

**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT  
IN AND FOR FLAGLER COUNTY, FLORIDA**

STATE OF FLORIDA,  
Plaintiff,

Case No.: 18-00426-CFFA

v.

KEITH JOHANSEN,  
Defendant/Movant.

**DEFENDANT'S REPLY TO STATE'S RESPONSE AND OBJECTION TO  
GROUND ONE OF RULE 3.850 MOTION**

COMES NOW, the Defendant, KEITH JOHANSEN, by and through undersigned counsel, and files this Reply to the State's Response and Objection to Ground One of his Motion for Postconviction Relief pursuant to Florida Rule of Criminal Procedure 3.850, and in support states:

The State relies on Simmons v. State, 337 So. 3d 470 (Fla. 1st DCA 2022), to argue that counsel's failure to file a Stand Your Ground motion cannot constitute ineffective assistance because the jury rejected self-defense beyond a reasonable doubt. The State further points to Boston v. State, 296 So. 3d 580 (Fla. 1st DCA 2020), approved by the Florida Supreme Court, to suggest that any error at a Stand Your Ground hearing is necessarily cured by a subsequent jury verdict.

Respectfully, Simmons and Boston are distinguishable and do not foreclose relief under the circumstances of Mr. Johansen's case. To prevail under Rule 3.850, a movant must demonstrate that (1) counsel's performance fell below the prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's deficient performance, the result of the

proceeding would have been different. Strickland v. Washington, 466 U.S. 668 (1984); Maxwell v. Wainwright, 490 So. 2d 927 (Fla. 1986).

The failure to file a meritorious Stand Your Ground motion may constitute deficient performance where the evidence supports immunity. See Nelson v. State, 43 So. 3d 20 (Fla. 2010); Gallo v. State, 304 So. 3d 1241 (Fla. 3d DCA 2020).

The State's reliance on Simmons is misplaced for several reasons:

**1. Different Inquiry under Strickland:**

Simmons addressed the effect of an erroneous burden at a hearing already held. In contrast, Mr. Johansen's claim is that no hearing was held at all because trial counsel unreasonably failed to file a Stand Your Ground motion. The prejudice inquiry under *Strickland* is therefore whether there is a reasonable probability that the motion would have succeeded—not whether a jury's later verdict negates the issue.

**2. Distinct Standards of Proof:**

A Stand Your Ground motion is adjudicated under the preponderance standard (§ 776.032, Fla. Stat.), while the jury applies proof beyond a reasonable doubt. The Florida Supreme Court has recognized these as distinct burdens. The fact that a jury ultimately rejected self-defense does not eliminate the possibility that the trial judge—under a lesser standard—could have granted immunity.

**3. Substantial Rights and Pretrial Immunity:**

The immunity conferred by § 776.032, Fla. Stat., is not merely an evidentiary defense but a substantive right to be free from trial altogether. Denying a defendant that opportunity because counsel failed to file the motion is not cured by a subsequent conviction; the

defendant's right not to stand trial at all is itself the substantial right protected by the statute.

**4. Case Law Supporting Ineffective Assistance Claims:**

Florida courts have recognized that failure to file a viable Stand Your Ground motion may support a claim of ineffective assistance. See Gallo, 304 So. 3d at 1245; Dennis v. State, 51 So. 3d 456 (Fla. 2010). These cases show that the deficiency inquiry turns on the evidence available and whether immunity could reasonably have been obtained—not merely on the jury's verdict.

Here, the evidence established that Mr. Johansen's wife pointed a firearm at him in their bedroom immediately before the shooting. Trial counsel's failure to seek immunity under § 776.032 fell below the standard of competent counsel. Had counsel filed the motion, there is a reasonable probability that the trial court would have granted immunity under the lower preponderance burden. Stand Your Ground immunity provides protection from the requirement of standing trial. The absence of such counsel affected Mr. Johansen's access to this statutory right and had an impact on the defense.

**Conclusion**

For the foregoing reasons, Simmons and Boston do not bar Mr. Johansen's claim. Ground One of the Rule 3.850 motion sufficiently alleges both deficient performance and prejudice under Strickland. The Defendant respectfully requests that this Court deny the State's objection and grant an evidentiary hearing on this ground.

Respectfully submitted,  
Marc A. Joseph, P.A.

A handwritten signature in black ink that reads "Marc Joseph". The signature is fluid and cursive, with the first letters of each word being capitalized and prominent.

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