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2 IN THE UNITED STATES DISTRICT COURT
3 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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5 FREDERICK NEWHALL WOODS,

No. 10-02104 CW

6 Petitioner,

ORDER DENYING
PETITION FOR A WRIT
OF HABEAS CORPUS;
AND DENYING
CERTIFICATE OF
APPEALABILITY

7 v.

8 TERRI GONZALEZ, Acting Warden,

9 Respondent.
10 _____/

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13 This is a federal habeas corpus action filed pursuant to 28
14 U.S.C. § 2254 in which Petitioner Frederick Newhall Woods,
15 represented by counsel, challenges the 2009 decision of the Board
16 of Parole Hearings (Board) denying him parole. Petitioner also
17 challenges, on ex post facto grounds, the constitutionality of
18 California's newly enacted Proposition 9. Respondent has filed an
19 answer. Petitioner has filed a traverse and, with leave of the
20 Court, has filed a supplemental memorandum addressing the recent
21 Supreme Court decision, Swarthout v. Cooke, 131 S. Ct. 859, 862
22 (2011). For the reasons set forth below, the petition is DENIED.
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24 BACKGROUND

25 In July 1976, Petitioner hijacked a school bus, kidnaping the
26 driver and twenty-six children. In 1977, Petitioner plead guilty
27 to twenty-seven separate counts of kidnaping for ransom.
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1 determined by the Supreme Court of the United States; or
2 (2) resulted in a decision that was based on an unreasonable
3 determination of the facts in light of the evidence presented in
4 the State court proceeding." 28 U.S.C. § 2254(d).

5 "Under the 'contrary to' clause, a federal habeas court may
6 grant the writ if the state court arrives at a conclusion opposite
7 to that reached by [the Supreme] Court on a question of law or if
8 the state court decides a case differently than [the Supreme]
9 Court has on a set of materially indistinguishable facts."
10 Williams v. Taylor, 529 U.S. 362, 412-13 (2000). "Under the
11 'unreasonable application' clause, a federal habeas court may
12 grant the writ if the state court identifies the correct governing
13 legal principle from [the Supreme] Court's decisions but
14 unreasonably applies that principle to the facts of the prisoner's
15 case." Id. at 413. The only definitive source of clearly
16 established federal law under 28 U.S.C. § 2254(d) is in the
17 holdings of the Supreme Court as of the time of the relevant state
18 court decision. Id. at 412. Although only Supreme Court
19 precedents are binding on the state courts and only those holdings
20 need to be reasonably applied, circuit law may be persuasive
21 authority in analyzing whether a state court unreasonably applied
22 Supreme Court authority. Clark v. Murphy, 331 F.3d 1062, 1070-71
23 (9th Cir. 2003).

26 To determine whether the state court's decision is contrary
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1 to, or involved an unreasonable application of, clearly
2 established law, a federal court looks to the decision of the
3 highest state court that addressed the merits of a petitioner's
4 claim in a reasoned decision. LaJoie v. Thompson, 217 F.3d 663,
5 669 n.7 (9th Cir. 2000). In the present case, the only state
6 court that issued a reasoned decision on Petitioner's habeas
7 claims was the Alameda County superior court.
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9 DISCUSSION

10 I. Due Process Claim

11 Petitioner claims that the Board's January 5, 2009 decision
12 violated his right to due process because it was not based on
13 "some evidence" that he currently poses an unreasonable risk to
14 public safety, a requirement under California law. "There is no
15 right under the Federal Constitution to be conditionally released
16 before the expiration of a valid sentence, and the States are
17 under no duty to offer parole to their prisoners." Greenholtz v.
18 Inmates of Neb. Penal and Correctional Complex, 442 U.S. 1, 7
19 (1979). "When, however, a State creates a liberty interest, the
20 Due Process Clause requires fair procedures for its vindication--
21 and federal courts will review the application of those
22 constitutionally required procedures." Cooke, 131 S. Ct. at 862.
23 The procedures required are "minimal." Id. A prisoner receives
24 adequate process when "he was allowed an opportunity to be heard
25 and was provided a statement of the reasons why parole was
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1 denied." Id. "The Constitution does not require more."
2 Greenholtz, 442 U.S. at 16.¹

3 In the instant matter, Petitioner received at least the
4 required amount of process. The record shows that he was allowed
5 to speak at his parole hearing and to contest the evidence against
6 him, that he had received his records in advance, and that he was
7 notified as to the reasons parole was denied. Having found that
8 Petitioner received these procedural requirements, this federal
9 habeas court's inquiry is at an end. Cooke, 131 S. Ct. at 863.
10 Petitioner's claim that the Board's decision did not comply with
11 California's "some evidence" rule of judicial review is of "no
12 federal concern." Id. Accordingly, Petitioner's due process
13 claim is denied.
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15 II. Ex Post Facto Claim

16 Petitioner argues that Proposition 9, which became effective
17 shortly before his 2009 parole determination hearing, and which
18 amended California Penal Code section 3041.5(b)(2), violates the
19 ex post facto prohibition, both on its face and as applied to him.
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21 Article I, Section 10, of the United States Constitution
22 prohibits the states from passing any ex post facto law. The Ex
23 Post Facto Clause "is aimed at laws 'that retroactively alter the
24 definition of crimes or increase the punishment for criminal
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26 ¹In a supplemental memorandum, Petitioner proffers several
27 arguments for the proposition that Cooke does not apply to his
28 case. The Court finds all of his arguments unpersuasive.

1 acts.'" California Dep't of Corrections v. Morales, 514 U.S. 499,
2 504 (1995) (quoting Collins v. Youngblood, 497 U.S. 37, 43
3 (1990)). "Retroactive changes in laws governing parole of
4 prisoners, in some instances, may be violative of this precept."
5 Garner v. Jones, 529 U.S. 244, 250 (2000). The dispositive
6 question is whether the retroactive application of the changed law
7 regarding parole creates a significant risk of prolonging an
8 inmate's incarceration. Id. at 251. However, when a statutory
9 change creates only a speculative possibility of increasing the
10 punishment for specified crimes, there is no ex post facto
11 violation. Morales, 514 U.S. at 509. Further, the ex post facto
12 clause "should not be employed for the micro-management of an
13 endless array of legislative adjustments to parole and sentencing
14 procedures." Garner, 529 U.S. at 252.

16 Proposition 9 significantly amended California Penal Code
17 section 3041.5(b), the statute that governs the length of deferral
18 of parole hearings. Gilman v. Schwarzenegger, 638 F.3d 1101, 1104
19 (9th Cir. 2011). Proposition 9 increased the minimum deferral
20 period for holding the next parole hearing from one to three
21 years, increased the maximum deferral period from five to fifteen
22 years and increased the default deferral period from one to
23 fifteen years. Id. Proposition 9 also increased the burden on
24 the Board to impose a deferral period other than the default
25 period. Id. Previously, the deferral period was one year unless
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1 the Board found it was unreasonable to expect the prisoner would
2 become suitable for parole within that year; after Proposition 9,
3 the deferral period is fifteen years unless the Board finds by
4 clear and convincing evidence that the prisoner will be suitable
5 for parole in ten years, in which case the deferral period is ten
6 years. Id. If, by clear and convincing evidence, the Board finds
7 the prisoner will be suitable for parole in seven years, the Board
8 may set a three, five or seven year deferral period. Id. at 1104-
9 05. Proposition 9 also authorizes the Board to advance a parole
10 hearing date, on its own or at the request of the prisoner, "when
11 a change in circumstances or new information establishes a
12 reasonable likelihood that consideration of the public and
13 victim's safety does not require the additional period of
14 incarceration of the prisoner." Id. at 1105 (citing
15 § 3041.5(b)(4)). A prisoner is limited to one request for an
16 advance hearing every three years. Id. Although three years is
17 the minimum deferral period, there is no minimum period for the
18 Board to hold an advance hearing. Id.

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21 Petitioner claims that Proposition 9, on its face, is
22 designed to lengthen parole-eligible prisoners' terms of
23 incarceration and, as applied to him, did increase his risk of a
24 longer incarceration.

25 A. Facial Challenge

26 The state habeas court, relying on California Dep't of
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1 Corrections v. Morales and Garner v. Jones, denied Petitioner's
2 facial challenge on the ground that he failed to show how the new
3 law would result in lengthier sentences. Pet's Ex. EE, In re
4 Woods, on Habeas Corpus, No. 63187A (August 27, 2009) at 11. The
5 court noted that Proposition 9, like the parole policy examined in
6 Garner, allows an expedited parole review if there is a change in
7 circumstance or new information indicating that an earlier review
8 is warranted. Id. at 11.

10 Petitioner argues that the state court's rejection of his
11 facial challenge was unreasonable for failing to discern the
12 differences between the parole policies addressed in Morales and
13 Garner and Proposition 9. Petitioner relies on the reasoning in
14 Gilman v. Davis, 690 F. Supp. 2d 1105 (E.D. Cal. 2010), where the
15 district court issued a preliminary injunction in a civil rights
16 action enjoining the Board from applying Proposition 9 because it
17 found that the petitioners were likely to succeed on the merits of
18 their ex post facto challenge. However, this opinion was reversed
19 by the Ninth Circuit in Gilman v. Schwarzenegger, 638 F.3d at
20 1110-11, issued after briefing was completed here. In reversing,
21 the Ninth Circuit relied on Garner, 529 U.S. at 256-57 and
22 Morales, 514 U.S. at 512, for the proposition that the
23 availability of expedited hearings by the Board removes any
24 possibility of harm to prisoners who experience changes in
25 circumstances between hearings. Gilman, 638 F.3d at 1109. The
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1 Ninth Circuit noted that Proposition 9 explicitly made advance
2 hearings available and provided that the Board's decision denying
3 a prisoner's request for an advance hearing was subject to
4 judicial review. Id. at 1109. The Ninth Circuit concluded that,
5 under Proposition 9, "an advance hearing by the Board 'would
6 remove any possibility of harm' to prisoners because they would
7 not be required to wait a minimum of three years for a hearing."
8 Id.

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10 In light of this recent Ninth Circuit authority interpreting
11 the same Supreme Court precedent relied upon by the state habeas
12 court to deny Petitioner's facial challenge to Proposition 9, this
13 Court concludes that the state court's holding was not contrary to
14 or an unreasonable application of Supreme Court precedent.
15 Petitioner is denied habeas relief on this ground.

16 B. As-Applied Challenge

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18 Petitioner argued to the state court that the Board's three-
19 year denial prolonged his incarceration because, at his last two
20 parole hearings, he was given one-year denials. Petitioner
21 pointed out that, in 2009, as at the two previous hearings, the
22 Board told him that he was quite close to getting a parole date.
23 The state court pointed out that Petitioner had received two
24 disciplinary reports for possession of pornographic material after
25 he had received the one-year deferrals. The court stated, "In
26 contrast, at the 2009 hearing, Petitioner had incurred two CDC 115
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1 disciplinary reports, and the pattern demonstrated in the rules
2 violations was of great concern to the Board because it had a
3 nexus to Petitioner's planning behavior before the crimes. Thus,
4 Petitioner has not demonstrated that it was the amendment to the
5 statute that created the significant risk of incarceration.
6 Instead, based on the record here, it is unlikely that the Board
7 would have given Petitioner a one year denial if the statute so
8 allowed." In re Woods, No. 63187A at 12.

10 Petitioner argues that the state court unreasonably applied
11 the facts to his case because it ignored a Board commissioner's
12 observation that Petitioner was "quite close" to being paroled and
13 this was the same comment former panel members had made when they
14 gave Petitioner one-year denials.

15 As discussed above, the Ninth Circuit in Gilman, 638 F.3d at
16 1109, determined that the opportunity to obtain an advance hearing
17 by the Board would ameliorate any significant risk of a prolonged
18 sentence because prisoners would not have to wait three years for
19 another parole hearing. Petitioner's as-applied challenge to
20 Proposition 9 fails because he has not requested an advance
21 hearing, nor has one been denied. Petitioner cannot establish a
22 colorable claim that Proposition 9 has created a significant risk
23 of prolonging his incarceration. Furthermore, because the Board
24 reconsidered its three-year parole denial and subsequently issued
25 a one-year denial, Petitioner cannot claim that Proposition 9
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1 caused him harm. Therefore, Petitioner's as-applied challenge to
2 Proposition 9 fails.

3 CONCLUSION

4 For the foregoing reasons, the state court's adjudication of
5 Petitioner's claims did not result in a decision that was contrary
6 to, or involved an unreasonable application of, clearly
7 established federal law, nor did it result in a decision that was
8 based on an unreasonable determination of the facts in light of
9 the evidence presented in the state court proceeding.

10 Accordingly, the petition is DENIED.

11 Further, a certificate of appealability is DENIED.
12 Reasonable jurists would not "find the district court's assessment
13 of the constitutional claims debatable or wrong." Slack v.
14 McDaniel, 529 U.S. 473, 484 (2000). Petitioner may seek a
15 certificate of appealability from the Ninth Circuit Court of
16 Appeals. The Clerk of the Court shall enter judgment in favor of
17 Respondent and close the file.
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21 IT IS SO ORDERED.

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23 Dated: 10/12/2011

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25 CLAUDIA WILKEN
26 United States District Judge
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