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Linda M. Trueb

THE EXPECTANCY OF PAROLE IN MONTANA: A RIGHT ENTITLED TO SOME DUE PROCESS

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I. INTRODUCTION

Until 1979, the common law uniformly stated that parole was a matter of grace.[1] Courts held that a validly convicted person had no right to an early release.[2] States therefore had no duty to create a parole system for prisoners.[3] If a state did create a parole system, the prisoner's expectancy of parole was only a mere hope of an early conditional release.[4]

Since 1979, courts have agreed that a parole statute may create a right to parole. Courts disagree, however, over what will raise the expectancy of parole from the status of a mere hope to that of a right.[5] This comment examines the statutory language necessary to create an entitlement to parole and the status of parole in Montana. It examines the minimum procedural due process accorded the parole-release decision process when parole has the status of a right. Finally, it compares the due process currently accorded parole decisions in Montana to the minimum due process guidelines established by the United States Supreme Court.

II. GREENHOLTZ AND THE DEVELOPMENT OF THE RIGHT TO EXPECT PAROLE

In 1979, the landmark case of *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex* held that a parole statute gives prisoners a right to expect their parole if the statutory language creates a presumption of release.[6] The United States Supreme Court held that a Nebraska statute which mandated parole created such a presumption of release, absent negative enumerated

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1. *E.g.*, State *ex rel.* Herman v. Powell, 139 Mont. 583, 589, 367 P.2d 553, 556 (1961); State v. Farmer, 39 Wash. 2d 675, 679, 237 P.2d 734, 736 (1951).

2. *See* Meachum v. Fano, 427 U.S. 215, 224 (1976) (which states that a valid conviction extinguishes all right to release prior to termination of the sentence).

3. Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 7 (1979).

4. *E.g.*, Scarpa v. United States Bd. of Parole, 477 F.2d 278, 282 (5th Cir. 1973) (which notes the difference between the possibility of parole and the present right to parole).

5. *Compare, e.g.*, Allen v. Board of Pardons, 792 F.2d 1404 (9th Cir.), *cert. granted*, 107 S. Ct. 431 (1986) (holding that some mandatory statutory language is necessary) *with* Winsett v. McGinnes, 617 F.2d 996 (3d Cir. 1980), *cert. denied*, 449 U.S. 1093 (1981) (holding that the creation of a parole system, regardless of the wording, is all that is required to create a right).

6. *Greenholtz*, 442 U.S. at 12.

conditions.[7] The Nebraska parole statute gave prisoners a right to expect parole, which is entitled to some constitutional due process protection.[8]

The *Greenholtz* court ruled that a prisoner's right to expect parole arises from statutory language which binds, by its mandatory language, a parole board to release an inmate.[9] The Nebraska statute stated:

> Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it *shall* order his release unless it is of the opinion that his release should be deferred because:
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> (a) There is a substantial risk that he will not conform to the conditions of parole;
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> (b) His release would depreciate the seriousness of his crime or promote disrespect for law;
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> (c) His release would have a substantially adverse effect on institutional discipline; or
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> (d) His continued correctional treatment . . . will substantially enhance his capacity to lead a law-abiding life when released at a later date.[10]

The legislature's use of a mandatory shall, absent the specified negative factors, creates an entitlement to parole deserving of some due process.[11] The *Greenholtz* court, however, warned that future litigation over the status of parole in other states should be decided only after looking at all the facts of the case.[12] This vague warning to look at all the facts has led to divergent rulings on what is necessary to create such a right.

A. *Parole in Other States*

Courts supporting a narrow interpretation of *Greenholtz* have ruled that a statute creates a right to expect parole only if it uses

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7. *Id.*

8. *Id.* The fifth and fourteenth amendments require that a person with a right to liberty, regardless of the importance of the particular liberty, be given some measure of due process before being deprived of the right. U.S. CONST. amend. 5, 14. A right by its nature, not its weight, is entitled to due process. *See, e.g., Meachum*, 427 U.S. at 224; Walker v. Hughes, 558 F.2d 1247, 1251 (6th Cir. 1977).

9. *Greenholtz*, 442 U.S. at 11-12. Other cases subsequent to *Greenholtz* have stated that a right to parole arises from a limitation of parole board discretion. Hewitt v. Helms, 459 U.S. 460, 472 (1983); Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 466 (1981). State law may limit official discretion by mandating the procedure, evidence or criteria to be applied. *Dumschat*, 452 U.S. at 466.

10. NEB. REV. STAT. § 83-1, 114(1) (1976) (emphasis added).

11. *Greenholtz*, 442 U.S. at 7.

12. *Id.* at 12.

identical "shall release . . . unless" language.[13] Any other statutory language gives inmates only a mere hope of parole,[14] and a mere hope of parole does not warrant any due process protection.[15] This narrow interpretation disregards the warning to consider all the facts, instead giving weight only to statutory language identical to that in *Greenholtz*. Many jurisdictions thus have rejected this narrow interpretation.[16]

The broadest interpretation of *Greenholtz* holds that the existence of a parole system, regardless of the particular language used, gives prisoners a right to expect parole.[17] The administrative rules and parole board policies provide a sufficient limitation on official discretion.[18] Adhering to this broad opinion, a Delaware court in *Winsett v. McGinnes* held that even expressed goals, behind a work release program, limited official discretion enough to create a right.[19] No court, however, has applied this decision to parole-release cases. The *Winsett* case continues to be the only decision to apply a broad interpretation of *Greenholtz*.[20]

The majority of courts interpret *Greenholtz* as supporting the recognition of a right to expect parole when a parole statute uses some type of mandatory language.[21] These courts hold that a statute containing any mandatory language and specific criteria limits discretion enough to raise the expectancy of parole to the status of a right.[22] For example, in *Williams v. Missouri Board of Probation & Parole*,[23] the court held that the Missouri parole statute, which

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13. *See* Campbell v. Montana State Bd. of Pardons 470 F. Supp. 1301 (D. Mont. 1979); Candelaria v. Griffin, 641 F.2d 868 (10th Cir. 1981).

14. *See, e.g., Campbell*, 470 F. Supp. at 1302.

15. Menechino v. Oswald, 430 F.2d 403, 408-09 (2d Cir. 1970).

16. *See generally Allen*, 792 F.2d 1404; Bauman v. Arizona Dep't of Corrections, 754 F.2d 841 (9th Cir. 1985); Mayes v. Trammel, 751 F.2d 175 (6th Cir. 1984); Peck v. Battery, 721 F.2d 1157 (8th Cir. 1983); Scott v. Illinois Parole & Pardon Bd., 669 F.2d 1185 (7th Cir. 1982); Williams v. Briscoe, 641 F.2d 274 (5th Cir. 1981); Williams v. Missouri Bd. of Probation & Parole, 661 F.2d 697 (8th Cir. 1981); Bowles v. Tennant, 613 F.2d 776 (9th Cir. 1980); Booth v. Hammock, 605 F.2d 661 (2d Cir. 1979); Wagner v. Gilligan, 609 F.2d 886 (6th Cir. 1979); Shirley v. Chestnut, 603 F.2d 805 (10th Cir. 1979). All these cases require some mandatory language as a prerequisite to creation of a right to expect parole, but none limit the mandatory language necessary to only a "shall/unless" statutory wording.

17. This broad holding was first suggested by a dissenting opinion in *Greenholtz*. *See Greenholtz*, 442 U.S. at 22 (Marshall, J., dissenting).

18. Winsett v. McGinnes, 617 F.2d 996, 1006 (3d Cir. 1980).

19. *Id.*

20. *Id.*

21. *See* cases cited, *supra* note 16.

22. *Dumschat*, 452 U.S. at 446; *See also* Roberts v. Spalding, 783 F.2d 867, 870 (9th Cir. 1986) (which holds that a state statute will not create a right to supplemental medical care unless it gives particularized standards or criteria).

23. 661 F.2d 697 (8th Cir. 1981).

contains the wording "when . . . shall release," limited official discretion and created an entitlement to parole.[24] In *Scott v. Illinois Parole & Pardon Board*,[25] the court ruled that the Illinois statute created an entitlement to parole. The *Scott* court held that the language "when . . . shall not" created a presumption of parole eligibility.[26] This presumption limited parole board discretion enough to raise the expectancy of parole from a mere hope to a right.[27]

The majority position is supported by the United States Supreme Court's general ruling that a limitation on official discretion, sufficient to create a liberty entitled to due process, requires some mandatory language.[28] The Court has held that mutually explicit understandings do not limit discretion enough to raise a hope to the status of a right.[29] Additionally, the Court has ruled that statistical probabilities based on past board decisions are not sufficient limitations on official discretion.[30] Only a statute with some form of mandatory language will raise a mere hope of a release to the status of a right.[31]

B. *Parole in Montana*

The status of parole in Montana has changed through alterations in the parole statute language and, more recently, from changes in the interpretation of that statute. Montana enacted its first parole statute in 1907.[32] The 1907 statute extended the possibility of parole to all prisoners without prior convictions.[33] The permissive language of the statute gave the state board of pardons and the governor broad discretion in parole-release decisions.[34]

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24. *Id.* at 698-99.

25. 669 F.2d at 1190. *See also Mayes*, 751 F.2d at 178-79.

26. *Scott*, 669 F.2d at 1190.

27. *Id.*

28. *Dumschat*, 452 U.S. at 466.

29. *See* Jago v. Curen, 454 U.S. 14, 20 (1981) (which held that Ohio inmates had no right to expect parole). The Court recognized that an entitlement to property, unlike an entitlement to liberty, may be created by mutually explicit understandings. *See*, Perry v. Sinderman, 408 U.S. 593 (1972).

30. *See Dumschat*, 452 U.S. at 465 (which held that a convicted felon in Connecticut had no right to a commutation of a life sentence).

31. *See* McFarland v. Cassady, 779 F.2d 1426, 1428 (9th Cir. 1986) (which held that mandatory language in an Arizona statute gave prisoners a right to expect good-time credits).

32. MONT. REV. CODES § 9573 (1907).

33. *Id.*

34. This first parole statute, MONT. REV. CODES § 9573 (1907), stated that: "The Governor may recommend and the State Board *may* parole any inmate . . . of the State Prison, under such reasonable conditions and regulations as may be deemed expedient, and adopted

The indeterminate sentencing law enacted in 1915 broadened the discretion of the board.[35] This law required judges to fix maximum and minimum terms for each sentence.[36] The board and the governor then fixed the exact sentence.[37] Under this law, the board would fix the minimum sentence and consider an inmate eligible for parole if the inmate showed a disposition to reform.[38] The sentence range and possibility of parole was intended to provide an incentive for rehabilitation.[39] Rehabilitation could result in an early parole. Early parole could benefit the community as well as the individual. Rehabilitated prisoners could be paroled to "regain their standing as useful citizens in the community."[40]

In 1955, the legislature changed the parole language from "may" to "shall." The new language mandated parole after a prisoner satisfied all eligibility requirements.[41] This language has remained unchanged, although eligibility requirements have been amended several times since 1955. The present parole statute states:

> Subject to the following restrictions, the board *shall* release on parole by appropriate order any person confined in the Montana state prison or the women's correction center . . . when in its opinion there is reasonable probability that the prisoner can be released without detriment to the prisoner or to the community . . . .[42]

The restrictions in the statute are a prerequisite to parole. These restrictions allow the board to consider an inmate only after: (1) they serve 30 years of a life sentence;[43] or (2) they serve the lesser of 17 ½ years or ½ their sentence less good time—if designated a

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. . . ." *Id.* (emphasis added).

35. MONT. REV. CODES § 12075 (1915). The indeterminate sentencing law was repealed March 12, 1929.

36. MONT. REV. CODES § 12075 (1921), which stated:

> [When] any person shall be found guilty of any crime or offense punishable by imprisonment in the state prison, except treason, murder in the first degree, rape by force, or administering poison to a human being with intent to kill, the court must, instead of fixing the punishment at a definite term, provide in the sentence and judgement that the defendant be confined . . . not less than a certain time nor longer than a certain time, both the minimum and maximum time shall be named . . . .

Id.

37. MONT. REV. CODES § 12076 (1915).

38. *In re* Collins, 51 Mont. 215, 217, 152 P. 40, 41 (1915).

39. *Id.*

40. *Id.*

41. MONT. REV. CODES § 94-9832 (1947).

42. MONT. CODE ANN. § 46-23-201(1) (1985) (emphasis added).

43. MONT. CODE ANN. § 46-23-201(1)(b) (1985).

dangerous offender; or (3) they serve the lesser of 17 ½ years or ¼ of their sentence less good time—if designated a nondangerous offender.[44]

The language of the Montana parole statute differs from the language of the Administrative Rules. The parole statute states the board "shall" release an inmate who has met the requirements, rules, and regulations regarding parole; the rules, however, state that the board "may" issue a release.[45] Yet, until 1986, Montana courts continued to interpret both the statute and rules as permissive.[46]

In 1986, this permissive interpretation was upset by the holding of *Allen v. Board of Pardons*.[47] In *Allen*, the Ninth Circuit held that the "shall release . . . when" language of the Montana parole statute mandated parole.[48] The *Allen* court held that this mandate limited board discretion and gave prisoners a right to expect parole, although the rules remain permissive.[49] *Allen* is currently on appeal to the United States Supreme Court.[50]

III. DUE PROCESS REQUIREMENTS

A. *The Nature of the Right Affects the Amount of Due Process*

The due process required will depend on surrounding factors such as the nature of the right.[51] Although the common law does not require a "full panoply" of due process rights, it does require enough to insure the fundamental fairness of the parole system.[52]

The injury incurred when a right is lost depends upon the nature of the right. Courts have stated that the loss, by denial of

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44. MONT. CODE ANN. § 46-23-201(1)(a) (1985). There are two exceptions to these general eligibility requirements: (1) An inmate will be ineligible for parole if a court includes an ineligibility restriction as part of the sentence, MONT. CODE ANN. § 46-23-201(3) (1985); and (2) An inmate may be eligible for parole 120 days earlier when for 30 consecutive days, (a) the Montana State Prison population exceeds by 96 inmates the 744 maximum capacity, or (b) the Women's Correctional Center exceeds its design capacity by 35 inmates, MONT. CODE ANN. § 46-23-201(3) (1985).

45. *Compare* MONT. CODE ANN. § 46-23-201(1) (1985) *with* MONT. ADMIN. R. 20.25.401(3) (1980).

46. *E.g.*, *Powell*, 139 Mont. 583, 367 P.2d 553; *Campbell*, 470 F. Supp. 1301; Goff v. State, 139 Mont. 641, 367 P.2d 557 (1961), *cert. denied*, 369 U.S. 806 (1962).

47. 792 F.2d 1404 (9th Cir. 1986).

48. *Id.* at 1406-07. *Allen* overruled *Campbell*. *Id.*

49. *Id.* at 1408.

50. The *Allen* case is currently on appeal to the United States Supreme Court: Docket No. 86-461. 107 S. Ct. 431 (1986).

51. *Wolff*, 418 U.S. at 560.

52. Greenholtz v. Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 1, 14 (1979).

parole, of the expectancy of an early conditional release is less grievous than the loss, by revocation of parole, of a right presently being enjoyed.[53] Parole-revocation terminates a release, while a denial of parole delays a release.[54] Because a denial of parole is a less grievous loss, it has been accorded no greater procedural protections than those given in parole-revocation proceedings.

Greenholtz required that prisoners eligible for parole be given: (1) notice; (2) the right to appear in person and present evidence on their behalf; (3) the reason(s) for denial; and (4) general access to the information used in a parole decision—subject to Board discretion.[55] By comparison, *Morrissey v. Brewer*[56] required that parolees be given additional procedural protections including: (1) a *written* notice; (2) a neutral and detached hearing body; (3) a disclosure in advance of the evidence against the parolee; (4) the right to confront and cross-examine adverse witnesses (unless good cause exists to deny such a confrontation); and (5) a *written* statement of the reasons for revoking parole, including a statement of the evidence relied on.[57]

B. *The Decision-Maker and Method of Determining Due Process*

After courts determine that a parole statute gives prisoners the right to expect parole, a second issue arises concerning who determines how much due process shall be accorded this right. Although courts agree that procedural due process protects individual rights against arbitrary government action, they disagree about who may prescribe such procedures.[58] Some courts have held that a state may determine how much procedural process is due.[59] These courts apply the "entitlement theory" which states that a right will not be created unless the state defines both the substance and the procedure. The state retains the right to determine according to its

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53. *E.g., Wolff*, 418 U.S. at 560-61. This case holds that revocation of parole deprives a person of a conditional liberty presently enjoyed while loss of good-time credits does not work an immediate change in the conditions of a prisoner's liberty. Such a loss merely postpones the date of eligibility for parole. *Id.*

54. *Greenholtz*, 442 U.S. at 9.

55. *Id.* at 14-16.

56. 408 U.S. 471 (1972).

57. *Id.* at 489.

58. *Compare, e.g.*, Bishop v. Wood, 426 U.S. 341 (1976) *with* Wolff v. McDonnell, 418 U.S. 546 (1974).

59. *See, e.g., Bishop*, 426 U.S. 341; Arnett v. Kennedy, 416 U.S. 134 (1974). This theory is in effect similar to the "Rights versus Privileges" common law distinction that prevailed prior to the late 1960s. If procedural due process is dependent on a state determination, then the state-created entitlement is in effect no more than a state privilege.

discretion, the quantity and quality of due process.[60]

Opponents of the entitlement theory support the "impact theory," which holds that a state may only create the substance of the right.[61] This theory is based upon the belief that government officials could arbitrarily deprive an individual of a right without any accountability to the judiciary, if states are allowed to prescribe the procedural safeguards attaching to a right.[62] An inherent fairness is assured by the judicial process which is not assured through an administrative process.[63] The majority of courts have thus assumed that only the judiciary has the right to determine the amount of due process accorded to prisoners who become eligible for parole consideration.[64]

Judicial determination of due process requires a balancing of various factors. Courts must balance these factors: (1) the nature and burden on the individual liberty at issue; (2) the risk of erroneous deprivation of such an interest by the procedures used; (3) the probable value of additional or substitute procedural safeguards; and (4) the burden on the government from such additional safeguards.[65] Since *Greenholtz*, all judicial parole-release decisions have used this balancing approach to determine the due process required.[66]

C. *The Risk of Error, the Value of Additional Due Process, and the Cost to the State*

The risk of error is another factor in determining the amount of due process required.[67] The amount of due process required will depend upon the degree of risk of error. Justice Marshall, in a dissenting opinion in *Greenholtz*, asserted that the risk of an erroneous denial of parole is great because of the existence of inaccura-

60. *See id.* at 152.

61. *E.g.*, Walker v. Hughes, 558 F.2d 1247, 1254-55 (6th Cir. 1977); *Arnett*, 416 U.S. at 167 (Powell, J., dissenting); Note, *"Some Measure" of Protection: Due Process in the Balance in Greenholtz*, 34 U. MIAMI L. REV. 357, 373 (1980).

62. Opponents of the "Entitlement Theory" argue that if an inmate's liberty interest is no greater than the state chooses to allow, then the inmate is no more than a slave of the state. *E.g.*, Meachum v. Fano 427 U.S. 215, 233 (1976) (Stevens, J., dissenting). *See* Morrissey v. Brewer, 443 F.2d 942, 952-53 (8th Cir. 1981) (Lay, J., dissenting), *rev'd*, 408 U.S. 471 (1972).

The idea that an inmate is a slave of the state is a 19th Century position. *See, e.g.*, Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871).

63. *See In re* Meidinger, 168 Mont. 7, 15, 539 P.2d 1185, 1190 (1975).

64. *Wolff*, 418 U.S. at 558.

65. *E.g.*, Matthews v. Eldridge, 424 U.S. 319 (1976); *Morrissey*, 408 U.S. 471 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970).

66. *See generally* cases cited, *supra* note 16.

67. *Greenholtz*, 442 U.S. at 13.

cies in many inmates' files.[68] Several cases support this assertion. In *Kohlman v. Norton*,[69] the board denied parole because an inmate's file erroneously stated that he used a gun in the robbery committed. In *In re Rodriguez*,[70] parole was denied because a file incorrectly stated that the inmate had violent tendencies and his family rejected him. Such file errors are certain in an overcrowded and undermanned prison system. Prison officials do not have the time to check the accuracy of letters and other information placed in an inmate's file.

Justice Marshall argued that because of the risk of incorrect information, additional safeguards should be required beyond those set by the *Greenholtz* majority.[71] He argued that courts should require that an inmate be given notice reasonably in advance of a parole hearing to allow an inmate time to arrange for favorable witnesses and counsel.[72] Additionally, Marshall argued that a written summary of the evidence should be given so that an inmate could challenge erroneous evidence.[73] Such additional due process requirements would greatly reduce the risk of a denial of parole because of erroneous information in files.

Few courts have required additional due process procedures because additional procedures place an additional burden on the state.[74] Many legal scholars, however, debate whether the fiscal and administrative burdens of a state should even be considered. Some have asserted that financial costs should never determine how much procedural protection to accord a fundamental right.[75] Justice Powell's dissent in *Greenholtz* implied that the expectancy of parole is a fundamental right that requires additional procedural protections. He stated, "[L]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause."[76] Others argue that burdens to the state

68. *Id.* at 33 (Marshall, J., dissenting) (Justices Brennan and Stevens joined in this dissent).

69. 380 F. Supp. 1073 (D. Conn. 1974).

70. 14 Cal. 3d 639, 537 P.2d 384, 112 Cal. Rptr. 552 (1975). *See also* State v. Pohlabel, 61 N.J. Super. 242, 160 A.2d 647 (1960) (the inmate's file incorrectly stated that he was under a life sentence in another jurisdiction).

71. *Greenholtz*, 442 U.S. at 32 (Marshall, J., dissenting).

72. *Id.*

73. *Id.* at 38-39.

74. Missouri is one of the few states to hold that the conditional right to parole necessitates appraising prisoners of adverse information that may lead to an unfavorable decision. Missouri courts also require that prisoners be given a chance to rebut inaccurate file information. Williams v. Missouri Bd. of Probation & Parole, 661 F.2d 697, 700 (8th Cir. 1981).

75. *See generally*, Huff, *Protecting Due Process and Civic Friendship in the Administrative State*, 42 MONT. L. REV. 1 (1981).

76. *Greenholtz*, 442 U.S. at 18 (Powell, J., dissenting).

must be considered, because failing to consider costs could contribute to the elimination of state-created rights.[77]

Courts should require additional due process if it would reduce the risk of a wrongful deprival of parole, yet minimally burden the state. This judicial determination of what additional requirements will adequately insure the fairness of parole proceedings, at a minimal cost to the state, depends upon an analysis of the parole laws unique to each state.

IV. Parole Procedures in Montana

Parole procedures in Montana are largely controlled by administrative rules for two reasons. First, Montana case law is largely silent on the due process required in parole proceedings. Prior to the *Allen* case, Montana courts considered the expectancy of parole only a matter of grace, not a right. Parole determinations therefore were not entitled to any due process or subject to judicial review.[78] Secondly, the Montana parole statute states only that the board of pardons shall interview an inmate prior to parole.[79] The parole statute permits an inmate to be represented by counsel;[80] it also allows any person to present oral statements to the board on behalf of the prisoner.[81]

The Administrative Rules of Montana state the type of hearing, notice, access to files, and notification of an adverse decision which must be given to an inmate. These rules provide for two types of hearings. An inmate will be given an initial informal interview sometime within the two months prior to their eligibility for parole.[82] No statements may be made by counsel or any other person prior to, or at, this personal interview.[83] Inmates, however, are

77. *Id.* at 13. *Cf.*, Me. Rev. Stat. Ann. tit. 34 § 1671-1679 (1964), repealed by Me. Acts, ch. 499, § 71 (in 1975, Maine repealed its parole statute, thereby eliminating its entire parole system).

Additionally, Missouri has changed its right to parole to a mere hope of parole by a change in statutory wording. Following *Williams*, 661 F.2d 697 (which ruled that a Missouri statute created an entitlement to parole, absent specified conditions, by its mandatory wording), Missouri changed the mandatory wording in their parole statute to a permissive wording. In Gale v. Moore, 763 F.2d 341 (8th Cir. 1985), the court held that the new parole statute with its permissive wording no longer gave prisoners a right to expect parole. *Compare* Mo. Rev. Stat. § 217.690 (Supp. 1982) (the new Missouri statute making parole permissive) *with* Mo. Rev. Stat. § 549.261 (1980) (the old statute which by its mandatory wording gave prisoners a right to expect parole).

78. *E.g.*, *Herman*, 139 Mont. at 589, 367 P.2d at 556.

79. Mont. Code Ann. § 46-23-202(2) (1985).

80. Mont. Code Ann. § 46-23-204 (1985).

81. *Id.*

82. Mont. Admin. R. 20.25.401(1) (1980).

83. *Id.*

entitled to a hearing, where they may be represented by counsel, friends, and family.[84] Notice of this hearing must be given in the month preceding the hearing.[85] If the board denies parole, it must give the inmate written notice of its decision and the general reasons for the denial.[86]

The provisions for prior notice, hearing, and notification of the board's decision meet the minimum due process mandated by *Greenholtz*.[87] Although Montana meets the minimum due process required in parole proceedings, it does not give its inmates the additional protections Nebraska and Missouri accord to their inmates. Nebraska inmates are allowed access to the information and documents in their files, subject to the discretion of the board.[88] Missouri inmates are not given access to their files, but they have a right to be advised of the adverse information in their files.[89] Neither of these due process protections are afforded to Montana prisoners. In Montana, files are closed.[90]

The issue of file access is controversial. Generally, the common law holds that an inmate is not *entitled* to file access.[91] When file access is denied, however, courts have sometimes required that inmates be given a summary of the evidence supporting an adverse parole decision, and be given an opportunity to rebut it.[92] Because inmate files are closed in Montana, courts should require that inmates be given a summary of the evidence supporting an adverse decision. A summary of the evidence would greatly reduce the risk of file error. Yet, the cost in requiring a summary of evidence would be minimal in comparison to the cost involved in independently investigating and verifying all information put into files. Some verification of file information is necessary to reduce the risk of wrongful denials of parole. A summary of the evidence relied upon, or access to files, would allow inmates to verify file information. It would bring errors to the attention of inmates and give them the opportunity to offer evidence refuting such errors.

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84. MONT. CODE ANN. § 46-23-204 (1985).

85. MONT. ADMIN. R. 20.25.101(4) (1980).

86. MONT. ADMIN. R. 20.25.502 (1980).

87. *Greenholtz*, 442 U.S. at 14-16.

88. NEB. REV. STAT. § 83-1, 112(1) (1976) (which allows the board to make file information available to inmates if the board determines it will facilitate the parole hearing).

89. Williams v. Missouri Bd. of Probation & Parole, 661 F.2d 697, 700 (8th Cir. 1981).

90. MONT. ADMIN. R. 20.25.401(5) (1980).

91. *E.g.*, Mayes v. Trammell, 751 F.2d 175, 179 (6th Cir. 1984).

92. *Williams*, 661 F.2d at 700.

V. CONCLUSION

Allen changes Montana's restrictive interpretation of *Greenholtz*, giving prisoners the right to expect parole. The court states that the mandatory language in the Montana parole statute gives prisoners a right to expect parole, upon fulfillment of enumerated conditions. Furthermore, *Allen* assures inmates that they will be entitled to some procedural protections before they are denied parole.[93] These procedural protections could increase inmate confidence in the fairness of the system: a confidence many inmates give up while trying to survive in a hostile, overcrowded prison.

Currently, inmates are denied both access to their files and a summary of the evidence supporting a denial of parole. Current procedure precludes inmate knowledge of any erroneous file information that could result in denial of parole. Montana courts could reduce the risk of wrongful denials of parole by giving inmates an opportunity to rebut any erroneous information brought to their attention by a brief summary of evidence. A summary would preserve the confidentiality of sources, yet increase inmate confidence in the system and encourage inmate reform. The encouragement of reform was the original purpose of parole.[94] The extent of rehabilitation possible in a harsh prison environment is debateable, yet any inmate reform deserves encouragement. Fuller disclosure of file information could be one small step towards assuring inmates of the fairness of the parole system, and thereby encouraging their reform.

93. *See* Allen v. Board of Pardons, 792 F.2d 1404, 1408 (9th Cir.), *cert. granted*, 107 S. Ct. 431 (1986).

94. *See generally, In re Collins*, 51 Mont. 215, 152 P. 40 (1915). Anything that encourages inmates to reform resulting in the parole of rehabilitated prisoners, would also prevent the use of parole as a tool to reduce bulging prison populations. *See generally* MONT. CODE ANN. § 46-23-201(3) (1985) (which allows for an early eligibility for parole when the population in the prison exceeds its designed capacity by a certain number).