

IN THE SUPREME COURT OF FLORIDA  
CASE NO. SC20-48

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JOE ELTON NIXON,  
Appellant,

v.

STATE OF FLORIDA,  
Appellee.

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ON APPEAL FROM THE CIRCUIT COURT OF THE SECOND  
JUDICIAL CIRCUIT, LEON COUNTY, FLORIDA

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**REPLY BRIEF OF APPELLANT**

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## TABLE OF CONTENTS

	<b>Page</b>
CITATIONS TO THE RECORD .....	v
I. SUMMARY OF ARGUMENT .....	1
II. ARGUMENT .....	4
Overview .....	4
Point 1: The State is Bound by the Decision in <u>Nixon VI</u> .....	6
A. State Law Finality Principles Require Adherence to <u>Nixon VI</u> .....	6
B. Denying Mr. Nixon the Benefits of <u>Nixon VI</u> Would Violate the United States Constitution.....	8
Point 2: The State’s Current Attack on <u>Nixon VI</u> Merely Re-hashes Assertions That Have Rightly Been Repeatedly Rejected by This Court.....	11
Point 3: This Court Should Order the Imposition of a Life Sentence.....	15
III. CONCLUSION.....	17
CERTIFICATE OF FONT COMPLIANCE .....	19
CERTIFICATE OF SERVICE .....	20

## TABLE OF AUTHORITIES

	Page(s)
<u>Cases</u>	
<u>Atkins v. Virginia</u> 536 U.S. 304 (2002) .....	3, 11, 17
<u>Bailey v. Alabama</u> 219 U.S. 219 (1910) .....	12
<u>Barr v. City of Columbia</u> 378 U.S. 146 (1964) .....	10
<u>Bell v. Burson</u> 402 U.S. 535 (1971) .....	9
<u>Brumfield v. Cain</u> 576 U.S. 305 (2015) .....	3, 13
<u>Chapman v. California</u> 386 U.S. 18 (1967) .....	11
<u>Evitts v. Lucey</u> 469 U.S. 387 (1985) .....	9
<u>Ford v. Georgia</u> 498 U.S. 411 (1991) .....	10
<u>Ford v. Wainwright</u> 477 U.S. 399 (1986) .....	12
<u>Franqui v. State</u> 211 So. 3d 1026 (Fla. 2017) .....	8
<u>Franqui v. State</u> 301 So. 3d 152 (Fla. 2020) .....	8
<u>Goldberg v. Kelly</u> 397 U.S. 254 (1970) .....	9
<u>Graham v. Richardson</u> 403 U.S. 365 (1971) .....	9

<u>Hall v. Florida</u> 572 U.S. 701 (2014) .....	<i>passim</i>
<u>Hall v. State</u> 201 So. 3d 628 (Fla. 2016) .....	13
<u>Herring v. State</u> No. SC15-1562, 2017 WL 1192999 (Fla. Mar. 31, 2017) .....	16
<u>Hitchcock v. Dugger</u> 481 U.S. 393 (1987) .....	14
<u>James v. Kentucky</u> 466 U.S. 341 (1984) .....	10
<u>Jordan v. State</u> 285 So. 3d 267 (Fla. 2019) .....	6
<u>Logan v. Zimmerman Brush Co.</u> 455 U.S. 422 (1982) .....	9
<u>Moore v. Texas</u> (“ <u>Moore I</u> ”) 137 S. Ct. 1039 (2017) .....	3
<u>Moore v. Texas</u> (“ <u>Moore II</u> ”) 139 S. Ct. 666 (2019) .....	3
<u>Morrison v. California</u> 291 U.S. 82 (1934) .....	12
<u>Morrissey v. Brewer</u> 408 U.S. 471 (1972) .....	9
<u>NAACP v. Alabama ex rel. Flowers</u> 377 U.S. 288 (1964) .....	10
<u>Nixon v. Florida</u> No. SC15-2309, 2017 WL 462148 (Fla. Feb. 3, 2017) .....	<i>passim</i>

<u>Oats v. State</u>	
181 So. 3d 457 (Fla. 2015) .....	1, 4
<u>Panetti v. Quarterman</u> (2007)	
551 U.S. 930 .....	11
<u>Penry v. Lynaugh</u>	
492 U.S. 302 (1989) .....	14
<u>Phillips v. State</u>	
299 So. 3d 1013 (Fla. 2020) .....	7, 8
<u>Sherbert v. Verner</u>	
374 U.S. 398 (1963) .....	9
<u>Speiser v. Randall</u>	
357 U.S. 513 (1958) .....	12
<u>State v. Okafor</u>	
No. SC20-323, 2020 WL 6948840 (Fla. Nov. 25, 2020) .....	7
<u>Taylor v. Georgia</u>	
315 U.S. 25 (1941) .....	12
<u>Thompson v. State</u>	
208 So. 3d 49 (Fla. 2016) .....	14
<u>Walls v. State</u>	
213 So. 3d 340 (2016) .....	7
<u>Williams v. Georgia</u>	
349 U.S. 375 (1955) .....	10
<u>Witt v. State</u>	
387 So. 2d 922 (1980) .....	7
<u>Constitutions</u>	
U.S. Const. amend. VIII .....	11

## **CITATIONS TO THE RECORD**

The citations to the record in this brief are in the same form as in the Initial Brief of Appellant filed on December 14, 2020 (“IB”).

“AB” refers to the Answer Brief of Appellee filed on January 4, 2021.

**I.**  
**SUMMARY OF ARGUMENT**

The State has been unable to find a plausible defense of the decision below.

Almost four years ago, in Nixon v. Florida, No. SC15-2309, 2017 WL 462148 (Fla. Feb. 3, 2017) (“Nixon VI”), this Court determined that the Circuit Court was required to give Mr. Nixon’s claim of intellectual disability the conjunctive and interrelated assessment mandated by Hall v. Florida, 572 U.S. 701 (2014) and Oats v. State, 181 So. 3d 457, 459 (Fla. 2015). (IB 8). On remand, the Circuit Court explicitly rejected this Court’s legal ruling. It wrote that the above-75 IQ scores in the record (of which this Court had been fully aware) meant that this was not a case “in which Hall would require resort to the interrelated and conjunctive assessment.” (IB 14-15).

The State might have decided to argue here that the error below was harmless because Mr. Nixon in fact is not intellectually disabled. But the State has rejected that course because a massive and uncontradicted record from a variety of independent sources, illuminating Mr. Nixon’s condition from before his birth through the

months after this Court's remand order, demonstrates the contrary. (IB 18-45).

Instead, the State has decided to argue that this Court was wrong in Nixon VI (AB 62, 68-72). But that route, as we show below, is blocked by two independent and insurmountable barriers.

1. First and most critically, the argument is not available now. The State does not even attempt to explain why it is. There is good reason for this dispositive silence. As a matter of basic and long-established Florida law, Nixon VI became final long ago and its rule governs this case. (Point 1.A) Any attempt by this Court to now alter the applicable Florida law to Mr. Nixon's detriment would violate the federal constitution. (Point 1.B)

2. Second, the argument in any event rests on a series of erroneous and illogical legal propositions, ones which the State has offered repeatedly and unsuccessfully in the past. They have no more merit now than they ever did. But the State repeats them nevertheless, failing even to acknowledge, much less respond to, Mr. Nixon's refutations. (Point 2)

This silence, like the first one, speaks loudly. In truth, the State's disagreement is not with any decision of this Court. Rather,

the State disagrees with the decisions of the Supreme Court of the United States in Atkins v. Virginia, 536 U.S. 304 (2002); Hall v. Florida, 572 U.S. 701 (2014); Brumfield v. Cain, 576 U.S. 305 (2015); Moore v. Texas (“Moore I”), 137 S. Ct. 1039 (2017); and Moore v. Texas (“Moore II”), 139 S. Ct. 666 (2019) because it rejects the root principle underlying all of those cases.

Properly recognizing that only that the U.S. Supreme Court can alter either those decisions or that principle, this Court has insisted that they be followed in Mr. Nixon’s case. It should adhere to that position now.

The Court below violated the mandate of Nixon VI. The State has failed to justify that violation. Exercising its authority as it has previously done in similar situations, and as Mr. Nixon requested when he was last here (IB 50), the Court should reverse the decision below and order the imposition of a life sentence. (Point 3).

## **II.** **ARGUMENT**<sup>1</sup>

### **Overview**

The background to this appeal is plain on the face of the record and uncontested.

There is no dispute that the Circuit Court did not adhere to the direction that this Court gave in Nixon VI. There, this Court, applying Hall and Oats, reversed the summary dismissal of Mr. Nixon's intellectual disability claim. After listing the various IQ scores in the record, this Court ruled:

The trial court incorrectly found the significantly subaverage intellectual functioning prong dispositive of Nixon's intellectual disability claim based on Nixon's current score of 80. Although the court did not have the benefit of the Oats decision, it should have conducted the more holistic, interrelated assessment for which Nixon's counsel argued at the Huff hearing. Furthermore, because of its ruling as to the subaverage intellectual functioning prong, the court here did not look to all of the record evidence of Nixon's intellectual disability, even

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<sup>1</sup> Mr. Nixon provides in this section a focused response to the most basic weaknesses in the AB. He does not waive any position he has previously asserted nor concede the validity of any argument of the State he does not specifically address.

disregarding other non-IQ evidence that could have been relevant.

2017 WL 462148, at \*1-2. (IB 8)

On remand, the Circuit Court refused to follow this ruling. (IB 45-47) Explicitly denying any obligation to consider non-IQ evidence as relevant to the issue of whether Mr. Nixon suffered from the condition of intellectual disability, that court once again insisted that Hall requires consideration of such evidence in reaching the overall intellectual disability determination only when no IQ scores exceed 75. See Order on Hall and Hurst Motions at 25-27 (Fla. 2d Jud. Cir. Nov. 21, 2019), ROA 9675-77. Therefore – ruling on the identical record respecting IQ scores that had just been before this Court, with the sole addition of a score of 67 obtained after remand on a test that all experts agree is state-of-the art (IB 44-45) – the court below denied the intellectual disability claim.

The State does not suggest here that the Circuit Court adhered to Nixon VI. Instead, the State seeks to justify the outcome below on the basis that Nixon VI was wrong.

But, as we now show:

1. The State is precluded from making this argument by (A) state law and (B) the United States Constitution.

2. The argument is in any event devoid of factual or legal merit. It consists largely of the repetition of assertions that, for good reason, failed to persuade this Court when made originally.

3. If the Circuit Court had followed the mandate of Nixon VI it would have vacated Mr. Nixon's death sentence and replaced it with a sentence of life imprisonment. This Court should grant that relief now.

**Point 1: The State is Bound by the Decision in Nixon VI**

*A. State Law Finality Principles Require Adherence to Nixon VI*

After Nixon VI was issued the State did not seek review by rehearing here or certiorari in the United States Supreme Court. The decision thereupon became binding on the State under finality doctrines well established in Florida law (IB 52-55).

The State does not even discuss this issue, which is sufficient reason for the Court to reject its attempt at re-opening Nixon VI. See Jordan v. State, 285 So. 3d 267, 277-78 (Fla. 2019) (refusing to revisit question of law decided on prior appeal because appellant failed to argue why this Court should do so).

The State instead writes three sentences, whose propositions are both irrelevant and meritless. Those sentences say that “[t]his Court erred” in 2017 in Nixon VI by permitting the Circuit Court to entertain post-conviction proceedings based on Hall, and therefore the Circuit Court on remand later that year should not have done so. (AB 62-63) Both claims are based on the decision of this Court three years later in Phillips v. State, 299 So. 3d 1013 (Fla. 2020) (announcing that Walls v. State, 213 So. 3d 340 (2016) erred in holding Hall v. Florida, 572 U.S. 701 (2014) retroactive under Witt v. State, 387 So. 2d 922 (1980)), a decision whose import is that Circuit Courts may no longer entertain post-conviction claims based upon Hall.<sup>2</sup>

The State’s argument is not only illogical but ignores the fundamental difference between the creation of a new decisional rule going forward and the application of one to assert error in a prior final decision of this Court. See State v. Okafor, No. SC20-323, 2020

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<sup>2</sup> The State’s brief (AB 62-63) confusingly suggests that it is discussing the retroactivity of Hall. At very best it is discussing the retroactivity of Phillips. But as Mr. Nixon pointed out initially, there is nothing in the latter case – which arose in a wholly different procedural posture than this one – that supports the State’s position (IB 52).

WL 6948840, at \*2-4 (Fla. Nov. 25, 2020). As Okafor exemplifies, once the time for rehearing has expired without the losing party challenging this Court's ruling, the issues adjudicated are foreclosed against re-litigation. Were it otherwise, the task assigned to appellate judges would closely resemble the one assigned to Sisyphus.

Florida finality law requires this appeal to be governed by Nixon VI. As already suggested, that is a serious problem for the State's position on the merits because the Circuit Court concededly did not comply with Nixon VI.

*B. Denying Mr. Nixon the Benefits of Nixon VI Would Violate the United States Constitution*

The State's failure even to articulate a basis on which this Court might decline to apply Nixon VI is more than just an insurmountable obstacle under state law to this Court's doing so.

That failure strengthens Mr. Nixon's initial argument (IB 55-56) that any attempt to reject his intellectual disability claim on the basis of Phillips would be an arbitrary deprivation of a state-created interest and violate Mr. Nixon's federal due process rights. In Franqui v. State, 301 So. 3d 152 (Fla. 2020), Mr. Franqui received a Hall-based holistic review of his intellectual disability claim on the

basis of the decision in Franqui v. State, 211 So. 3d 1026 (Fla. 2017). If the Court in this case were to deny Mr. Nixon the same benefit notwithstanding Nixon VI, it would be denying him an entitlement the Constitution protects.

The State silently concedes the correctness of our argument (IB 55) that the firmly-embedded Florida law described in the previous section is a state-created interest upon which individuals are entitled to rely and which is protected by the federal constitution against arbitrary deprivation under such cases as Sherbert v. Verner, 374 U.S. 398 (1963); Goldberg v. Kelly, 397 U.S. 254 (1970); Morrissey v. Brewer, 408 U.S. 471 (1972); Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982); Evitts v. Lucey, 469 U.S. 387 (1985); Bell v. Burson, 402 U.S. 535, 539 (1971); and Graham v. Richardson, 403 U.S. 365, 374 (1971).

The State's failure to advance some even arguably applicable exception to the doctrine well-established by state law seems to suggest a hope that this Court will create an ad hoc one. Mr. Nixon reiterates that the Court should resist any temptation to follow that course (IB 55), as a matter of both constitutional law and judicial good sense.

As a constitutional law matter, any one-off failure by this Court to enforce its own decision in Mr. Nixon's favor will certainly lead this litigation down the path laid out in the caselaw stemming from Williams v. Georgia, 349 U.S. 375, 383 (1955), which holds that "where a State allows questions of this sort to be raised at a late stage and be determined by its courts as a matter of discretion, we are not concluded from assuming jurisdiction and deciding whether the state court action in the particular circumstances is, in effect, an avoidance of the federal right." Cases like James v. Kentucky, 466 U.S. 341, 348-349 (1984), hold that only a "firmly established and regularly followed state practice ... can prevent implementation of federal constitutional rights." See, e.g., Ford v. Georgia, 498 U.S. 411 (1991); Barr v. City of Columbia, 378 U.S. 146, 149 (1964); NAACP v. Alabama ex rel. Flowers, 377 U.S. 288, 297 (1964).

At this point, judicial good sense should enter the picture. Nothing in this scenario has the remotest connection either to justice or to a reasonably effective judicial system for its delivery. The State had a fair opportunity to litigate. Having lost, it should be at least as bound by the result as a Death Row inmate would be in the same circumstances.

**Point 2: The State's Current Attack on Nixon VI Merely Re-hashes Assertions That Have Rightly Been Repeatedly Rejected by This Court**

As noted, the State does not even bother to explain why it should be permitted a renewed assault on Nixon VI. It just launches that assault. But a renewed assault is not the same as a new assault. The propositions the State advances are old. They also lack merit. As we have repeatedly pointed out, they are simply attacks on Hall and Atkins.

In Atkins, the Supreme Court held that the Eighth Amendment prevented the states from executing intellectually disabled persons. In Hall, the Supreme Court reviewed the Florida statute governing determinations of whether a particular individual was intellectually disabled. The Court did so because a state's procedures for determining whether facts do or do not bring a case within a substantive federal constitutional prohibition are subject to federal review. See Chapman v. California, 386 U.S. 18, 21 (1967). The purpose of such a review is to assure that the federal immunity is not being nullified. See, e.g., Panetti v. Quarterman, 551 U.S. 930, 954-60 (2007) (finding test applied by the Fifth Circuit to assess a Texas prisoner's competency to be executed inadequate where it treated a

prisoner's delusional belief system as irrelevant and disregarded clinical evidence of the prisoner's psychological dysfunction); Ford v. Wainwright, 477 U.S. 399, 414 (1986) (finding Florida procedure for determining insanity of capital defendant inadequate and stating "consistent with the heightened concern for fairness and accuracy that has characterized our review of the process requisite to the taking of a human life, we believe that any procedure that precludes the prisoner or his counsel from presenting material relevant to his sanity or bars consideration of that material by the factfinder is necessarily inadequate"); Speiser v. Randall, 357 U.S. 513, 526 (1958); Taylor v. Georgia, 315 U.S. 25, 29 (1941); Morrison v. California, 291 U.S. 82, 90-93 (1934); Bailey v. Alabama, 219 U.S. 219, 239 (1910).

In Hall, the underlying substantive issue before the Florida courts for decision was whether the prisoner was intellectually disabled. In making that decision, the Supreme Court held, "when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits. It is not sound to view a single factor as

dispositive of a conjunctive and interrelated assessment.” Hall, 572 U.S. at 723.

Although Mr. Hall’s various IQ test scores in the record included one of 80, see 572 U.S. at 707, his intellectual disability claim had not been analyzed in the necessary integrated way. On remand, this Court ordered the imposition of a life sentence after conducting its own review of the record and concluding that, holistically viewed, it supported a finding of intellectual disability. See Hall v. State, 201 So. 3d 628 (Fla. 2016).

Yet in Mr. Nixon’s case, the State has repeatedly asserted, as it does once more on this appeal, that (a) Hall does not apply because one of Mr. Nixon’s IQ scores was an 80, and (b) in any event, Hall was not violated because Mr. Nixon was not precluded from presenting any desired evidence of his intellectual disability, notwithstanding that the factfinder was legally forbidden from considering it. (AB 63-64).

Adopting the first proposition, would, as we told this Court in briefing Nixon VI, require overruling Hall itself, not to mention such subsequent cases as Brumfield v. Cain, 576 U.S. 305, 314-15 (2015). (IB 45-46). Not surprisingly, this Court in Nixon VI rejected the

State's position. The State's brief provides no argument in support of a different outcome this time.

To read Hall as being consistent with the second proposition would, as we told this Court during the same round of briefing (ROA 4062, 4065-68), be at odds not just with such cases as Penry v. Lynaugh, 492 U.S. 302, 324 (1989) and Hitchcock v. Dugger, 481 U.S. 393, 396-99 (1987) (Scalia, J.) (unanimous) (reversing Florida death sentence where, although non-statutory mitigation evidence was presented, law prevented judge and jury from considering it), but also with common sense. This Court in Nixon VI silently rejected the State's proffered reading of Hall. It deemed the issue unworthy of discussion because it had, as the State concedes (AB 35-36), explicitly rejected the State's position just a few months earlier in Thompson v. State, 208 So. 3d 49, 59 (Fla. 2016).

So, for good measure, the State now calls on the Court to overrule Thompson as well (AB 68-69). But it fails to put forward any reason why its position is any more consistent with law or common sense than it has ever been.

**Point 3: This Court Should Order the Imposition of a Life Sentence**

On the most recent appeal of this case, Mr. Nixon urged that it was clear as a matter of law that if the record were viewed through the applicable Hall-Oats lens, he could not constitutionally be executed. He accordingly requested the Court to exercise its authority to order the imposition of a life sentence, just as it had recently done in Hall v. State. See Supplemental Brief of Appellant, No. SC15-2309 (Sept. 27, 2016), ROA 4121-56. (IB 50).

This Court declined the request in an order dated January 27, 2017 (IB 7), and instead in Nixon VI gave the Circuit Court the opportunity to assess the record under the Hall-Oats standard. Notwithstanding Mr. Nixon's repeated requests to that court both before and after the evidentiary hearing (IB 10-11), it refused to do so.

There would be no point to yet another remand.

The record in support of Mr. Nixon's position before this Court now is even stronger than it was on the last appeal, having been enhanced by additional confirmatory test results, school reports, eyewitness affidavits, and expert reports. (IB 12). Most notably, the

record now contains an IQ test score of 67 that was obtained in the spring of 2017 using the WAIS-IV testing instrument, which is concededly the current “gold standard” in the field (IB 44-45).

The State presented no new data below. It continued to rest on the only bit of factual evidence it has ever put forward since this Court’s 2006 decision in Nixon IV, the IQ score of 80 that it obtained in that year using the then-current but now-superseded test instrument. (See Joe Elton Nixon’s Post-Hearing Memorandum in Support of His Claim of Intellectual Disability (Fla. 2d Jud. Cir. Feb. 18, 2019) (“Nix. 2019 Post-Hrg. Mem.”), ROA 9555-9557, 9559-9562; Tr. of Evid. Hrg. Vol. 3 (Fla. 2d Jud. Cir. July 31, 2018), ROA 9427.)

Thus, it is not surprising that the State does not argue here that Mr. Nixon’s intellectual disability claim would have been denied even if he had received the requisite Hall-based review, but rather confines itself to attempting to move the goalposts by attacking Nixon VI.

If the court below had done what it should have done, it would have concluded on the basis of the overwhelming record canvassed in our initial brief (IB 18-45) that Mr. Nixon is intellectually disabled. This Court should now do what that one did not. As in Herring v.

State, No. SC15-1562, 2017 WL 1192999 (Fla. Mar. 31, 2017), it should order the imposition of a life sentence.

The Court will thereby serve the interests of all concerned. Mr. Nixon will obtain the relief to which the facts and the law entitle him. The Florida judicial system will expend its resources wisely. And the State will remain free, if so advised, to ask the Supreme Court of the United States to overrule its decisions in Hall and Atkins.

**III.**  
**CONCLUSION**

This Court should reverse the decision below, vacate Mr. Nixon's sentence of death, and order that his sentence be reduced to life imprisonment.

Respectfully submitted,

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**CERTIFICATE OF FONT COMPLIANCE**

**I HEREBY CERTIFY** that the size and font used in this brief is 14-point Bookman Old Style, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true copy of the foregoing Reply Brief of Appellant has been electronically filed with the Court on this 25th day of January, 2021 using the Florida E-Filing Portal and electronically served to the parties listed below and by U.S. mail to Joe Elton Nixon.

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