discussion is essentially asexual, that is, without sexual references. At least perhaps to the final point at least.

Q Uh-huh.

A Now, let me say, also, that with few exceptions, my best reference for the material that I am alluding to is contained within two volumes titled Actions of Alcohol, by Drs. Wallgran and Barry.

I am prepared to leave these as references.

[51] This is an extraordinary compendium, unbelievably detailed, of all research directed to the actions of alcohol through the year 1970, approximately. It contains every conceivable reference.

MR. MOORE: Excuse me. Will the witness repeat the name of the books, please.

A You want them? I can give them to you.

MR. MOORE: Just the title and authors, please.

A Actions of Alcohol. The authors being Wallgran, W-a-l-l-g-r-a-n, and Barry.

MR. MOORE: Thank you.

A October, 1970.

Now, first, there is the matter of the cellular basis of ethanol on the nervous system and the electrophysiological effects of ethanol upon the nervous system functions have been studied.

Now, very simply, in summary form, what ethanol does is to destroy or at least inhibit or depress the electrical efficiency of nervous tissue. Specifically affecting the behavior of the nerve cell membrane which maintains the charge, that is required for the efficient transportation of the nerve impulse.

In effect, what happens is that ethanol affects the functioning of the nerve cell membrane in such a fashion that the capacity of that nerve cell battery to maintain

[52] the charge and to discharge is impaired⁹. It loses its efficiency in this respect, it becomes depressed.

Now, then there are other effects upon the central nervous system, looking at it in a more global sense.

We can see how electroencephalogram traces indicate regular function of the nervous system becomes depressed.

Other parts of the brain have been studied in more detailed ways, but particularly in lower animals, and again, it is regularly shown that alcohol depresses the electrical functioning of various parts of the nervous system.

There are certainly very little evidence for any stimulant or beneficial effect of anything¹⁰ alcohol does on any sensory capability.

Specific sensory functions have been studied. Specific motor functions have been studied. Specific combinations of sensory and motor functioning have been studied, and in any event, the more complex the task studied, the more ready is the evidence that alcohol does produce a depression or impairment of function.

Lastly, there has been systematic study of complex behavioral effects upon intellectual function. How people behave verbally. Matters of judgment. How their [53] emotionality is influenced by alcohol consumption.

For instance, these have been studied in projective tests. Tests like the "Ink Blot Test" or Rorschach Test are shown that the person under the influence of alcohol becomes increasingly impulsive and superficial and has a tendency to elect risky alternatives, especially in hypothetical situations.

Let me say in summary, and here I refer back again, to the compendium by Wallgran and Barry. There has been a striking absence of systematic sex effect studies as a result of systematic sex effect from alcohol dosage.

⁹"Comparative" appears in the original.

¹⁰"Any" appear in the original.

There is some evidence, but not much.

Q Let me ask this, Doctor. You define or describe the chemical effect of — first of all, is ethanol the same thing as ethyl alcohol?

A Yes, sir. Ethyl is the two-carbon alcohol.

Q All right. Now, you define the effect of ethyl alcohol as impairing the electrical functioning of nerve cells?

A Yes, sir.

Q Would your statement be true for members of the human species, 18 through 20 years of age?

A Yes.

Q To your knowledge, is there any, either in, to your knowledge, or in the opinion of medical science, is there [54] electrical or anatomical difference in the male and female central system?

A None whatsoever.

Q All right. To your knowledge, is there any difference between males and females and the way that ethyl alcohol gets into the body and is transported throughout the body to the blood or to the nervous system?

A None.

It is absorbed very directly and immediately through the stomach wall. Metabolized almost entirely within the liver.

Q Is that the same for both sexes?

A Yes, sir.

Q Is that the same for all ages, the mechanism?

A Yes.

Q All right. Now, Doctor, sometimes I hear about things called hormones or a chemical difference between male and female.

Could you explain to the Court what that means and whether or not that has any effect upon the, chemi-

cal effect of ethyl alcohol on the central nervous system?

A Well, there certainly are very specific chemical differences between male and female and especially I would guess most distinctively in the matter of the so-called sexual hormones.

[55] Now, there are sex-related hormones that are produced by the adrenal cortex, but the most significant sexual hormones are produced by the sex specific gonads of the male and female.

Again, this is a large — there are large families of these hormones, but essentially the sex hormones produced by the male is one referred to as testosterone. The sex hormone produced by the female is, the female ovary, is estradiol, d-i-o-l, estradiol.

A Is that all one word?

A Yes.

Q Doctor, either in your opinion or in the opinion of medical science, as you understand it or know it, do these sex hormones, testosterone and estradiol, have any effect upon the direction of ethyl alcohol with the function of the central nervous system?

MR. MOORE: Your Honor, I would object to asking any opinion other than his own. His own opinion is fine.

JUDGE HOLLOWAY: The objection is sustained. The question should be confined in this respect to the doctor's own opinion.

BY MR. GILBERT:

Q Doctor, do you have an opinion as to whether or not the sexual hormones that you have mentioned, the varying hormones between the two sexes, have any effect upon [56] the interaction between the central nervous system and ethyl alcohol?

A I would say sexual hormones, specifically, have no such effect.

Q I am sorry?

A Have no such effect.

Q All right. Doctor, let's move from the realm of straight¹¹ physiology to the realm of psychiatry, or the mind.

With reference to members of the human species, 18 through 20 years of age, is there any evidence or do you have any opinion as to whether or not there is a difference of intelligence between the sexes?

A No difference in intelligence between the sexes from the point of view of formal psychological testing. I have noticed that many, many of my clinical psychologist friends who have considerable expertise in this area are impressed that younger boys — here I am thinking of about children, say, between the 8 and 12, are less interested in the testing situation and so perhaps those are very minor differences and again, by clinical psychologists, not accepted as significant, and my own opinion is, that such differences are really insignificant.

JUDGE HOLLOWAY: Are what?

Are insignificant.

BY MR. GILBERT:

[57] Q Doctor, I sometimes hear a folk myth that girls are more mature than boys or that girls mature earlier than boys. With reference to the human species, specifically 18 to 20, do you have any comments or opinions about this folk myth?

A Okay. Well, when we look closely at that, that phrase, that collection of phrases, it seems to me what people are usually referring to, of course, is, first, the earlier manifestation of secondary sexual characteristics.

In the developing girl, the girl developing into womanhood — so, this is specifically a physical kind of maturation and the male, you know, runs a couple of

¹¹"Trait" appears in the original.

years behind that, two or three.

Secondly, I notice as I have heard people talk about this, they seem to be referring also to the greater propensity, the greater interest that the young woman would have in making marriage, forming a family, the nesting, the interest in nesting, if you would like.

That seems to be what I hear people saying as they talk about the greater maturity during these years of the woman. The developing woman.

A All right. By the time the average human reaches the 18th year, both male and female, do you have [58] an opinion, as to whether or not there is any difference in emotional maturity between the sexes?

A My own clinical — and this is based upon my regular work with young people.

I find no essential difference in their maturational levels from the point of view of their emotional or psychic development. Both of them have a lot of work to do for the rest of their lives.

JUDGE HOLLOWAY: Emotional or what?

A Emotional or psychological development.

BY MR. GILBERT:

A Doctor, are you aware of any scientific or experimental evidence or do you have an opinion regarding the ability, respective¹² ability, of males and females with special emphasis on the 18 to 20 years of age bracket, in their respective abilities to handle alcohol in the normal social context or in the normal context?

A Now, are you referring to the ability to — well, I guess we have already dealt with that, not — are you talking about alcohol using behavior?

Q Right. From the behavioral aspects.

A I see. My impression is that males seem to have

¹²“Respect of” appears in the original.

a greater interest in experimenting with alcohol, or that somehow the use of alcohol, alcohol using behavior seems to be associated with the idea of being a man. So, we see some, [59] you know, experimental interest in some alcohol using behavior that certainly is associated with that. Is that the response to your question?

Q Well, I was thinking more in a biological sense. Can you think of any difference in the male and females' biological ability to handle alcohol?

A Well, now, only one thing occurs to me, and that is that very simply put, women are, on the average, smaller than men and very specifically their volume of body water is less than a man. So, given a fixed dosage of alcohol, a woman will regularly obtain a slightly higher blood level of alcohol than a man would.

Q To your knowledge, Doctor, is that difference which, is that difference enough to be immediately or clinically significant?

A I would say perhaps it is, and we have some slight evidence to that effect in a study that is recently done by Dr. Ben Jones, here at Oklahoma City, in our Center for Alcohol Related Studies.

Q Is that the Dr. Ben Jones who is present here in the courtroom today?

A Yes, And this is titled "Sex Difference in Response to Alcohol" where memory functioning in both men and women have been studied systematically.

Q All right. Now, Doctor, he will be available to [60] testify next. Since it does tie into your testimony, could you just summarize what the findings were, however —

MR. MOORE: I object, Your Honor.

MR. GILBERT: Let me rephrase the question.

JUDGE HOLLOWAY: Very well.

BY MR. GILBERT:

Q Are you familiar with his study and his findings?

A Yes.

Q And do those, do you have a, are those findings consistent with what you understand about the relationship between the nervous system and ethyl alcohol and whatever sexual differences there may be?

A Yes, very much so.

Q All right. Would you summarize then, what those findings were.

MR. MOORE: I renew the objection, Your Honor, I don't feel that Dr. Ruffin is competent to testify from another doctor's report. Especially since that gentleman is present in this courtroom and available to testify.

JUDGE HOLLOWAY: Objection is sustained. You may answer the question as to his own opinion, from his own studies, but to refer briefly or merely to the other doctor's opinion would not be competent.

BY MR. GILBERT:

[61] Q All right. I was just doing it for the sole purpose of linking it up.

JUDGE HOLLOWAY: You can ask him what his opinion is and then ask him if it is the same.

BY MR. GILBERT:

Q All right.

Well, doctor, is your opinion about the respective abilities of young adults to handle alcohol the same as or would they be consistent with Dr. Jones' conclusions?

A Yes. And something I was particularly pleased by was Dr. Jones' incidental observation that perhaps women have even a greater tendency —

MR. MOORE: I object, Your Honor. Let Dr. Jones testify to this.

JUDGE HOLLOWAY: I believe that the objection is well taken in line with the Court's ruling and the

other physician can testify.

MR. GILBERT: Very well.

JUDGE HOLLOWAY: Dr. Ruffin may testify as to his own opinion as to this point you are developing, if you wish, but not merely as to what the other physician —

MR. GILBERT: Yes.

Q Dr. Ruffin, you have heard the order of the Court. If you have something of your own to say, you may say it.

[62] A Yes. Now, I am responding to a finding of Dr. Jones' study, right?

JUDGE HOLLOWAY: Well, you may state your opinion, Doctor, on the question being asked. We are pleased to receive it. Your own opinion.

A Fine. That women tend to become intoxicated, seems to me, a little more readily than males do on the same fixed dosage of alcohol, but also they have an increasing tendency towards intoxication or some type of emotional difficulty that would appear to be a kind of impairment in their premenstrual period.

I have had this clinical impression for a long time. It is quite interesting to me to see it corroborated in the experimental situation.

Q All right, Doctor. You are aware that this is a lawsuit to determine the legality of a statute which allows females to purchase 3.2 percent alcohol at age 18 while males are prohibited therefrom until age 21. You are familiar with that, are you not?

A Yes.

Q All right, Doctor. Drawing upon your own expertise, do you have an opinion, based upon either chemistry or biology or neurology or medicine or psychology or psychiatry, as to whether or not this discrimination is rational?

[63] A Specifically, the 18 to 21 years discrimination?

Q Yes, that is right.

A I find no rational basis for such a discrimination.

Q Thank you very much.

You may cross examine.

CROSS EXAMINATION

BY MR. MOORE:

Q Dr. Ruffin, let's just start at the last there. You see no rational basis for the classification, none whatsoever?

A For the classification?

Q Of the state law that we are talking about today.

A Oh, yes.

Q You see absolutely no basis for that classification?

A For that specific classification, no, sir, I do not.

Q Are you talking about now, solely within the terms of biological chemical standpoint or any type of justification? In other words, is your testimony going outside the scope of your expertise or are you just saying that within your area of expertise there is no rational justification? I want to be very clear on that. Am I clear?

[64] A No, I am not understanding your question.

Q Well, it is a very important statement you made, Dr. Ruffin. You said that there was no rational justification for the state law which we are talking about.

A For this discrimination or ages between 18 and 21?

Q That is right.

Can you say there is absolutely no rational justification or is there just merely no rational justification from biological, sociological or psychiatric standpoint?

A I would say none from a biological, sociological

or psychiatric standpoint, yes.

Q Thank you.

Now, I am sorry, you said, but I don't recall, how long have you been a practicing psychiatrist?

A Since 1965.

Q About nine years?

A Yes.

Q Do you specialize in the treatment of alcoholics? Do I gather that from your testimony?

A Actually, I do a great deal of work with alcoholics, yes.

Q How many patients have you had, male, female, in this age group which we are talking about, 18 through 21? [65] Generally, I don't certainly require a precise number.

A You mean people who would be defined as alcoholics?

Q Patients, people who have come under your observation, hundreds, thousands, ten —

A Well, I would say several hundred.

Q And how many of those several hundred have been alcoholics, male and female? Could you generalize?

A I would say what you and I and probably all members of this Court regularly define as alcoholism is seldom defined in this group of people, seldom defined. We see alcohol use, but not someone labeled as alcoholics. I am not saying it doesn't exist. I am saying you seldom find it.

Q What is your definition of an alcoholic then? The chronic problem drinker?

A That is certainly the ultimate statement of alcoholism.

Q Habitual user?

A Yes, and also compulsive use. You know, inability

to take a drink and stop. That is certainly a very fine definition.

Q Have you seen any chronic compulsive drinkers in this age group, 18 through 21, male or female?

A Perhaps I have seen someone, 20, 21, I think I [66] have seen a few young males like that, yes. Most of what I see in this age group is the use of other chemicals, other than alcohol, other drugs.

Q I see. So, you have seen some males 21 and 22 or within your definition, alcoholics, but no females. Is that correct? Am I accurately summarizing your testimony?

A Offhand, I can think of two young women who were alcohol abusers too. I have seen more males than females.

Q More males than females?

A Oh, yes, yes.

Q Now, obviously, then, most of the alcoholics or problem drinkers, which you treat, are older in age then. Is that correct?

A Most of those would eventually come into treatment, yes.

Q Now, in the course of your therapy with these people, could you generalize as to what time they started drinking?

A Oh, it is amazing. I am surprised at how often many of these people will tell, beginning to drink at 9, 10, 11, 12.

Q 18, 19, 20, 21?

A Usually earlier, usually earlier.

Q Is there any variation that you could state with [67] regard to males and females when they start drinking? Would there be any age variation there, generally speaking?

A Well —

Q If the question is too general, feel free to tell me.

A No, let me think about it for a minute.

My impression would be that a woman might start drinking later.

Q Okay. Now, during your direct testimony — well, let me recap for a moment.

Your testimony was that as a general statement, women start drinking later than men. Is that correct? And that is based upon your experience with alcoholics that you have treated in later life and you go back and question them as to when they started. Is that a correct brief summary of what you have said?

A Yes. I am sure the question has been more systematically studied.

Q But — well, isn't one of the problems in this area, and correct me if I am wrong, but isn't one of the problems in this area is that there have been a lot of studies conducted and statistics in the area of alcoholism as a function of age and sex. Is that an accurate statement?

A It is certainly what I have found, yes.

[68] Q So, we —

JUDGE HOLLOWAY: Pardon me, but do you mean yes, there have not been many studies done on it?

A Yes, there have not been many studies. That is very evident in this book. There are a lot of references to sex related differences, that is through 1970.

BY MR. MOORE:

Q I am sorry. I didn't hear the statement you made to the Court there.

There are, are there not, a lot of studies in the book?

A No, there are very few studies in the book, studies of orangutans and chimps and rats and mice.

Q So, we are dealing with limited data. Is that right?

A That is right.

Q Okay. In the course of your direct testimony, you referred to the idea that women mature faster than men. Men mature faster than women. Now, were you speaking of that in a lay sense or — let me ask you this. Is there a credible theory within your position that men mature slower than women?

A None whatsoever.

Q There is no such credible doctrine, even though you don't agree with it?

[69] A Now, wait a minute, let me be specific now. There is no disagreement with the generalization that women mature, physically, you know, sooner than you do.

A That is what you call the primary?

A Secondary characteristics.

A I am sorry, secondary.

A Now, as far as the psychic or emotional development, I would say essentially no difference and here, of course, we are getting into, you know, a nice argument about what constitutes psychic or emotional maturation.

Q You said essentially no difference. Is there any difference?

A None that I could find in my own work.

Q So, it is your opinion that there is no difference in a psychiatric point of view between the maturity levels of men and women?

A Yes.

Q Is there a credible psychiatric school of thought to the contrary?

A No. I would say that psychiatric schools of thought, these days, with reference to the issue of maturity —

Q Yes.

A — are achieving a remarkable degree of consistency, [70] which is unusual in psychiatric work, I may add. And here, if you wish, I can cite, you know, two references.

Q No, I think you have made your point.

A You see, simply that the maturation or the maturation process is essentially a lifetime task, you know, proceeds continually through life. Through marriage, through growth of children and on through death, and as a matter of fact, how we handle death is an expression of our degree of maturity.

Q So, professionally speaking, I am talking about your profession — there is no credible school of thought which supports the proposition that men mature slower, is that correct?

A Right.

Q Is there, have you heard lay people express this opinion?

A Yes, it is a common myth, it is a common myth.

Q Do you think it, if those lay people might include legislatures —

MR. GILBERT: I object. That is getting opinions out of the doctor's field of expertise.

JUDGE HOLLOWAY: The objection is sustained. We believe the question is argumentative.

BY MR. MOORE:

Q Well, let me get to this lay opinion, if you will. [71] You were talking about maturity. I guess in a practical sense, in terms of the nesting characteristic of women or a woman during this age period. A woman shows more compensity to settle down.

A Yes.

Q That is what most people think?

A Uh-huh.

Q And that is what they refer to when they talk about different levels of maturity, is that correct?

A That is correct, that and the greater tendency toward quietness and less rambunctiousness.

Q Do you agree with that?

A Do I agree with what?

Q That women show a nesting instinct or settling down instinct or whatever you want to call it?

A I think women are quieter people. They are less active and that is readily demonstrated beginning in the early years of development.

Q So, I am not a psychiatrist, but if I were to say that maturity to me means settling down, let's assume that, then it would be accurate to say that men mature later than women. Is that correct?

A Well, by your definition.

Q You were present in the courtroom during the statistical data which I went through, which showed the [72] various arrest levels, were you not?

A Yes, uh-huh.

Q Without showing you those in detail, they show that males are arrested a lot more than females.

A Uh-huh.

Q For operating an open saloon, possession of liquor, public drunk, all types of offenses. Why is that? Do you have any professional opinion as to that?

Do you have any professional explanation for the statistics which I have offered today or any comment on them?

A Oh, I have some comments on them, yes.

Q Well, I would welcome them.

A Okay. Let's see, let me just — no, the two that you presented to the Court initially, your two first exhibits.

Let's see, I have seen neither of these previously.

The first is that a copy of the report presented by Mr. Wallock.

Q Yes, sir.

A Now, here I am just, you know, roughly, eyeballing —

Q Well, I don't want you to — it is not necessary to examine the statistics in detail.

A Well, I am talking about a rough eyeballing.

Q Can you account for that difference from a [73] professional point of view, from the psychiatric point of view?

A Oh, I see it is just normal, you know, this is how, this is how boys and girls are in our society where alcohol is available.

Q Boys drink more than girls?

A I don't know that. They may. All right, secondly, somehow they come to the attention of the law more readily, however that —

Q So, there is two possibilities.

A Right.

Q It is possible that boys drink more than girls and it is possible that boys are under the scrutiny of the law enforcement authorities more than girls?

A Uh-huh. Well, what I am impressed with is that the male, female differential, not boy and girl differential.

Q Now, let me ask you another question in winding up here.

You testified, there may be some overlap here, but you testified to the behavioral aspects of alcohol?

A Uh-huh.

Q And you said that the male shows a greater propensity to experiment. Could you elaborate on that. Are you saying that a male might be more inclined to experiment with alcohol than a female in ages of 18 through 21?

[74] A That seems to be so. We study, you know, a pure group of males, that —

Q What do you attribute this innate curiosity or experiment — Is there any known explanation for it?

A Well, none except the proclivity that is, again, how should I say, immensely normal during adolescence and particularly in connection with the issue of one's peer group.

Q Is it true that males are more aggressive than females?

A I don't think there is any question that males are much more active and much more, what you would call aggressive.

Q In all aspects of their human conduct, whether it be business, fighting, driving, drinking?

A Well, I can't say in all aspects, but I think very prominently so, and very generally so.

Q So, if an 18-year-old female had about three beers and an 18-year-old male has about three beers and they both slipped behind the wheel of separate cars, it is not inconsistent to think that the male would be more aggressive?

A Well, there is several considerations there. First, the problem in management of aggression is usually associated with whatever other kinds of emotional conflicts [75] exist within the individual at that moment.

In other words, I can be a very aggressive person. Okay, I am of a high activity behavior, but to behave impulsively and get out of control, you see, that is the point of discrimination right there, where things get out of control. We no longer — that is another matter, you see.

Q Well, perhaps that is what I should have talked about then.

A Okay.

Q Would the males be more impulsive?

A Not necessarily. You see, here, we all carry a lot of emotional conflict within us that differs considerably at different points in time and circumstance.

Now, when a person takes in alcohol and is in the state of considerable emotional tension, the probability of losing control is much greater. I don't think that males are uniquely afflicted in this respect.

Q Well, I am not a psychiatrist, Doctor, and I am having a little difficulty. I am just a lay person. You made the statement initially that males were more aggressive than females.

Now, how does that tie into your statement which you have just made there, of, can you define what we are talking about, aggression?

[76] A Okay.

Q As it would relate to drinking, if at all?

A Well, I tell you in my own notes, I do not prefer to use the word "aggression." I prefer rather to talk about activity or drive behavior.

Q I beg your pardon?

A Activity or drive behavior, because if we can contrast males and females — let's go to the playground situation. Looking at children in kindergarten or shortly after kindergarten, we see different, definite differences in the play characteristics of males and females.

Q Well —

A Now the males are labeled as being more aggressive. The males are labeled to be more aggressive. They're rougher, more body contact, more action within any particular space.

Q And this continues throughout their lives?

A Yes, sir.

Q Through the years 18 through 21?

A Uh-huh. Males have more muscles to put to work and they put them to work.

Q Is this an environmental function of one's character? Is it innate?

A I think it is basically biological. Dr. Carlotti, University of Wisconsin, in the Institute for Primate Studies, [77] has made the same observations with Rhesus monkeys, just observing their normal development.

Q So, this characteristic is not derived from one's environment or culture. It is innate?

A For the most part, I think a certain amount can be taught, but I think most of it is essentially biological.

Q And that is this aggressive attitude or increased activity or however you want to characterize it?

A Greater activity behavior.

Q And it continues throughout the life of the male?

A Throughout the lives, I think it has a tendency to slow down, perhaps in the fifth decade.

Q Excuse me?

A I think it would tend to slow down in the fifth decade.

Q Would it be more acute if at all during the ages of 18 through 21?

A No.

Q When does this aggression or when does it rise and when does it fall?

A Oh, dear, that would be a curve of my own creation.

Q Well, I welcome your opinion.

[78] A Okay.

Q Would it be on the upslope or the downslope during the age 18 through 21? That is obviously what I am interested in.

A Yes. Well, in the first place, I see it as being more in a level phase, with the greatest period of activity being in earlier childhood, activity differential