

Serial: 204584

IN THE SUPREME COURT OF MISSISSIPPI

No. 2016-M-00218

**JAMES JOHN RODGERS A/K/A JAMES
J. RODGERS A/K/A JAMES RODGERS**

Petitioner

v.

STATE OF MISSISSIPPI

Respondent

EN BANC ORDER

This matter is before the Court, *en banc*, on the Application for Leave of Supreme Court to Proceed on Motion for Post-Conviction Collateral Relief in Trial Court filed by James John Rodgers. The Court of Appeals affirmed Rodgers's conviction and sentence on November 18, 2014. *Rodgers v. State*, 166 So. 2d 537 (Miss. Ct. App. 2014). This Court denied Rodgers's petition for writ of certiorari, and the mandate issued on July 16, 2015. *Rodgers v. State*, 2013-CT-01718-SCT (Miss. June 25, 2015).

Now, Rodgers raises three claims of ineffective assistance of counsel – failure to object to “at peril” language in the jury instructions, failure to raise the Castle Doctrine as a defense, and failure to rebut testimony of the State's forensic pathologist. The jury-instruction claim was raised on direct appeal and in the petition for writ of certiorari. Thus, the claim is barred under the doctrine of res judicata. The remaining claims fail to meet the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d

674 (1984), and are without merit. After due consideration, the Court finds the petition should be denied.

IT IS THEREFORE ORDERED that the Application for Leave of Supreme Court to Proceed on Motion for Post-Conviction Collateral Relief in Trial Court filed by James John Rodgers is denied.

SO ORDERED, this the 29th day of June, 2016.

/s/ Michael K. Randolph

MICHAEL K. RANDOLPH, PRESIDING JUSTICE
FOR THE COURT

**AGREE WITH ORDER: WALLER, C.J., RANDOLPH, P.J., LAMAR, COLEMAN,
MAXWELL, AND BEAM, JJ.**

**KITCHENS, J., OBJECTS WITH SEPARATE WRITTEN STATEMENT JOINED
BY DICKINSON, P.J., AND KING, J.**

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**KITCHENS, JUSTICE, OBJECTING TO THE ORDER WITH SEPARATE
WRITTEN STATEMENT:**

¶1. Rodgers was convicted of murder and sentenced to life imprisonment in 2013. In this, Rodgers’s first petition for post-conviction relief (PCR), he claims that his trial counsel rendered constitutionally ineffective assistance of counsel by failing to object to a self-defense jury instruction which informed the jury that “[w]here a person repels an assault with a deadly weapon, he acts at his own peril” Because Rodgers’s motion for leave to file a petition for post-conviction relief in the trial court should be granted, I write separately.

¶2. In 1985, this Court first condemned the use of “at peril” jury instructions, holding specifically that the use of such instructions “be discontinued”: “we now condemn [the instruction containing ‘at peril’ language] and forthrightly hold it constitutes reversible error in this case and will be so considered in future cases.” *Flowers v. State*, 473 So. 2d 164, 165 (Miss. 1985). In 2005, this Court likewise reversed a conviction and remanded the case because an instruction with “at peril” language had been given to the jury: the instruction “is contradictory and confusing and does not correctly state the applicable law because one

acting in self-defense does not act at his own peril.” *Johnson v. State*, 908 So. 2d 758, 764 (Miss. 2005).

¶3. More recently still, the Mississippi Court of Appeals reversed the denial of post-conviction relief and remanded the case, finding that trial counsel had rendered constitutionally ineffective assistance of counsel in failing to object to an “at peril” jury instruction. *Blunt v. State*, 55 So. 3d 207 (Miss. Ct. App. 2011). The court found that the deficient performance prong of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), had been satisfied because Blunt’s counsel, in 1996, had failed to object to an instruction that was condemned by the Flowers Court in 1985. *Blunt*, 55 So. 3d at 211. With regard to the prejudice prong of *Strickland*, the court held that failure to object to the jury instruction resulted in actual prejudice to Blunt, whose “due process rights include the right to a properly instructed jury.” *Blunt*, 55 So. 3d at 211 (citing *Shaffer v. State*, 740 So. 2d 273, 282 (Miss. 1998)).

¶4. Rodgers argued in his direct appeal that the “at peril” language in the jury instruction constituted reversible error. The Court of Appeals held that “[t]here is no per se rule requiring automatic reversal whenever jury instructions contain conflicting or potentially confusing explanations of the law.” *Rodgers v. State*, 166 So. 3d 537, 544 (Miss. 2014). On plain error review, the Court of Appeals affirmed,¹ holding that no miscarriage of justice had occurred because the jury had received six instructions informing them that “they must acquit if Rodgers had a reasonable fear of death or serious harm to himself or another” and that

¹ Chief Judge Lee dissented, joined by Judge Barnes.

“[n]o supreme court decision holds that use of the ‘he acts at his own peril’ language in a self-defense instruction is ‘per se’ reversible error.” *Rodgers*, 166 So. 3d at 546.

¶5. This Court denied Rodgers’s petition for a writ of *certiorari* on June 25, 2015, despite this Court’s having held, in *Flowers* and *Johnson*, that the giving of the condemned “at peril” instruction constituted reversible error.² Moreover, the Court of Appeals stated that “we will not reverse a trial court on a matter never presented to it . . . ,” after having declared it was reviewing the trial court’s decision for plain error. *Rodgers*, 166 So. 3d at 547.

¶6. The majority perpetuates its error in denying Rodgers’s petition for a writ of *certiorari* in its denial today of Rodgers’s request that he be allowed to file a petition for post-conviction relief. The failure of Rodgers’s trial counsel, in August of 2013, to object to a jury instruction condemned by this Court in 1985 constitutes deficient performance by the attorney. *See Blunt*, 55 So. 3d at 211. And it is difficult to say that the jury’s consideration of the erroneous instruction did not result in actual prejudice, given that Rodgers is constitutionally entitled to a properly instructed jury. *See Blunt*, 55 So. 3d at 211 (citing *Shaffer*, 740 So. 2d at 282).

¶7. In order to obtain leave of this Court to proceed in the circuit court with a petition for post-conviction relief, Mississippi Code Section 99-39-27(5) requires only that the petitioner “present a substantial showing of the denial of a state or federal right” Miss. Code Ann. § 99-39-27(5) (Rev. 2015). Because, in the absence of an objection from counsel, an erroneous jury instruction, condemned more than thirty years ago, was given, I find that

² I, along with Justices Chandler and King, would have granted Rodgers’s petition. My position on this issue has not changed.

Rodgers has made a substantial showing that his right to effective assistance of counsel was compromised. Rodgers should be given an opportunity to present his claims to the Circuit Court of the First Judicial District of Harrison County, and I would grant him leave to proceed.

DICKINSON, P.J., AND KING, J., JOIN THIS SEPARATE WRITTEN STATEMENT.