Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-382

JANUARY TERM, 2003

In re Roy Johnson	}	APPEALED FROM:
	}	Chittenden Superior Court
	}	DOCKET NO. S0785-98 CnC
	}	Trial Judge: Mary Miles Teachout

In the above-entitled cause, the Clerk will enter:

Petitioner in this post-conviction relief proceeding appeals pro se from a summary judgment in favor of the State. He contends the court erred in: (1) denying the bulk of his claims for failure to raise them on direct appeal or in a prior petition for post-conviction relief; and (2) rejecting his claim of ineffective assistance of counsel during his first post-conviction relief proceeding. We affirm.

This is petitioner' s fourth appeal to this Court. We affirmed his 1990 conviction of first-degree murder in State v. Johnson, 158 Vt. 508 (1992), rejecting claims that the evidence failed to establish causation, that petitioner was improperly charged by information rather than indictment, and that the trial court committed instructional error, improperly allowed a sequestered juror to return from emergency leave, and improperly questioned an expert witness. In 1992, petitioner filed a petition for post-conviction relief, alleging that his trial counsel rendered ineffective assistance during the investigative, pre-trial and trial phases of his case, and that counsel had a conflict of interest resulting from his prior work in the state' s attorneys office. The trial court denied the petition, and this Court affirmed. In re Johnson, No. 96-287 (Vt. April 3, 1997) (three-justice mem.).

In 1998, petitioner filed a petition for writ of habeas corpus and a motion for appointment of counsel. Although the court granted the motion for appointment of counsel, no counsel was ever appointed prior to the trial court' s order dismissing the habeas corpus petition as successive. On appeal, we concluded that, having been granted counsel, petitioner was entitled to counsel before the trial court decided to dismiss the motion as successive. In re Johnson, No. 99-145 (Vt. Oct. 28, 1999) (three-justice mem.). Thereafter, appointed counsel filed an amended petition for post-conviction relief, setting forth five claims: (1) the prosecution' s primary witness was incompetent to testify at trial because he had a prior conviction for false swearing; (2) the State had improperly instructed certain witnesses not to speak with defense counsel and improperly influenced their testimony; (3) the State had improperly failed to disclose certain evidence to the defense; (4) trial counsel was ineffective in failing to move to suppress the testimony of the State' s primary witness and in failing to move for a mistrial based on prosecutorial misconduct; and (5) petitioner' s counsel for his first post-conviction relief proceeding rendered ineffective assistance in failing to raise the foregoing issues.

After a number of delays caused, in part, by petitioner' s efforts to change counsel, the court granted the State' s motion for summary judgment. The court declined to address the first four claims, ruling that petitioner had failed to present any argument or evidence to show why he had not raised them on appeal or in his first petition. As to the fifth claim, the court found that petitioner had not presented any facts showing that counsel was ineffective in failing to raise the additional claims, or that such failure affected the outcome at trial. Accordingly, the court dismissed the petition. This

appeal followed.

Although petitioner contests the trial court' s ruling, we conclude that its reasoning was sound. Factual or legal contentions that a petitioner has failed to raise, without adequate excuse, either at trial or in earlier post-conviction relief proceedings, are foreclosed. In re Mayer, 131 Vt. 248, 250-51 (1973); State v. Provencher, 128 Vt. 586, 591-92 (1970) (Holden, C.J., concurring). The trial court here correctly found that petitioner adduced no facts or evidence showing why the issues raised in this petition could not have been raised at trial or in the first petition. Nor has petitioner advanced any facts or argument showing that counsel was ineffective in failing to raise the issues in the first petition, or that but for the omission there is a reasonable probability the outcome at trial would have been different. In re Dunbar, 162 Vt. 209, 212 (1994); see also Strickland v. Washington, 466 U.S. 668, 694 (1984). Accordingly, we discern no basis to disturb the judgment.

Affirmed.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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John A. Dooley, Associate Justice

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Marilyn S. Skoglund, Associate Justice