

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUN 13 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

STERLING RAY CUNIO,

Plaintiff-Appellant,

v.

KATE BROWN, in her Official Capacity
as Governor of the State of Oregon;
COLETTE PETERS, in her Official
Capacity as Director of the Oregon
Department of Corrections; KRISTIN A.
WINGES-YANEZ, in her Official
Capacity as Chairperson, Oregon Board of
Parole and Post-Prison Supervision; jointly
and severally,

Defendants-Appellees.

No. 15-35519

D.C. No. 6:14-cv-01647-TC

MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Thomas M. Coffin, Magistrate Judge, Presiding

Argued and Submitted May 10, 2017
Portland, Oregon

* This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

Before: BYBEE and HURWITZ, Circuit Judges, and RAKOFF,** Senior District Judge.

Cunio appeals the district court’s dismissal of his 42 U.S.C. § 1983 claim on *Younger* abstention grounds. We review de novo whether *Younger* abstention applies. *Green v. City of Tucson*, 255 F.3d 1086, 1093 (9th Cir. 2001) (en banc).

Younger abstention is only appropriate if “the federal plaintiff is not barred from litigating federal constitutional issues in the state proceeding.” *San Jose Silicon Valley Chamber of Commerce Political Action Comm. v. City of San Jose*, 546 F.3d 1087, 1092 (9th Cir. 2008). The pending proceeding before the Oregon Court of Appeals does not provide Cunio “an adequate opportunity to raise his federal constitutional claims.” *Meredith v. Oregon*, 321 F.3d 807, 818 (9th Cir. 2003). That proceeding only addresses the 48-year minimum sentence imposed by the Oregon Board of Parole and Post-Prison Supervision (“Parole Board”) in 2012 for Cunio’s homicide offenses. *See* Or. Rev. Stat. § 144.335 (challenging final orders of the Parole Board). Oregon law required Cunio to challenge the 23-year portion of his determinate guidelines sentence for his non-homicide offenses in separate proceedings. *See* Or. Rev. Stat. §§ 138.050 (direct appeal), 138.510–680 (post-conviction relief). None of these proceedings provided Cunio an “adequate”

** The Honorable Jed S. Rakoff, Senior United States District Judge for the Southern District of New York, sitting by designation.

and “full and fair” opportunity to challenge the combined effect of his sentences as a de facto life sentence without parole, or to challenge the constitutionality of Oregon’s bifurcated sentencing scheme for juveniles convicted of homicide and non-homicide crimes in a single judgment. *Meredith*, 321 F.3d at 818–19. The district court therefore should not have abstained.

REVERSED.