**UNPUBLISHED**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

---

**No. 24-7146**

---

RILEY DYSON BIRO,

Petitioner - Appellant,

v.

DIRECTOR OF THE VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent - Appellee.

---

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Michael Stefan Nachmanoff, District Judge. (1:22-cv-01210-MSN-JFA)

---

Submitted: February 27, 2025 Decided: March 4, 2025

---

Before KING and QUATTLEBAUM, Circuit Judges, and TRAXLER, Senior Circuit Judge.

---

Dismissed by unpublished per curiam opinion.

---

Riley Dyson Biro, Appellant Pro Se.

---

Unpublished opinions are not binding precedent in this circuit.

APPENDIX A

PER CURIAM:

Riley Dyson Biro seeks to appeal the district court's orders dismissing his three consolidated 28 U.S.C. § 2254 petitions and denying his subsequent Fed. R. Civ. P. 59(e) motion. The orders are not appealable unless a circuit justice or judge issues a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(A). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists could find the district court's assessment of the constitutional claims debatable or wrong. *See Buck v. Davis*, 580 U.S. 100, 115-17 (2017). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable and that the petition states a debatable claim of the denial of a constitutional right. *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

We have independently reviewed the record and conclude that Biro has not made the requisite showing. Accordingly, we deny Biro's motion for summary reversal, deny a certificate of appealability, and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

*DISMISSED*

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

RILEY DYSON BIRO,
*Petitioner*,

v.

DIRECTOR OF THE VA DOC,
*Respondent.*

1:22-cv-1210-MSN-JFA

FINAL ORDER

For the reasons stated in the accompanying Memorandum Opinion, the Respondent's Motion to Dismiss [Dkt. No. 24] is GRANTED; Petitioner's motions to appoint counsel [Dkt. No. 35], and to have transcripts prepared [Dkt. No. 41] are DENIED; Petitioner's motion to expedite is DENIED as MOOT; and it is hereby

ORDERED that this petition for habeas corpus relief pursuant to 28 U.S.C. § 2254 be and is DISMISSED WITH PREJUDICE.

To appeal this decision, Petitioner must file a written notice of appeal with the Clerk's office within thirty (30) days of the date of this Order. *See* Fed. R. App. P. 4(a). A written notice of appeal is a short statement indicating a desire to appeal and including the date of the Order the Petitioner wishes to appeal. Failure to file a timely notice of appeal waives the right to appeal this decision. Petitioner also must obtain a certificate of appealability ("COA") from a circuit justice or judge. *See* 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22(b). The Court expressly declines to issue a COA for the reasons explained in the accompanying Memorandum Opinion.

The Clerk is directed, pursuant to Federal Rule of Civil Procedure 58, to enter final

APPENDIX B

judgment in favor of Respondent; to send a copy of this Order and the accompanying Memorandum Opinion to Petitioner and counsel of record for Respondent; and to close this civil action.

/s/
Michael S. Nachmanoff
United States District Judge

August 21, 2024
Alexandria, Virginia

FILED: April 7, 2025

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

---

No. 24-7146
(1:22-cv-01210-MSN-JFA)

---

RILEY DYSON BIRO

Petitioner - Appellant

v.

DIRECTOR OF THE VIRGINIA DEPARTMENT OF CORRECTIONS

Respondent - Appellee

---

ORDER

---

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 40 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge King, Judge Quattlebaum, and Senior Judge Traxler.

For the Court

/s/ Nwamaka Anowi, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

RILEY DYSON BIRO,
*Petitioner*,

v.

DIRECTOR OF THE VA DOC,
*Respondent.*

1:22cv-1210-MSN-JFA

MEMORANDUM OPINION AND ORDER

The Court denied Petitioner's § 2254 petition on August 21, 2024, and this matter is before the Court to address four motions Petitioner filed on August 29, 2024: Motion for Reconsideration of the Court's August 21, 2024 judgment dismissing his § 2254 petition (ECF 51); Motion to Seal Affidavit in Support of Request to Reconsider (ECF 52); Motion/Request for Emergency Review of Motion for Reconsideration (ECF 54); and Motion for Discovery (ECF 55). After reviewing the motions, each motion has no merit and will be denied or denied as moot.

**I. Rule 59(e)**

"'[I]f a post-judgment motion is [timely] filed . . . and calls into question the correctness of that judgment it should be treated as a motion under [Fed. R. Civ. P.] 59(e), however it may be formally styled.'" *MLC Auto., LLC v. Town of S. Pines*, 532 F.3d 269, 277 (4th Cir. 2008) (quoting *Dove v. CODESCO*, 569 F.2d 807, 809 (4th Cir. 1978)). The Fourth Circuit has held that under its precedent, if a party "filed the motion within 10 days after the order was entered, the district court should have considered it under Rule 59(e)." *MLC Auto*, 532 F.3d at 278 (quoting *Va. Dep't of State Police v. Wash. Post*, 386 F.3d 567, 573 n.2 (4th Cir. 2004) (citing *Dove*, 569 F.2d at 809).

The decision to reconsider an order pursuant to Rule 59(e) is a matter committed to the sound discretion of the district court, and "reconsideration of a judgment after its entry is an

APPENDIX I

extraordinary remedy which should be used sparingly." *Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co.*, 148 F.3d 396, 402, 403 (4th Cir. 1998) (internal quotation marks omitted). The Fourth Circuit has recognized three grounds upon which a district court may alter or amend its judgment: "(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." *Id.* at 403.[1] A Rule 59(e) motion "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to entry of judgment." *Id* (internal quotation marks omitted).

When, as here, a party argues that Rule 59(e) relief is necessary to correct a clear error of law or to prevent manifest injustice, "mere disagreement" with the Court's previous decision will not suffice. *Hutchinson v. Staton*, 994 F.2d 1076, 1082 (4th Cir. 1993). Rather, to justify altering or amending a judgment on this basis, "the prior judgment cannot be 'just maybe or probably wrong; it must . . . strike the court as wrong with the force of a five-week-old, unrefrigerated dead fish.'" *Fontell v. Hassett*, 891 F.Supp.2d 739, 741 (D. Md. 2012) (alteration in original) (quoting *TFWS, Inc. v. Franchot*, 572 F.3d 186, 194 (4th Cir. 2009)). In other words, the Court's previous judgment must be "dead wrong," *Franchot*, 572 F.3d at 194 (citation omitted), and a "factually supported and legally justified" decision does not constitute a clear error of law. *See Hutchinson*, 994 F.2d at 1081–82.

A motion for reconsideration that only "attempt[s] to reargue the merits" of a case, *French v. King*, 14 F.3d 594, 594 (4th Cir. 1993), or "relitigate[s] old matters" already considered and rejected is not proper and will be denied, *Pac. Ins. Co.*, 148 F.3d at 403 (citation omitted). A

[1] If the Court considered this matter a motion filed pursuant to Rule 60(b), asserting mistake by the Court in the denial of habeas relief, the result would be the same—the motion should be denied. *Robinson v. Wix Filtration Corp.*, 599 F.3d 403, 407-13 (4th Cir. 2010) (holding district court did not err in construing motion as filed under Rule 59(e) or abuse its discretion in denying appellant's Rule 59(e) motion, because the result was the same under Rule 60(b)).

motion for reconsideration, however, "addresses only factual and legal matters that the Court might have overlooked . . . . It is improper on a motion for reconsideration to 'ask the Court to rethink what it already thought through—rightly or wrongly.'" *Glendon Energy Co. v. Borough of Glendon*, 836 F. Supp. 1109, 1122 (E.D. Pa. 1993) (citation omitted). A Rule 59(e) motion "may not be used ... to raise arguments or present evidence that could have been raised prior to entry of judgment." *Pac. Ins. Co.,* 148, F.3d at 403 (citation omitted).

On August 21, 2024, this Court dismissed Petitioner's § 2254 petition because he had defaulted all of his claims. ECF 47 at 17. On August 29, 2024, Petitioner filed his motion for reconsideration, and asserts the Court erred:

> A) in conducting a procedural default analysis for Petitioner's two misdemeanor convictions because the Respondent did not assert this affirmative defense with respect to the two misdemeanor convictions;
>
> B) by not considering the "applied adequacy" of the default applied by the Virginia Supreme Court in dismissing Petitioner's state habeas;
>
> C) "by finding the claims procedurally defaulted," and not adjudicating the claims on the merits;
>
> D) "by failing to excuse any procedural default on the basis of the misconduct of his trial attorney . . . between the return of the jury's verdict and the entry of the order of conviction and sentence;"
>
> E) by not having transcripts of the two sentencing hearings prepared because petitioner "alleged that [his] waiver of appeal was not valid;" and
>
> F) by considering material not submitted into evidence as part of its sufficiency of the evidence analysis."

ECF 51 at 1-3. The text of the six alleged errors indicates that Petitioner is asserting "clear error[s] of law" as his basis for relief and not attacking his conviction or sentence. *United States v. Winestock*, 340 F.3d 200, 206 (4th Cir. 2003) ("[A] motion directly attacking the prisoner's conviction or sentence will usually amount to a successive application, while a motion seeking a remedy for some defect in the collateral review process will generally be deemed a proper motion to reconsider."); *cf. Bixby v. Stirling*, 90 F.4th 140, 155 (4th Cir. 2024) (holding where a Rule 60(b)

movant seeks "permission to raise new and revised claims in a second or successive" habeas motion, district court should "dismiss[]—not den[y]—the motion"). Petitioner has not established any error on the part of the Court in denying his § 2254 petition.

*A. The Court Erred by Applying Procedural Default to the Misdemeanor Convictions Sua Sponte.*

On February 23, 2024, the Court granted a joint motion to consolidate three habeas petitions: 1) *Biro I*, Case No. 1:22cv1208, challenging his June 13, 2022 conviction for assault on a law enforcement officer and two–year sentence in prison; 2) *Biro II*, Case No. 1:22cv1209, challenging his June 13, 2022 conviction for violation of a protective order, and thirty-day sentence in jail; and 3) *Biro III*, Case No. 1:22cv1210 conviction for obstruction of a law enforcement officer, and thirty-day sentence in jail. ECF 39. In *Biro III*, Case No. 1:22cv1210, *Biro II*, Case No. 1:22cv1209, and in *Biro I*, Case No. 1:22cv1208, Respondent argued that "Petitioner's claims should be dismissed because they are exhausted" and "defaulted." *Biro III*, ECF 25 at 9; *Biro II*, ECF 22 at 10, *Biro I*, ECF 23 at 8.[2] His assertion of error is without merit.

[2] In addition, the Fourth Circuit held in *Yeatts v. Angelone*, 166 F.3d 255 (4th Cir. 1999) that "a federal habeas court possesses the authority, in its discretion, to decide a petitioner's claim on the basis of procedural default despite the failure of the state to properly preserve procedural default as a defense." *Id.* at 261. In its analysis, the Fourth Circuit observed that

> in the presence of overriding interests of comity and judicial efficiency that transcend the interests of the parties, a federal habeas court may, in its discretion, deny federal habeas relief on the basis of issues that were not preserved or presented properly by a state. *See Granberry v. Greer*, 481 U.S. 129, 131–36 (1987) (holding that based on concerns of comity and judicial economy, a federal habeas court, within its discretion, may raise an exhaustion defense that was not raised in the district court). Those concerns support the conclusion that a federal habeas court possesses the authority to address, in its discretion, whether there exists an unexcused adequate and independent state-law ground for a denial of relief from a challenged conviction or sentence.

*Id.* In this case, Petitioner had notice and opportunity to respond and did respond to the procedural default argument. *Biro I*, ECF 29–32; and *Biro III*, ECF 31, 32 at 1–2; 34 at 1–7. The Court considered those responses in ruling on the motion to dismiss. *Biro III*, ECF 47.

*B. The Court Erred by Not Considering the "applied adequacy" of the Brooks v. Peyton Default.*

Petitioner's assertion of error in this regard is terse, but it references his January 2, 2024 pleading in *Biro III*, ECF 32, which discusses *Brooks v. Peyton,* 171 S.E.2d 243 (Va. 1969). The concept of "adequacy" in the context of procedural default is straight forward. "A state procedural rule is adequate if it is consistently or regularly applied." *Reid v. True*, 349 F.3d 788, 804 (4th Cir. 2003). Contrary to Petitioner's assertion of error, the Court discussed the adequacy of *Brooks* as a procedural default at length citing several opinions by federal courts from 1987 through 2023 that applied *Brooks* and found it was an independent and adequate state law procedural default. *Biro III*, ECF 47 at 11–12. The Court also noted that the default applied in *Brooks* (barring a claim in habeas that could have been raised on direct appeal because habeas may not be employed as a substitute for an appeal) is more often applied by citing another Virginia case, *Slayton v. Parrigan*, 205 S.E.2d 680 (Va. 1974), which applies that same default. Further, in 1986, the United States Supreme Court observed in *Smith v. Murray*, 477 U.S. 527 (1986), that "[u]nder Virginia law, failure to raise a claim on direct appeal from a criminal conviction ordinarily bars consideration of that claim in any subsequent state proceeding." *Id.* at 533 (citing *Coppola v. Warden of Virginia State Penitentiary*, 282 S. E. 2d 10 (Va. 1981); *Slayton v. Parrigan*, 205 S. E. 2d 680 (Va. 1974)). *Biro III*, ECF 47 at 11.[3] This assertion of error has no merit.[4]

[3] *Coppola* held that if an "objection could have been raised at trial and on direct appeal, it may not now be raised in a habeas corpus proceeding." 282 S.E.2d at 12 (citing *Slayton v. Parrigan*). *Slayton*, held that "[a] petition for a writ of habeas corpus may not be employed as a substitute for an appeal or a writ of error," 205 S.E.2d at 682 (citing *Brooks*, 171 S.E.2d at 246), and found that "[a] prisoner is not entitled to use habeas corpus to circumvent the trial and appellate processes for an inquiry into an alleged non-jurisdictional defect of a judgment of conviction." In short, each case applied the same default.

[4] Petitioner even refers to *Brooks* in his Motion for Reconsideration as a "long-standing Virginia rule" during his argument asserting error on the part of the Court. ECF 51–1 at 4.

*C. The Court Erred by Finding the Claims Procedurally Defaulted.*

Petitioner next argues that the Court erred because his claims were jurisdictional and the Virginia Supreme Court therefore erred in dismissing his claims pursuant to *Brooks*, which only applies to non-jurisdictional claims. ECF at 51–1 at 4-5 (citing *Bell v. Cone*, 556 U.S. 449, 465 (2009)). Petitioner's reliance on *Bell* is misplaced. While Petitioner correctly notes that adequacy of a state procedural issue is a federal issue, he does not appreciate that the rule at issue—failure to raise a claim on direct appeal from a criminal conviction ordinarily bars consideration of that claim in any subsequent state proceeding—is a rule that has been found independent and adequate in numerous cases, over several decades by the federal district courts in Virgina, the Fourth Circuit,[5] and the United States Supreme Court. ECF 47 at 10–12. In any event, his assertion that the Virginia Supreme Court erred in dismissing his state claims pursuant to *Brooks* presents, at best, an error of state law. "In this Circuit, 'claims of error occurring in a state post-conviction proceeding cannot serve as a basis for federal habeas corpus relief.'" *Sigmon v. Stirling*, 956 F.3d 183, 193 (4th Cir. 2020) (quoting *Bryant v. Maryland*, 848 F.2d 492, 493 (4th Cir. 1988)).[6] This assertion of error has no merit.

[5] In 2015, the Fourth Circuit considered "the procedural rule established by *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680, 682 (Va. 1974), [that] a 'non–jurisdictional issue [that] could have been raised during the direct appeal process . . . is not cognizable in a petition for a writ of habeas corpus,'" and observed that it had previously "held that this precise Virginia procedural default rule constitutes an independent and adequate state ground for a denial of a state habeas petition. *Prieto v. Zook*, 791 F.3d 465, 467–68 (4th Cir. 2015) (citing *Mu'Min v. Pruett*, 125 F.3d 192, 196–97 (4th Cir. 1997)).

[6] *See, e.g., Lawrence v. Branker*, 517 F.3d 700, 717 (4th Cir. 2008) ("[E]ven where there is some error in state post-conviction proceedings, a petitioner is not entitled to federal habeas relief because the assignment of error relating to those post-conviction proceedings represents an attack on a proceeding collateral to detention and not to the detention itself."); *see also Richardson v. Branker*, 668 F.3d 128, 141 (4th Cir. 2012) ("When a claim of ineffective assistance of counsel raised in a habeas corpus petition involves an issue unique to state law . . . a federal court should be especially deferential to a state post-conviction court's interpretation of its own state's law.").

*D. The Court Erred by Not Finding Cause to Excuse the Default Due to the Ineffective Assistance of Counsel.*

Petitioner next asserts this Court erred by not finding cause to excuse his default of his appellate waiver claim based upon ineffective assistance of counsel. ECF 53 at 1.[7] The Court ruled on the issue of cause based upon Petitioner's allegation that his counsel was ineffective in advising Petitioner to agree to the appellate waiver in the dispositional agreement in the August 21, 2024 Memorandum Opinion, (ECF 47 at 3–5, 13–14), and Petitioner has not set forth any specific error in the Court's reasoning. The Court found Petitioner could not establish cause, via the substantial claim exception in *Martinez v. Ryan*, 566 U.S. 1 (2012), because he had not exhausted his alleged cause in state habeas; he had not raised an ineffective assistance of counsel claim in his federal petition, (ECF 47 at 7; and 7–8, note 11); and, importantly, he admitted in the state habeas proceedings "that, based upon his discussions with counsel, he knew his appellate waiver would result in the default of 'factual and procedural issues;' and his attorney had told him he would be defaulting 'factual and procedural issues . . . by waiving his right to appeal.'" (ECF 47 at 4, note 6) (citing ECF No. 25–5 at 6). This assertion of merit has no merit.

*E. The Court Erred by Not Ordering the Preparation of Transcripts from the Two Sentencing Hearings.*

Petitioner's motion states, in a conclusory manner, that the Court erred by not having the two sentencing hearing transcripts transcribed and made a part of the habeas record, which he alleges would prove his appellate waiver was invalid. (ECF 51 at 3). First, Petitioner amended his

[7] Petitioner argued in his responses to the motion to dismiss that his attorney was "extremely unprofessional," and abandoned him "after trial, coercing him into taking an agreed disposition, and misadvising him that some of his claims were cognizable in a habeas corpus petition." *Biro I*, ECF at 30 at 2. *See, infra* at 9–12. As established by the record, Petitioner only raised three claims (none of which alleged ineffective assistance of counsel) as his basis for § 2254 relief, and he did not rise a claim that his counsel was ineffective regarding the appellate waiver. To be sure, the Court expressly noted in the order granting his motion to amend that "the motion [did] not add any new claims to any of his petitions." ECF 39 at 2. Petitioner is apparently attempting to raise such a claim now in his motion for discovery. *See, infra* at 9–12. Any such claim would be barred as successive. *See, supra* at 3–4.

§ 2254 petition to raise only three claims, which did not include the alleged ineffective assistance of counsel with respect to the appellate waiver or an independent claim that his appellate waiver was invalid. ECF 39. Indeed, Petitioner admitted in his state habeas pleadings that "he knew agreeing to the appellate waiver," and waiving his right to appeal, would default "'factual and procedural issues.'" ECF 47 at 3. This allegation of error has no merit.[8]

*F. The Court Erred by Considering Material not Submitted into Evidence as Part of Its Sufficiency Analysis.*

Petitioner again misstates the record. His petition, as amended at his request in his response to the respondent's motion to consolidate, did not assert a sufficiency of the evidence claim. Consequently, the Court did not "consider" any evidence as part of a sufficiency of the evidence argument. The Court did consider Petitioner's claim of actual innocence, EFC 47 at 14–17, and based its ruling on a review of the record of the criminal proceedings.

> When a petitioner raises a *Schlup [v. Delo,* 513 U.S. 298 (1995)] gateway actual innocence claim, it must be supported by "new reliable evidence." *Schlup*, 513 U.S. at 324, 115 S.Ct. 851. However, in its consideration of a petitioner's *Schlup* gateway actual innocence claim, the district court '*must* consider "all the evidence" old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under "rules of admissibility that would govern at trial.'" *House [v. Bell*, 547 U.S. 518], 537, 126 S.Ct. 2064 [(2006)] (quoting *Schlup*, 513 U.S. at 327–28, 115 S.Ct. 851) (emphasis added) (quotation marks omitted).

*Teleguz v. Pearson*, 689 F.3d 322, 328 (4th Cir. 2012); *United States v. MacDonald*, 641 F.3d 596, 612 (4th Cir. 2011) (same). This assertion of error is without merit, and his Rule 59(e) motion will be denied.

**II. Motion to Seal Affidavit in Support of Request to Reconsider; Motion for Emergency Review of Motion for Reconsideration; and Motion for Discovery.**

Petitioner's Motion to Seal and Motion for Emergency Review are both moot. The affidavit

[8] In addition, any claim of ineffective assistance of counsel with respect to the alleged appellate waiver filed in August/September 2023 would have been defaulted as a successive state habeas petition under Virginia Code § 8.01-654(B)(2) because Petitioner had knowledge at the time he filed a previous state habeas petition. *See, infra* at 9–12.

was sealed by the Clerk when it was received, and this order negates any "emergency." The discovery motion will also be denied because Petitioner would have had knowledge of the alleged August/September 2023 state habeas petition before he filed any of his numerous motions in *Biro I, Biro II, and Biro III,* and certainly before he filed his motion to consolidate and amend on January 2, 2024.[9]

Habeas petitioners in federal court are "'not entitled to discovery as a matter of ordinary course.'" *Stephens v. Branker*, 570 F.3d 198, 213 (4th Cir. 2009) (quoting *Bracy v. Gramley*, 520 U.S. 899, 904 (1997)). Further, Rule 6 of the Rules Governing Section 2254 Cases, requires reasons for the request and "good cause," including "specific allegations suggesting that the petitioner will be able to demonstrate that he is entitled to habeas corpus relief." *Id.* Here, because the claim of ineffective assistance of counsel with regard to the appellate waiver has already been defaulted, *see, supra* note 7, and Petitioner "has not shown cause and prejudice or fundamental miscarriage of justice permitting its consideration on federal habeas," he cannot demonstrate that discovery would entitle him to habeas relief, *Royal v. Taylor*, 188 F.3d 239, 249 (4th Cir. 1999), and his motion for discovery is denied.

In examining the basis for the discovery motion (the allegation that Petitioner filed a successive state habeas in August/September 2023 raising a claim that counsel was ineffective regarding the appellate waiver), the Court reviewed Petitioner's numerous civil actions pending in federal court during 2023. The Court's review did not find Petitioner had ever used an address in Williamsburg, VA, or that he had filed a notice of change of address in any of his civil actions indicating he had moved to an address in Williamsburg, VA. Petitioner avers that he was at Eastern State Hospital in Williamsburg, Virginia in August and September 2023, and that while at that

[9] *Biro I* (ECF 34 at 1); *Biro II* (ECF 17 at 1); *Biro III* (ECF 36 at 1).

hospital in August or September 2023 he gave a notarized state habeas petition to a social worker named "Gwen" to send to the Virginia Supreme Court. ECF 53. In reviewing the dockets in *Biro I, Biro II, and Biro III,* as well as the dockets in other civil actions, the Court has not found any change of address notification indicating that Petitioner was in the Eastern State Hospital in August and September 2023, or at any other time; but that he has consistently provided notifications of change of addresses in other civil actions during 2023.[10]

- On February 17, 2023, Petitioner notified the Fourth Circuit that he was released from custody on February 6, 2023 and that his new address was 3140 Island Road, Gloucester, VA 23061. *Biro v. Director*, No. 23–6087 (4th Cir.), ECF 6.
- On April 2, 2023, Petitioner filed a § 1983 civil action in this Court. *Biro v. Flynn, et al.*, No. 4:23cv57-JKW-RJK. Petitioner's address was 3140 Island Road, Gloucester, VA 23061.
- On June 1, 2023, Petitioner filed a complaint in *Biro v. Flynn, et al.*, No. 4:23cv57–JKW–RJK. Petitioner's address in his complaint was 3140 Island Road, Gloucester, VA 23061.
- On October 12, 2023, Petitioner executed a two-page § 2254 petition that was filed in this Court on October 25, 2023, and his address was Northern Neck Regional Jail, P. O. Box 1060, Warsaw, VA 22572. *Biro v. Miyares*, No. 1:23-cv-01467-MSN-LRV.
- On December 4, 2023, Petitioner filed a change of address with the Clerk stating his address was now, Norther Neck Regional Jail, P.O. Box 1060, Warsaw, VA 22572. *Biro III,* ECF 21.
- On January 9, 2024, Petitioner filed a change of address with the Clerk stating his address was now, 335 Airpark Drive, Mooresville NC 28115. *Id.,* ECF 38.

Petitioner's address change notifications in his various civil actions indicate that he was not in custody from February 6, 2023 through at least September 13, 2023. Further, at no time during that period did Petitioner file a notification of change of address indicating that he was living at a

[10] The Fourth Circuit's September 13, 2023 decision remanding his habeas petitions to the district court, along with the mandate that issued on October 5, 2023, was sent to the Gloucester address: 3140 Island Road, Gloucester, VA 23061. *Riley Biro v. Director,* No. 23–6089 (4th Cir.), Dkt. 11. *See* https://pacer.login.uscourts.gov/csologin/login.jsf (Tab, Pacer Case Locator, search Biro, Riley) (last viewed September 12, 2024).

Williamsburg, VA address during August and September 2023.

It is, however, of no moment as to whether he actually attempted to file a state habeas petition in August/September 2023 to raise the alleged appellate waiver ineffective assistance of counsel claim because any such claim would have been defaulted. Petitioner filed a state habeas in the Virginia Supreme Court that was denied on March 15, 2023.[11] If he had filed a second state habeas petition in August/September 2023 in that court, the petition would have been deemed successive under Virginia Code § 8.01–654(B)(2) because he had knowledge of the default at the time he filed his first state habeas petition in that court. Moreover, the Court's Memorandum Opinion observed that the circuit court had addressed the merits of Petitioner's appellate waiver ineffective assistance claim in a post-conviction civil action, and denied relief on August 23, 2023.

> On May 3, 2023, about six weeks after his state habeas was dismissed, Biro filed a "Motion to Modify Judgment under Va. Code 8.01–677," in the circuit court. This motion was the first time he sought relief based on the appellate waiver, arguing that he had only agreed to waive his right to appeal "due to coercion and incessant pressure from co-counsel Alex Levay and under the pretense of a false promise that he could be exonerated through petition for a writ of habeas corpus." CCT at 22 (emphasis added); *see also id.* at 31 ("believing that habeas corpus was an alternative to appeal due to Levay's faulty advice, [Biro] agreed to the agreed disposition that would strip him of his ability to appeal"). The circuit court denied his motion on August 23, 2023, *id.* at 9, and Biro did not appeal. Biro defaulted this allegation of ineffective assistance of counsel, which rendered it defaulted and exhausted.

*Biro III,* ECF 47 at 4. Petitioner did not appeal the denial of relief, and thus defaulted the allegation of ineffective assistance. In short, whether defaulted by virtue of Code § 8.01– 654(B)(2), or by

[11] Petitioner mentioned the appellate waiver in the amended state habeas petition he filed in the Virginia Supreme Court, on January 31, 2023. ECF 25–5. Petitioner did not assert the voluntariness of his appellate waiver as one of the five allegations of trial error he raised in that amended petition, *Id.* at 29–30, and his amended state petition did not allege any claims of ineffective assistance of counsel. Petitioner mentioned the appellate waiver a second time in a pleading dated February 14, 2023. In that pleading, he admitted, based upon his discussions with counsel, that although counsel advised him that he could "still be exonerated by filing a petition for habeas corpus in the original jurisdiction of an appellate court," that Petitioner knew by agreeing to the appellate waiver that he would be defaulting "factual and procedural issues . . . by waiving his right to appeal." *Id.* at 61. On March 15, 2023, the Supreme Court of Virginia found Petitioner's state habeas claims were defaulted because he had not raised the claims on appeal. *Id.* at 149.

his failure to appeal the adverse August 23, 2023 order of the circuit court, the alleged allegation of ineffective assistance for which he seeks discovery is defaulted. "Because it is defaulted, it cannot serve as 'cause' to excuse his default." *Id.* (citing *Powell v. Kelly*, 531 F. Supp. 2d 695, 723 (E.D. Va. 2008), *aff'd*, 562 F.3d 656 (4th Cir. 2009) (where a petitioner for federal habeas relief seeks review of claims defaulted during state habeas proceedings, he must show that he raised the ineffectiveness argument as a cause for the defaulted substantive claims during his state habeas proceedings. If a petitioner did not raise the ineffectiveness claim at the state habeas level, a federal habeas court may not consider it.) (citing *Edwards v. Carpenter*, 529 U.S. 446, 452–53).

Petitioner also omits the fact that when he moved to consolidate his three federal habeas petitions, as well as leave to amend, he stated in his motion to amend that he "move[d] to withdraw and dismiss *all claims except those expressly preserved in '#2.'*" *Biro III*, ECF 36 at 1 (emphasis added). The "#2" to which he refers lists only three claims, none of which alleges ineffective assistance of counsel.[12] Petitioner argued in his motion to amend that he believed his "expressly preserved claims were [his] strongest and will compel the Court to issue the writ . . . and make it unnecessary to adjudicate the other claims." *Id.* at 2. The Court granted the motion to consolidate and the motion to amend on February 23, 2024. ECF 39. Consequently, there is no need to grant leave to conduct discovery.

Accordingly, it is hereby

**ORDERED** that Petitioner's Motion for Reconsideration, (ECF 51), and Motion for Discovery, (ECF 55), are each **DENIED**; and it is further

**ORDERED** that Petitioner's Motion to Seal Affidavit in Support of Request to Reconsider,

[12] The three claims were: 1 "Due process protects" Biro's rights as a pro se litigant in a "protective order respondent . . . to send court papers to" the opposing party; 2) The "1st Amendment limits the state's ability to criminalize the verbal abuse of a police officer"; and 3) Petitioner's "6th Amendment right to a speedy trial was violated." ECF 47 at 7.

(ECF 52) and Motion/Request for Emergency Review of Motion for Reconsideration, (ECF 54), are **DENIED** as **MOOT**.

This is a final Order for the purposes of appeal. To appeal this decision, plaintiff must file a written notice of appeal with the Clerk's office within thirty (30) days of the date of this Order. *See* Fed. R. App. P. 4(a). A written notice of appeal is a short statement indicating a desire to appeal and including the date of the Order the plaintiff wishes to appeal. Failure to file a timely notice of appeal waives the right to appeal this decision.

The Clerk is directed to send a copy of this Order to Petitioner and counsel of record for the Respondent.

/s/
Michael S. Nachmanoff
United States District Judge

November 13, 2024
Alexandria, Virginia

**Additional material from this filing is available in the Clerk's Office.**