MINUTES OF MEETING
SENATE JUDICIARY COMMITTEE
MARCH 12, 1981

Tne forty-first meeting of the Senate Judiciary Committee was called to order by Senator Anderson, Chairman, on the above date in Room 331, at 10:00 a.m.

ROLL CALL:

All members were present.

CONSIDERATION OF HOUSE BILL 154:

TO REMOVE STATUTORY PROVISIONS
GRANTING INTERESTS IN STATE LAND
TO THE FEDERAL GOVERNMENT.

The bill was presented by Rep. Brand, District 28, Deer Lodge, who described some of the problems in his area with the building of power lines coming from the coal fields. He said that if many of them are to be built the people should have a say in how it is done, and this bill would give the Land Board better management.

David Woodgerd, representing the Department of State Lands, supported the bill as shown on his attached written testimony, and said it would allow the state to be treated just like any other landowner.

CONSIDERATION OF HOUSE BILL 209:

TO BROADEN THE COURSES OF ACTION
THAT A JUDGE MAY TAKE WHEN HE
DETERMINES THAT A FAIR TRIAL CANNOT
BE HAD IN THE COUNTY IN WHICH THE
PROSECUTION IS PENDING.

Rep. Keedy, District 18, Kalispell, presented the bill. He said that presently in a situation where a fair trial is jeopardized by local prejudice law requires that the trial be moved to another locale. His bill would have the option of selecting a jury from another locale, and then trying the case before that jury in the county of origin. This would provide greater convenience and economy.

Tom Honzel, representing the County Attorneys Association, supported the bill, saying that it would give added flexibility to the court. He cited a case in Gallatin County where a former football player was charged with homicide. Because of

the great number of exhibits, witnesses, etc., it would have been cheaper and more convenient to hold the trial in Gallatin County before a jury selected in another area.

Mike Meloy, representing the Trial Lawyers Association, spoke in opposition, pointing out that there are other factors besides picking a jury which demand that the trial be held somewnere else, such as excessive publicity and the pressure exerted by locals who show up day after day and sit in the front rows, influencing the members of the jury.

Senator Crippen asked Rep. Keedy if his intent had been to limit the options available to the defense or prosecutor relative to moving the trial to a different location. Keedy said that this was a good point, and that he would accept an amendment since this had not been his intent.

Senator Anderson asked who would be required to pay for the moving of the jury to the county of origin, and Keedy did not know for sure.

Senator Crippen asked if there would be a jurisdictional problem; and Mr. Meloy said there probably would not be, but that Judge Bennett had said that he would have a lot of reservations about calling a jury from another county.

CONSIDERATION OF HOUSE BILL 208:

TO EXPAND THE DEFINITION OF "WITHOUT CONSENT" RELATING TO SEXUAL CRIMES.

Rep. Keedy presented the bill, saying that it would extend the definition of "without consent", making it apply not only to sexual intercourse without consent and deviate sexual conduct, but also to sexual assault. He said that Section 502 should be referred to in setting the application for "without consent". The problem in past legislative sessions in making this obviously needed change, he said, has been the very strict definition in Section 501. He said that rape is the most frequently occurring violent crime in this country, and that it is inconsistent that women are counseled not to actively resist rape, for their own safety, but then must show physical evidence of force to prove that she was not a willing participant.

Tom Honzel supported the bill on behalf of the County Attorneys Association.

Mike Meloy, representing the Trial Lawyers Association, opposed the bill. He said that "without consent" should not be applied to sexual assault, which is a misdemeanor, and added that physical evidence of violence should be required to prevent a person's reputation from being ruined maliciously.

He left relevant annotations (attached Exhibit A), explaining why the criminal law commission adopted the current statutory language.

Rep. Keedy, in response to a question by Senator O'Hara, said that proof of the actual deed has been and would still be necessary for building a case, and feels that the common sense of a jury would prevail in determining whether force had been used.

CONSIDERATION OF HOUSE BILL 207:

TO DEFINE "CONVICTED" AS USED IN NON-DANGEROUS OFFENDER AND PERSISTENT FELONY OFFENDER DESIGNATIONS.

Rep. Keedy presented the bill as an attempt to clarify the meaning of "convicted". He cited a case in Missoula County which was the purpose of drafting this bill, and said he had mixed feelings about its necessity. In the case in question, a person who had entered a guilty plea on charges of theft and burglary escaped from jail prior to a judgment of conviction on the theft and burglary charges and committed another felony; and upon his capture and return to jail, was given the designation of "persistent felony offender". This designation did not hold up under challenge, however, because a formal conviction had not yet been handed down in the first case.

Mike Meloy, in opposing on behalf of the Trial Lawyers Association, said that the bill does not really do very much, but inasmuch as a criminal proceeding is not over until a formal judgment has been made the term "convicted" would not be accurate. He gave as examples the case where a guilty plea might be entered but later withdrawn, and the case where a person has pleaded guilty, been given a deferred sentence, and made total restitution and gotten the plea removed from the record. He asked for Keedy's intent relative to these areas.

Karen Mikota, on behalf of the League of Women Voters, said that for the same reasons as given by Mr. Meloy the LWV opposed the bill, and seconded the request for a clarification of Rep. Keedy's intent.

Rep. Keedy stated that his intentions with this bill are very narrow, and the cases cited by Mr. Meloy would not be affected.

Senator Mazurek said that he felt the bill was drawn for such a specific case that it might not be really necessary. Keedy agreed somewhat, but pointed out that extraordinary circumstances do sometimes occur and that present law doesn't handle them adequately. He quoted the dissenting opinion in the Fisher case that the law should never allow an individual to

He left relevant annotations (attached Exhibit A), explaining why the criminal law commission adopted the current statutory language.

Rep. Keedy, in response to a question by Senator O'Hara, said that proof of the actual deed has been and would still be necessary for building a case, and feels that the common sense of a jury would prevail in determining whether force had been used.

CONSIDERATION OF HOUSE BILL 207:

TO DEFINE "CONVICTED" AS USED IN NON-DANGEROUS OFFENDER AND PERSISTENT FELONY OFFENDER DESIGNATIONS.

Rep. Keedy presented the bill as an attempt to clarify the meaning of "convicted". He cited a case in Missoula County which was the purpose of drafting this bill, and said he had mixed feelings about its necessity. In the case in question, a person who had entered a guilty plea on charges of theft and burglary escaped from jail prior to a judgment of conviction on the theft and burglary charges and committed another felony; and upon his capture and return to jail, was given the designation of "persistent felony offender". This designation did not hold up under challenge, however, because a formal conviction had not yet been handed down in the first case.

Mike Meloy, in opposing on behalf of the Trial Lawyers Association, said that the bill does not really do very much, but inasmuch as a criminal proceeding is not over until a formal judgment has been made the term "convicted" would not be accurate. He gave as examples the case where a guilty plea might be entered but later withdrawn, and the case where a person has pleaded guilty, been given a deferred sentence, and made total restitution and gotten the plea removed from the record. He asked for Keedy's intent relative to these areas.

Karen Mikota, on behalf of the League of Women Voters, said that for the same reasons as given by Mr. Meloy the LWV opposed the bill, and seconded the request for a clarification of Rep. Keedy's intent.

Rep. Keedy stated that his intentions with this bill are very narrow, and the cases cited by Mr. Meloy would not be affected.

Senator Mazurek said that he felt the bill was drawn for such a specific case that it might not be really necessary. Keedy agreed somewhat, but pointed out that extraordinary circumstances do sometimes occur and that present law doesn't handle them adequately. He quoted the dissenting opinion in the Fisher case that the law should never allow an individual to

take advantage of his own wrongdoing.

CONSIDERATION OF HOUSE BILL 110:

SETTING PENALTIES FOR FRAUDULENTLY OBTAINING DANGEROUS DRUGS.

Rep. Pavlovich presented the bill and gave written testimony which is attached to these minutes.

Joe Lee, of the Butte-Silver Bow Sheriff's Department, testified in support of the bill as shown on his attached testimony sheet.

Greg Loushin, representing the Montana Pharmaceutical Association, said that the present law is too week to prohibit obtaining fraudulent prescriptions.

Frank Davis, member of the Montana Pharmaceutical Association, presented written testimony which is attached to his testimony sheet.

Senator Olson asked Mr. Davis if a pharmacist could fill a dangerous drug prescription over the phone, and was told that this could not be done legally. Greg Loushin pointed out that certain of these prescriptions could be filled over the phone, depending upon the amount and type of drug in the medication.

Senator Crippen asked if most of the offenders were users or pushers, and was told by Duchene that both are involved, but frequently it is the user who is desperate for the drug and chooses this method of getting it.

Senator Mazurek objected to the word "shall" as it related to line 21 of the bill, and felt that this constituted a mandatory sentence for even a young first-time offender.

Senator Crippen asked how soon an offender sentenced to five years could get out on parole, and was told by Tom Honzel that he could do so in one year. Senator Crippen said that he felt this is too lenient.

Mike Anderson
Chairman, Judiciary Committee

ROLL CALL

JUDICIARY COMMITTEE

47th LEGISLATIVE SESSION - - 1981 Date March 12, 198

| NAME | PRESENT | ABSENT | EXCUSED |
|---|---|---|---|
| ~~Anderson, Mike, Chr. (R)~~ | ✓ | | |
| O'Hara, Jesse A. (R) | ✓ | | |
| Olson, S. A. (R) | ✓ | | |
| Brown, Bob (R) | ✓ | | |
| Crippen, Bruce D. (R) | ✓ | | |
| Tveit, Larry J. (R) | ✓ | | |
| Brown, Steve (D) | ✓ | | |
| Berg, Harry K. (D) | ✓ | | |
| Mazurek, Joseph P. (D) | ✓ | | |
| Halligan, Michael (D) | ✓ | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |

Each day attach to minutes.

NAME: David W. Woodgerd DATE: 3-12-81

ADDRESS: 1625 Eleventh Ave

PHONE: 449-2074

REPRESENTING WHOM? Dept. of State Lands

APPEARING ON WHICH PROPOSAL: HB 154

DO YOU: SUPPORT? X AMEND? _____ OPPOSE? _____

COMMENTS: _____

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

(4)

TESTIMONY

HB 154

The purpose of this bill is to require the federal government to follow the normal application process in acquiring state-owned land for use for such things as power lines. The bill repeals 2 sections of state law. Section 77-2-108 grants an outright easement over all state lands to the federal government for ditches, canals, tunnels, telephone, telegraph and electric power lines. The section does not provide for any compensation to the state or allow the state any discretion as to siting. Section 77-2-316 requires the sale of state land to the federal government for such purposes.

The repeal of these statutes will not prevent the acquisition of state land by the federal government for such projects but will allow the state to be adequately compensated and will give the state more control over siting. The original land grants which transferred most state land from the federal government to the state, reserves an easement for ditches and canals. The repeal of these statutes will not affect this reservation.

Also, easements across state land can be obtained by the federal government through the normal easement application process which private developers must follow. Furthermore, as a last resort, the federal government can exercise its power of eminent domain and condemn state land for its projects.

In summary, the purpose of this bill is to allow the state to be treated like any other landowner when the federal government wishes to acquire its land for a power line or other purpose.

NAME: Mike Meloy DATE: 3/11/87

ADDRESS: Sacramento Bldg

PHONE: 442 9430

REPRESENTING WHOM? MTLA

APPEARING ON WHICH PROPOSAL: HB 207, 208, 209

DO YOU: SUPPORT? _____ AMEND? _____ OPPOSE? X

COMMENTS:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

# HOUSE BILL 110

This bill was brought to my attention by a group of pharmacists and the Chief of Detectives in Silver Bow County. There is in our county and all over the state a need to stop these people from fraudulently obtaining these dangerous drugs listed in Schedules I, II, III, IV, and V in our M.C.A. and stop these drugs from getting on the streets of our cities for personal use or for resale to our children and other persons.

These drugs are being obtained through forged prescriptions that are usually taken from a doctor's office or a hospital. In many cases they are professional forgers who can match a given doctor's signature including dots on an "i."

One pharmacy in Butte only refused twelve suspicious orders in November 1980 and has since Christmas turned down fourteen suspected forged prescriptions.

Our Chief of Detectives in Silver Bow County sent out requests to several other western states pertaining to this matter. He received a reply from Nevada and Oregon. In Oregon the law reads as follow:

> Re: Fraudulently Obtaining Dangerous Drugs
>
> Fraudulently obtaining controlled substances is now a Class A misdemeanor punishable by one year in jail and a $1,000 fine.

However, the Oregon District Attorneys' Association proposes to introduce in this 1981 legislature a bill to make this a Class B felony punishable by over one year in jail and a fine.

In Nevada their Law Code 453.331, Section 1, Subsection D reads:

> Acquire or obtain or attempt to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, subterfuge or alteration.

Penalty - Section 2:

> Any person who violates this section shall be punished by imprisonment in the state prison for not less than one year nor more than six years, and may be further punished by a fine of not more than $2,000.

Also enclosed is a copy from the Montana State Pharmaceutical Association, submitted by Frank J. Davis, Executive Director, endorsing the bill.

I thank you Mr. Chairman and members of the Judiciary Committee.

REPRESENTATIVE BOB PAVLOVICH
House District 86
Butte Silver Bow

BP:hf

NAME: JOSEPH E. LEE DATE: 3/12/81

ADDRESS: 3001 THOMAS ST.

PHONE: 494-3415

REPRESENTING WHOM? BUTTE-SILVER BOW SHERIFF'S DEPT.

APPEARING ON WHICH PROPOSAL: HB 110

DO YOU: SUPPORT? ✓ AMEND? _____ OPPOSE? _____

COMMENTS: We in the law enforcement community have a deep concern for the amount of illicit dangerous drugs that are being made available on the streets of our Montana cities. We feel that HB 110 will help alleviate the problem.

Joseph E. Lee

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

NAME: Greg Loushin DATE: 3/12/81

ADDRESS: 3545 Columbus

PHONE: 494-2360

REPRESENTING WHOM? Montana Pharmaceutical Ass.

APPEARING ON WHICH PROPOSAL: HB 110

DO YOU: SUPPORT? X AMEND? _____ OPPOSE? _____

COMMENTS: This Bill should be passed to make law on fraudent Prescriptions stiffer Hopefully to get some illegal drug traffic off of the streets

Greg Loushin

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

NAME: Tom Hoyt DATE: 3-17-21

ADDRESS: Helena

PHONE: 443-5555

REPRESENTING WHOM? County Attorneys

APPEARING ON WHICH PROPOSAL: HB 213 - 214 - 215

DO YOU: SUPPORT? ✓ AMEND? _____ OPPOSE? _____

COMMENTS:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

NAME: FRANK J. DAVIS DATE: Mar. 12 1981

ADDRESS: GREAT FALLS, MT

PHONE: 453-6622

REPRESENTING WHOM? MONT. STATE PHARMACEUTICAL ASSOC.

APPEARING ON WHICH PROPOSAL: HB 110

DO YOU: SUPPORT? ✓ AMEND? _____ OPPOSE? _____

COMMENTS: Written testimony will be left with the committee

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

# MONTANA STATE PHARMACEUTICAL ASSOCIATION

**P.O. Box 6335, Great Falls, Montana 59406**
**Telephone: 406-452-3201**


January 14, 1981

My name is Frank Davis, I am a pharmacist. I represent the Montana State Pharmaceutical Association as their executive director. My home is in Great Falls, Montana.

I appear in support of HB 110 and would encourage a favorable report from this committee, on this bill, for the following reasons:

1. The present penalty for fraudulently obtaining a dangerous drug is " imprisonment in the county jail for a term not to exceed 6 months". 45-9-106 - MCA. It is reported to me by our pharmacist constituency that this light penalty is a deterent to prosecution for this crime by county attorney's offices. It is further more not a sufficient penalty to act as a deterent to the offender even when convicted.

2. In a two month period one pharmacy (the Medicine Shoppe) in Butte, Montana detected 14 cases of fraudulently presented prescriptions that he did not fill. The estimate from all pharmacies in Butte is that 3 to 5 fraudulent prescriptions per week may be filled in lieu of sufficient evidence to suspect fraud. The amount may vary in direct proportion to the availability of drugs on the street.

3. The improvement in copying machine reproductions has compounded the problem of fraud in prescriptions legitimately written as copies are now so good they are difficult to distinguish from the original.
4. As an example of another type of problem, a Missoula physician released an office employee who upon leaving took with her a pad of the physician's prescription blanks. Someone then cleverly forged prescriptions for Qualude, Percodan, Demerol etc. and six of these were filled b efore the fraud was detected. The forger became aware of the fact that he was being suspected when a pharmacist ask him to return for the prescription because he did not have the item in stock. He disappeared and to my knowledge has not been apprehended.

The seriousness of legitimate drug products escaping to street traffic, where they are abused and tend to spawn other problems is well documented. Drug abuse is responsible for many problems in our teenagers today. I hope you will do what you can to help solve the problem of fraudulent drugs escaping from their legitimate use into the illegal market.

Frank J. Davis, R. Ph.
Executive Director

NAME: Tom Hopgood DATE: 3-12-81

ADDRESS: Helena

PHONE: 443-5584

REPRESENTING WHOM? County Attorneys

APPEARING ON WHICH PROPOSAL: HB 204 - 208

DO YOU: SUPPORT? ✓ AMEND? _____ OPPOSE? _____

COMMENTS:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

Exhibit A

of this section is "knowingly" or "purposely" and the jury need not consider "intent" as well, since knowingly and purposely replace the older terms "intentionally" and "feloniously." State v. Klein, 169 Mont. 350, 547 P.2d 75 (1976).

## Part 5--Sexual Crimes

45-5-501. Definition. As used in 45-5-503 and 45-5-505, the term "without consent" means:

(1) the victim is compelled to submit by force or by threat of imminent death, bodily injury, or kidnapping to be inflicted on anyone; or

(2) the victim is incapable of consent because he is:

(a) mentally defective or incapacitated;

(b) physically helpless; or

(c) less than 16 years old.

### Historical Note

Enacted: M.C.C. 1973, § 94-5-501, Sec. 1, Ch. 513, Laws of Montana 1973

Amended: Sec. 2, Ch. 405, Laws of Montana 1975; Sec. 15, Ch. 359, Laws of Montana 1977

Source: New and N.Y. Pen. L. 1965, § 130.05

Prior Law: None

### Annotator's Note

The 1975 amendment designated the former section as subsection (1) and added as subsection (2) the current section. The 1977 amendment deleted former subsection (1) which read "in this part unless a different meaning plainly is required the definitions given in Chapter 2 of 94-2-101 apply" and renumbered the section accordingly.

It is an element of every sexual offense except for deviate sexual conduct that the sexual act be committed without consent. This definition details when consent will be lacking. It should be noted, however, that this definition does not apply to § 45-5-502 on sexual assault, where the same term, "without consent," is used, but with its ordinary meaning, i.e. that the conduct was, in fact, not agreed to by the victim. Since young children do not always find it easy to withhold consent from an adult, there can be cases under § 45-5-502 where the requisite lack of consent cannot be proved although the sexual contact is obvious. That problem was alleviated to a great extent by the enactment of § 45-5-502(5) in 1979



4/1

which makes actual consent ineffective where the victim is less than 14 years old and the offender is three or more years older. Any offenses involving juveniles not covered by § 45-5-502(5) can be prosecuted under § 45-5-201(1)(c) (assault by contact of an insulting or provoking nature) in which the mental state or consent of the victim is not an issue. Subsection (1) covers forcible complusion. Subsection (2) covers those instances when, regardless of acquiescence, the victim is deemed incapable of consent. The terms mentally defective, mentally incapacitated and physically helpless refer to varying degrees of incapacity as defined in section 45-2-101(28), (29), and (45), M.C.A. 1978, respectively. A person who has not reached the age of sixteen is legally incapable of consenting to a sexual act. The wording for this definition while based on New York source has been changed considerably. Consent as a defense is covered in M.C.A. 1978, § 45-2-211.

Cross References

Definition of "mentally defective" M.C.A. 1978, § 45-2-101(28)
Definition of "mentally incapacitated" M.C.A. 1978, § 45-2-101(29)
Definition of "physically helpless" M.C.A. 1978, § 45-2-101(45)
Definition of "sexual contact" M.C.A. 1978, § 45-2-101(54)
Definition of "sexual intercourse" M.C.A. 1978, § 45-2-101(55)
Consent as a defense M.C.A. 1978, § 45-2-211
Sexual intercourse without consent M.C.A. 1978, § 45-5-503
Deviate sexual conduct M.C.A. 1978, § 45-5-505
Sexual Abuse of Children M.C.A. 1978, § 45-6-625

Library References

Rape Key Nos. 9 et seq.
Sodomy Key No. 3
C.J.S. Rape § 11
C.J.S. Sodomy § 2

Law Review Commentaries

Note. Forcible and statutory rape: An exploration of the operation and objectives of the consent standard. 62 Yale L. J. 55 (1952)

Note. The proposed Penal Law of New York. 64 Colum. L. Rev. 1469, 1543 (1964).

Ploscowe. Age of consent. 32 Brooklyn L. Rev. 274 (1966)

Ploscowe. Lack of consent in sex cases. 32 Brooklyn L. Rev. 276 (1966)

Potter. Sex offenses. 28 Me. L. Rev. 65 (1976)

Notes of Decisions

This definition and those contained in sections 94-2-101(14) [now M.C.A. 1978, § 45-2-101(14)] (deviate sexual relations), 94-2-101(54) [now M.C.A. 1978, § 45-2-101(54)] (sexual contact), 94-2-101(55) [now M.C.A. 1978, § 45-2-101(55)] (sexual intercourse) when read into section 94-5-505 [now M.C.A. 1978, § 45-5-505] (prohibiting deviate sexual conduct) are sufficient to protect section 94-5-505 [now 45-5-505] from the contention that it is unconstitutional for vagueness. State v. Ballew, 166 Mont. 270, 532 P.2d 407 (1975).

45-5-502. Sexual assault. (1) A person who knowingly subjects another not

Exhibit 11

his spouse to any sexual contact without consent commits the offense of sexual assault.

(2) A person convicted of sexual assault shall be fined not to exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months.

(3) If the victim is less than 16 years old and the offender is 3 or more years older than the victim or if the offender inflicts bodily injury upon anyone in the course of committing sexual assault, he shall be imprisoned in the state prison for any term not to exceed 20 years.

(4) An act "in the course of committing sexual assault' shall include an attempt to commit the offense or flight after the attempt or commission.

(5) Consent is ineffective under this section if the victim is less than 14 years old and the offender is 3 or more years older than the victim.

Historical Note

Enacted: M.C.C. 1973, § 94-5-502, Sec. 1, Ch. 513, Laws of Montana 1973

Amended: Sec. 1, Ch. 687, Laws of Montana 1979

Source: M.P.C. 1962, § 213.4

Prior Law: None

Annotator's Note

This section provides sanctions for nonconsensual sexual contact which falls short of sexual intercourse. There is no counterpart under the old law. The section deals with acts of sexual aggression which do not involve the element of "penetration" which is covered by M.C.A. 1978, § 45-5-503. The central terms are defined: sexual intercourse, § 45-2-101(55); sexual contact, § 45-2-101(54).

Subsection (1) describes the substantive offense and provides that it must be done "knowingly," defined at § 45-2-101(27). This requirement eliminates the possibility of prosecution for inadvertent or accidental touching. It should be noted that the definition of "without consent" contained in 45-5-501 does not apply to this section. As used in this section, the phrase "without consent" has its normal grammatical meaning. The legislative intent was to prohibit any sexual contact to which the victim did not give an informed consent which he or she was legally capable of giving. The 1979 amendment added subsection (5) making consent ineffective where the victim is less than 14 years old and the offender is three or more years older. There may still be some cases involving juveniles which would not be covered even by this subsection although it appears that a majority of situations would be. In those instances not covered by subsection (5), section 45-5-201(1)(c) (assault by contact of an insulting or provoking nature) should apply, and the mental state

Exhibit H

or consent of the victim is not an issue. The combination of this section and § 45-5-201(1)(c) should cover all of the conduct formerly prohibited as "Lewd and Lascivious Conduct" where the victim is a minor.

The definition of "sexual contact," supra, imposes the requirement of a physical touching. Further, such touching must be done with the purpose of sexual arousal or gratification. "Purpose" is defined at M.C.A. 1978, § 45-2-101(52).

Subsection (2) provides that sexual assault shall be a misdemeanor in the absence of any of the aggravating circumstances enumerated in subsection (3).

The much more severe maximum penalty in subsection (3) is reserved for cases of infliction of "bodily injury," defined at § 45-2-101(5) and for cases where a person exploits a juvenile three or more years younger than himself. This age differential protects any person less than sixteen years old from exploitation by anyone over eighteen years old whether or not force is used. If the offender is between the ages of sixteen and eighteen, he will ordinarily be subject to youth court jurisdiction. Thus, this subsection applies to the adult over eighteen who is three or more years older than the under sixteen year old victim.

Subsection (4) extends the applicability of the more severe penalty of subsection (3) by broadly defining the time period during which the infliction of bodily injury will cause that penalty to apply. Thus the offender may be subject to the more severe penalty whether or not the assault is completed by a touching and even if the bodily injury is inflicted subsequent to he commission of the offense or the attempt.

Criminal Law Commission Comment

This section is a substantial change from the old law. It carries out the rationale behind section 213.4 of the Model Penal Code. This section deals with acts of sexual aggression which do not involve the element of "penetration" found in R.C.M. 1947, former section 94-4103. The range of activity covered extends from unauthorized fondling of a woman's breasts to homosexual manipulation of a boy's genitals. The old law did not differentiate sexual from other assault, except assault in connection with rape or lewd and lascivious acts upon children. The following considerations favor special treatment of indecent assault within the sexual offense category: (1) The individualized treatment of sexual misconduct with children is consistent with current legislation; (2) Societal concern with indecent assault focuses on the outrage, disgust or shame engendered in the victim rather than fear of physical injury; and (3) the gist of the offense being a sexual imposition, although of a lesser degree. The important features of this section require an actual touching and leave for separate consideration cases of indecent exposure, etc. Although contact must be with the victim it need not be contact between the offender and the victim. Thus, subjecting another to sexual contact with a third person is covered. It covers situations of nonconsent only.

There is a maximum penalty of twenty years if the victim is under sixteen years and the defendant is three years or more older, covering the situation where sexual contact takes a deviate form in regard to children. The rationale behind heavy punishment of "lewd acts upon children" or statutory rape is victimization of immaturity. To give effect to the victimization rationale, an age differential in favor of the male is provided. Thus, a youth who had sexual contact with a fifteen year-old girl would have to be eighteen years or older before such act is a criminal event.

(b) the actual result involves the same kind of injury or harm as the probable result, unless the actual result is too remote or accidental to have a bearing on the offender's liability or on the gravity of the offense.

History: En. 94-2-105 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-2-105.

**45-2-202. Voluntary act.** A material element of every offense is a voluntary act, which includes an omission to perform a duty which the law imposes on the offender and which he is physically capable of performing. Possession is a voluntary act if the offender knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient time to have been able to terminate his control.

History: En. 94-2-102 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-2-102.

**45-2-203. Responsibility — intoxicated or drugged condition.** A person who is in an intoxicated or drugged condition is criminally responsible for conduct unless such condition is involuntarily produced and deprives him of his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. An intoxicated or drugged condition may be taken into consideration in determining the existence of a mental state which is an element of the offense.

History: En. 94-2-109 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 53, Ch. 329, L. 1974; R.C.M. 1947, 94-2-109.

**45-2-204 through 45-2-210 reserved.**

**45-2-211. Consent as a defense.** (1) The consent of the victim to conduct charged to constitute an offense or to the result thereof is a defense.

(2) Consent is ineffective if:

(a) it is given by a person who is legally incompetent to authorize the conduct charged to constitute the offense;

(b) it is given by a person who by reason of youth, mental disease or defect, or intoxication is unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense;

(c) it is induced by force, duress, or deception; or

(d) it is against public policy to permit the conduct or the resulting harm, even though consented to.

History: En. 94-2-111 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 13, Ch. 359, L. 1977; R.C.M. 1947, 94-2-111.

**45-2-212. Compulsion.** A person is not guilty of an offense, other than an offense punishable with death, by reason of conduct which he performs under the compulsion of threat or menace of the imminent infliction of death or serious bodily harm if he reasonably believes that death or serious bodily harm will be inflicted upon him if he does not perform such conduct.

History: En. 94-3-110 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-3-110.

**45-2-213. Entrapment.** A person is not guilty of an offense if his conduct is incited or induced by a public servant or his agent for the purpose of obtaining evidence for the prosecution of such person. However, this section is inapplicable if a public servant or his agent merely affords to such

Exhibit



person the opp
of criminal pur
History: En. 94-

Lia

**45-2-301.**
responsible for
either that of t
able for such c
History: En. 94-

**45-2-302.**
able for the cor
(1) having
he causes anot
mental state of
(2) the stat
(3) either b
to promote or
attempts to a
offense. Howev
(a) he is a
the offense pr
(b) before
mote or facilit
(i) wholly
(ii) gives tim
(iii) otherwi
offense.
History: En. 94

**45-2-303.**
who is legally
an offense ma
that he was s
mitted the off
of a different
History: En. 9

**45-2-304 t**

**45-2-311.**
tion may be p
(a) the oft
45-6-317, 45-6
or by another
liability on a
duct which is

TESTIMONY

HB 154

The purpose of this bill is to require the federal government to follow the normal application process in acquiring state-owned land for use for such things as power lines. The bill repeals 2 sections of state law. Section 77-2-108 grants an outright easement over all state lands to the federal government for ditches, canals, tunnels, telephone, telegraph and electric power lines. The section does not provide for any compensation to the state or allow the state any discretion as to siting. Section 77-2-316 requires the sale of state land to the federal government for such purposes.

The repeal of these statutes will not prevent the acquisition of state land by the federal government for such projects but will allow the state to be adequately compensated and will give the state more control over siting. The original land grants which transferred most state land from the federal government to the state, reserves an easement for ditches and canals. The repeal of these statutes will not affect this reservation.

Also, easements across state land can be obtained by the federal government through the normal easement application process which private developers must follow. Furthermore, as a last resort, the federal government can exercise its power of eminent domain and condemn state land for its projects.

In summary, the purpose of this bill is to allow the state to be treated like any other landowner when the federal government wishes to acquire its land for a power line or other purpose.

# MONTANA STATE PHARMACEUTICAL ASSOCIATION

P.O. Box 6335, Great Falls, Montana 59406
Telephone: 406-452-3201


January 14, 1981

My name is Frank Davis, I am a pharmacist. I represent the Montana State Pharmaceutical Association as their executive director. My home is in Great Falls, Montana.

I appear in support of HB 110 and would encourage a favorable report from this committee, on this bill, for the following reasons:

1. The present penalty for fraudulently obtaining a dangerous drug is " imprisonment in the county jail for a term not to exceed 6 months". 45-9-106 - MCA. It is reported to me by our pharmacist constituency that this light penalty is a deterent to prosecution for this crime by county attorney's offices. It is further more not a sufficient penalty to act as a deterent to the offender even when convicted.

2. In a two month period one pharmacy (the Medicine Shoppe) in Butte, Montana detected 14 cases of fraudulently presented prescriptions that he did not fill. The estimate from all pharmacies in Butte is that 3 to 5 fraudulent prescriptions per week may be filled in lieu of sufficient evidence to suspect fraud. The amount may vary in direct proportion to the availability of drugs on the street.

3. The improvement in copying machine reproductions has compounded the problem of fraud in prescriptions legitimately written as copies are now so good they are difficult to distinguish from the original.
4. As an example of another type of problem, a Missoula physician released an office employee who upon leaving took with her a pad of the physician's prescription blanks. Someone then cleverly forged prescriptions for Qualude, Percodan, Demerol etc. and six of these were filled b efore the fraud was detected. The forger became aware of the fact that he was being suspected when a pharmacist ask him to return for the prescription because he did not have the item in stock. He disappeared and to my knowledge has not been apprehended.

The seriousness of legitimate drug products escaping to street traffic, where they are abused and tend to spawn other problems is well documented. Drug abuse is responsible for many problems in our teenagers today. I hope you will do what you can to help solve the problem of fraudulent drugs escaping from their legitimate use into the illegal market.

Frank J. Davis, R. Ph.
Executive Director

DATE March 12, 1981

COMMITTEE ON JUDICIARY

HB 154 HB 207
HB 209 HB 110
HB 208

VISITORS' REGISTER

| NAME | REPRESENTING | BILL # | Check One | |
|---|---|---|---|---|
| | | | Support | Oppos |
| David W. Woodgerd | Dept. of State Land | HB 154 | X | |
| Leslie Remington | Secretary of State | HB 154 | — | — |