IN THE SUPREME COURT OF THE UNITED STATES

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BOBBY JAMES MOORE, :

Petitioner : No. 15-797

v. :

TEXAS, :

Respondent. :

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Washington, D.C.

Tuesday, November 29, 2016

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:09 a.m.

APPEARANCES:

CLIFFORD M. SLOAN, ESQ., Washington, D.C.; on behalf of the Petitioner.

SCOTT A. KELLER, ESQ., Solicitor General, Austin, Tex.; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:09 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case No. 15-797, Moore v. Texas.

Mr. Sloan.

ORAL ARGUMENT OF CLIFFORD M. SLOAN

ON BEHALF OF THE PETITIONER

MR. SLOAN: Mr. Chief Justice, and may it please the Court:

In Atkins v. Virginia, this Court held that the Eighth Amendment prohibits executing people who are intellectually disabled. And in Hall v. Florida, this Court reiterated that the inquiry into whether somebody is intellectually disabled for that important Eighth Amendment purpose should be informed by the medical community's diagnostic framework and by clinical standards.

Texas has adopted a unique approach to intellectual disability in capital cases in which it prohibits the use of current medical standards. It relies on harmful and inappropriate lay stereotypes, including the so-called Briseno factors. It uses an extraordinary, virtually insuperable, and clinically unwarranted causation requirement. And most fundamentally, it challenges and disagrees with this

Court's core holding in Atkins; namely, that the entire category of the intellectually disabled, every person who is intellectually disabled, is exempt from execution under the Eighth Amendment.

CHIEF JUSTICE ROBERTS: Those are --

JUSTICE KENNEDY: I -- I -- excuse me, Chief Justice.

CHIEF JUSTICE ROBERTS: That's a long laundry list of objections you have. Your question presented, though, focused only on one, which is that it prohibits the use of current medical standards and requires outdated medical standards. And I think several of the other points you made are not encompassed within that question presented. And maybe there are questions that should be looked at, but they don't seem to be covered by that.

I mean, in what -- you mentioned the correspondence with clinical practices. Has that changed? Did Texas similarly depart from clinical practices under the old standard as it is under the new?

MR. SLOAN: It -- it did. The prohibition on the use of current medical standards aggravates and exacerbates that.

But if I could address Your Honor's question about the -- the question presented, because I'd like to

make two points with regard to that, Your Honor, which is that, first of all, it is woven into the Texas Court of Criminal Appeals' decision and the judgment that is before the Court, because the Texas court grounded its determination on the prohibition of consulting and using current medical standards on its Briseno opinion and Briseno framework. And the Court said, what we decided in Briseno in 2004, that framework governs, including the clinical standards at the time, but also its view that medical standards generally are exceedingly subjective.

That was very important to the Court in its determination here. It's at 6a of the Petition Appendix --

JUSTICE KAGAN: Well, Mr. Sloan, can I --

JUSTICE KENNEDY: I have the same question as -- as the Chief Justice. It -- it just seems to me the question presented doesn't cut to the heart of the case as you describe it.

My understanding of your argument -- and again, I don't think it's wholly reflected in that question -- is that whether you use the most current or even slightly -- slightly older medical standards, there is still a conflict.

Am I right about that, that that's your

theory?

MR. SLOAN: Yes, Your Honor. And if I could add one point, though, it is that the current clinical standards accentuate the conflict, make it even more clear. And what has happened with the --

JUSTICE KAGAN: We wouldn't need that, would we, Mr. Sloan? We could say that the Briseno standards are in conflict with the old Atkins standards, as well as the new ones. There wouldn't need to be a difference between the old ones and the new ones for you to win this case.

MR. SLOAN: That's correct, Your Honor.

CHIEF JUSTICE ROBERTS: But you got in the door by a question presented that is a little more eye-catching, which is that they prohibit the current standards and rely on the outdated one. And that's all it says. And I'm just wondering if you got yourself in the door with a -- with a dramatic question presented and are now going back to a concern that was just as present, as I understand your argument, under the old standards. .

MR. SLOAN: Two points on that, Your Honor. First, again as I was saying, it is woven into the court of criminal appeals' decision. One cannot look at their judgment on the prohibition of the use of current

medical standards without looking at the framework in which they grounded it.

But, secondly, Your Honor --

JUSTICE KAGAN: Could I just make -- I'm sorry to interrupt, Mr. Sloan, but could I just make sure I understand that? Because what you're essentially saying is that the court of appeals said, you are barred from using new standards; you must use the Briseno standards. So the two are flip sides of the same coin, and what the holding was, is you must use Briseno standards.

Now, your QP reflected their framing of the issue -- you can't use new standards; you must use the Briseno standards -- but you were just reflecting their essential holding, which is, we have this Briseno case and you have to use it.

MR. SLOAN: That's -- that's exactly right, Your Honor.

CHIEF JUSTICE ROBERTS: Well, then why didn't you say that? I mean, really, the question presented talks about a comparison between current and outdated, and it seems -- it's pretty dramatic to say you can't use current standards; you're only using outdated. It's quite a different question, is -- you know, they used the Briseno standards and they

shouldn't.

You don't think they should have used the Briseno standards under the old medical standards, do you?

MR. SLOAN: No, that's correct.

CHIEF JUSTICE ROBERTS: Okay.

MR. SLOAN: But I think, Your Honor, first of all, the question presented, we absolutely stand by it, because they have prohibited the use of current medical standards and, instead, they have required the use of the 1992 standard --

JUSTICE ALITO: Well, let me ask you -- let me ask you the same question in -- in different terms, and you can tell me that -- whether this is not a fair paraphrase of your question. And I -- if you can give me a yes-or-no answer to this question, I'd appreciate it.

Under Hall and Atkins, must a State use current medical standards, for example, DSM-5, as opposed to older standards, for example, DSM-IV? Yes or no.

MR. SLOAN: No, with that wording, Your Honor.

JUSTICE ALITO: Then I don't know --

MR. SLOAN: It's because --

JUSTICE ALITO: -- how you can recover on the question -- you can prevail on the question that you presented to us.

MR. SLOAN: Because, Your Honor, the question presented talks about prohibiting. If Your Honor had said can a State prohibit --

JUSTICE ALITO: Well, I don't understand what you mean by "prohibit." You mean prohibit the -- the lower courts from using a standard different from the one that the court of criminal appeals has said is the standard that has to be used everywhere in Texas? So each -- each trial level judge would apply a different standard, whatever that judge thinks is the right one?

MR. SLOAN: And that the Court said prospectively the law of Texas is you -- is that you're prohibited from using the current medical standards.

JUSTICE ALITO: And you think that this is a question of trial court discretion? A trial court has the discretion to use the newer standards as opposed to the -- as opposed to the standards that the court of criminal appeals says are the appropriate ones?

MR. SLOAN: No, I don't think it's discretion. I think the Court has prohibited. The Court said that the State habeas trial court erred by

employing the current standards. That's the language the Court used.

JUSTICE ALITO: As opposed to the ones that the court of criminal appeals had itself adopted.

MR. SLOAN: From -- from 1992, and so it -- it's helpful to consider if the court of criminal appeals' decision stands, how --

JUSTICE SOTOMAYOR: Mr. Sloan, cut to the chase of the underlying question. Was the criminal court of appeals using any clinical standard, any medical clinical standard?

MR. SLOAN: No, Your Honor.

JUSTICE SOTOMAYOR: It was making up --

MR. SLOAN: They -- they --

JUSTICE ALITO: Mr. Sloan, I don't think you finished answering my question. There are two -- let me rephrase it this way: There are different things in the Briseno or Briseno opinion.

One is the -- the medical standards that are taken from the medical publications that were current as of the time of that decision. And then there are these additional considerations, and that's what's regarded as the Briseno factors.

But if you -- let's take a -- disregard the latter. The first part are current -- are medical

standards that were current at that time, are they not?

MR. SLOAN: Well, I respectfully disagree, Your Honor, in this respect, because what the Court said in Briseno was, after talking about following the 1992 standard, it said we view the medical standards as exceedingly subjective. That's the wording that the Court used in Briseno, and that's why we are going to come up with these Briseno factors on our own that are nonclinical.

In fact, they are anti-clinical because they're -- they're based on these lay stereotypes. And that's exactly what the Court said here as its justification for its prohibition on the use of current medical standards.

Its justification, as it says, is 6a to 7a of the petition appendix is the Court's long-standing view about the subjectivity surrounding the medical diagnosis of the intellectual disability which stands in sharp contrast to what this Court has said in Atkins and in Hall, where, in Atkins, the clinical definitions were fundamentally -- as this Court said in Hall, the clinical definitions were a fundamental premise of Hall. And as Hall said, the inquiry has to be informed by the medical community's diagnostic framework, and there is no way that it can be informed by the medical

community's diagnostic framework if the -- if there is an exclusion and a prohibition on using current medical standards.

And, Justice Alito --

JUSTICE GINSBURG: There is no doubt about what the Texas court said. It's marching orders for Texas courts. It said the habeas judge erred by employing current clinical definition of intellectually disabled, there in that respect, rather than the test we established in Briseno. The test we established in Briseno is -- is stated sharply and clearly as the test that must be applied by Texas courts.

Is that how you read it?

MR. SLOAN: Yes, exactly, Your Honor. And --

JUSTICE GINSBURG: It's on page 6a in these?

MR. SLOAN: That's right. And I think it is helpful here to consider how Atkins adjudications -- and obviously, this is a vitally important, life-or-death issue that goes to human -- the human dignity of the intellectually disabled and how these adjudications will proceed in Texas after the opinion in light of the passage that Justice Ginsburg just quoted the critical passage, is that, to judges, to lawyers, and to clinical experts testifying in Texas, the message is clear and

unmistakable: You may not consult or rely on current clinical guidance.

And so think about that from a clinician's perspective. A clinical expert who has been entrusted with evaluating and making this vitally important evaluation of somebody, about whether they are intellectually disabled, that person has gotten the clear and unmistakable instruction, and will by the lawyers, you have to go back to the 1992 standard; you can't consider the standards since then.

JUSTICE KAGAN: Mr. Sloan, I think it's more than that. Because it's not just you can't consult the current guidance and you have to go back to the '92 standard. It says, you have to go back to Briseno, and Briseno has these seven factors that are not consistent with the old standards, just as they are not consistent with the new standards.

MR. SLOAN: That -- that's exactly right, Your Honor, and it's also part of a broader problem in the framework interwoven with Briseno itself. Where Briseno is setting up a framework where it's saying that only those who are the most severely intellectually disabled are exempt from the death penalty, and that it's an open question, it says in Briseno, whether those who are more mildly intellectually disabled, or mentally

retarded as they said at the time, are similarly exempt. And this Court in Atkins had just held that there is a bright line exemption for the intellectually disabled.

JUSTICE KENNEDY: I tried to ask myself if the Court could say, use the Briseno factors first, and after that, if you find no intellectual disability, then turn to the clinical standards. But as Justice Kagan points out, I think there is a conflict.

MR. SLOAN: There absolutely is, and it's all rooted by the conflict of clinical standards generally and the prohibition on the use of current medical standards and the hostility to current medical standards --

JUSTICE KENNEDY: But it is true that Atkins left some discretion to the States. What is the rule that you propose for how closely standards must hew to medical practice?

MR. SLOAN: I think it's the rule that the Court notes and -- and explained in Hall, which is that the State must be informed by the medical community's diagnostic framework, and so what I understand that to mean is that -- and -- and, of course, as the Court said in Atkins and in Hall and Brumfield, the clinical definitions are very, very important that you have to inform it. And if a State wants to conflict with or

disagree with the clinical standard, then there has to be a sound reason for doing so. And I think in Hall, this Court identified several considerations. There are four considerations in particular that would go into evaluating whether there is a sound reason for doing so.

And the first is, is there genuinely a clinical consensus on that point? The second is, what do other States do on that point? The third is, what does the State do in other intellectual disability context? And very tellingly here, Texas uses these Briseno factors and this prohibition on current medical standards only in the death penalty context, in no other intellectual disability context.

And as the Court explained in Hall, the condition, as the Court said in Hall, of intellectual disability has applicability far beyond the death penalty. And so when a State does, as Texas is doing here, treats it very differently with much more severe restrictions on finding intellectual disability only in the death penalty, it is at the very least a very major red flag. But --

JUSTICE SOTOMAYOR: Mr. Sloan, can we go --

CHIEF JUSTICE ROBERTS: Justice Sotomayor?

JUSTICE SOTOMAYOR: Can we go to the practical application of what you're saying for a

moment?

Let's take the decision of the CCA here. All right? They found two prongs that Mr. Moore had not met: That he couldn't prove that he was clinically intellectually disabled, that his IQ was higher than what was generally recognized clinically. What did they do wrong with respect to that prong?

And then secondly, with respect to the adaptive-function prong, what did the court below do wrong?

Identify the two ways in which what they're doing and how they're applying the standards we're talking about were in error.

MR. SLOAN: I will, Your Honor. And as to both, they are in very sharp conflict with the clinical guidance generally and especially with current clinical standards.

So beginning with the intellectual deficits in the IQ, the Court of Criminal Appeals accepted as valid an IQ test of 74, which, as the Court explained in Hall, with the standard error of measurement would take it down to 69, well within the range for intellectual disability.

But what the court did here is that it chopped off the lower end of the standard error of

measurement. It then treated the 74, the number 74, as decisive and as in and of itself determining that Mr. Moore could not establish an intellectual deficit and he could not establish intellectual disability, which conflicts with clinical standards, current clinical standards, and this Court's decision in Hall.

The reasons that the court gives for lopping off the end of the -- the lower end of the standard error of measurement are completely clinically unsupportable. The court says that he had a history of poor academic performance. Well, of course, that's not consistent with an intellectual deficit or with intellectual disability. The court also says, well, he may have been depressed because he was on death row. Well, there's no death row -- there is no rule that if somebody is on death row, you cut off the lower end of the standard.

JUSTICE SOTOMAYOR: There is no medical rule to that.

MR. SLOAN: That's --

JUSTICE SOTOMAYOR: No medical support.

MR. SLOAN: There's no medical support. There's no clinical basis for that. And the court points to what it views as a depressive episode from 2005, which was 16 years after he took the exam in 1989.

JUSTICE SOTOMAYOR: Well, I thought the most significant part of this alleged error by you in your briefs were that it assumed that things like poverty, poor nutrition, poor performance in school were not attributable to intellectual functioning, but to his lack of a good home, essentially. Why is that clinically wrong?

MR. SLOAN: Because, Your Honor -- so in terms of the causation requirement, which is, I think, what Your Honor is referring to -- and there are -- there are three major problems with the way the court dealt with causation from --

JUSTICE ALITO: Well, I think the court's -- would you say something about the adaptive behavior? Because I think that may be a stronger leg.

CHIEF JUSTICE ROBERTS: Why don't you deal with Justice Sotomayor's question first and then Justice Alito's.

MR. SLOAN: Thank you, Your Honor.

So in terms of the causation, first the court says at page 10a of the petition appendix, they emphasize that intellectual deficits caused it rather than some other cause like the causes Your Honor is talking about. And it's well understood as a clinical matter that there is a very high incidence in

intellectual disability of multiple causation, co-morbidity. So that view of the inquiry is -- rather than some other cause is completely at odds with the clinical understanding to begin with.

Secondly, factors that the court points to include things, in addition to what Your Honor was saying like, again, poor academic performance, his terrible childhood abuse that he suffered, which not only do not detract from a finding of intellectual disability, they are well recognized as -- as risk factors and associated characteristics of intellectual disability.

And third, and very importantly, as the -- as the AAIDD explains in its amicus brief, from a clinical perspective, there is absolutely no way to make the kind of showing that the court requires here about rather than some other cause. As a clinical matter, it's simply impossible to do. And this Court in Hall talked about the risk and the threat that Atkins would be turned into a nullity. And there is no question with that kind of causation requirement that it turns it into a nullity.

CHIEF JUSTICE ROBERTS: Now -- now maybe you can respond to Justice Alito.

MR. SLOAN: Yes, Your Honor.

In terms of the adaptive deficits, Your Honor -- and it's important at the outset to recognize certain points that are undisputed in the record. And it's undisputed, for example, that the at the age of 13, Mr. Moore did not understand the days of the week, the months of the year, the seasons, how to tell time, the principle that subtraction is the opposite of addition, standard units of measurement. And there are numerous other deficits like that that are undisputed.

JUSTICE ALITO: But what was the -- what is the problem with their analysis of that point?

MR. SLOAN: So there are four problems, Your Honor.

So one of them is that the court focuses on what it perceives as some strengths, which it says outweighs the deficits and --

JUSTICE ALITO: Okay. On that one, is there a consensus in the medical community that that's improper?

MR. SLOAN: Yes, Your Honor.

And, in fact --

JUSTICE ALITO: Well, here is an article written by a number of experts, recent article from the Journal of American Academy of Psychiatry and the Law, Assessing Adaptive Functioning in Death Penalty Cases

after Hall and DSM-5. One of these experts was cited in the -- in -- in one of the supporting amicus briefs by professional organizations in Hall, which says that any assessment of adaptive functioning must give sufficient consideration to assets and deficits alike.

So what -- what do you make of that? That these are just -- these are -- are these quacks?

MR. SLOAN: Um --

JUSTICE ALITO: This is Dr. Hagan, Drogin, and Guilmette.

MR. SLOAN: Well, Your Honor, the clinical guidance from both the AAIDD and the American Psychiatric Association in their definitive clinical guidance, which comes out about once every 10 years, is -- is very explicit that the adaptive-deficit inquiry focuses on deficits and not on strengths, and for two very, very important reasons.

And the first is that -- is the clinical inquiry is about the degree to which somebody is impaired in their everyday life, and so it's focusing on the impairments. And the second reason is that there is a very common stereotype and misunderstanding that if somebody has strengths, they're not intellectually disabled. And both of those authoritative sources of clinical guidance emphasize --

JUSTICE ALITO: If the professional organizations by, I suppose, a majority vote or something like that conclude one thing, and but there are respected experts who disagree, you're saying the State is obligated --

MR. SLOAN: Well, I --

JUSTICE ALITO: -- as a matter of constitutional law to follow the organizations?

MR. SLOAN: I'm not saying that, Your Honor. As I said to Justice Kennedy, I think Hall identifies considerations if the court is going to disagree. And the first one I mentioned was, is there a clinical consensus on this point.

JUSTICE KAGAN: And can I ask whether you might be talking about two different things? And I might be wrong about this, but as I understand adaptive functioning, there are these particular areas of functioning that have been set out. And what the consensus is, is to say, well, if you have deficits in four of these areas, it doesn't matter that you don't have a deficit in another area. And that's what the consensus is.

Now, within each area, people/psychologists can look at, you know, within an area --

MR. SLOAN: Sure.

JUSTICE KAGAN: -- to determine whether you have a deficit. Yeah, you have to look at what you can do and what you can't do to decide whether there is a deficit in that area. So the two things might not be in conflict at all.

MR. SLOAN: That's exactly right, Your Honor. Or if there is a dispute, for example, about a particular skill. Somebody says he cannot drive. There is proof on the other side that, yes, the person can drive. So those --

JUSTICE BREYER: I have one question, which I don't think you can answer orally. But I think that these cases -- you can point me to the answer. That's what I want.

Look. There will be a bunch of easy cases. And then there are going to be cases like your client who has been on death row for 36 years. And there will be borderline cases. And the reason they're borderline is because the testing is right at the border, like an IQ test. And then you'll put weight on what's called related limitations in adaptive functioning, a matter that on its face sounds as if it's maybe easy in some cases and tough in another. All right?

What is the Court supposed to do? Are we supposed to have all those hearings here? I mean,

you've made very good arguments for your client. There are probably several others in the country in different states which may have different standards. And if you have some view that the law in this area should be law, i.e., that it should be uniform across the country, point me to something that will tell me how a district judge should go about making this determination in borderline cases.

MR. SLOAN: Yes, Your Honor.

JUSTICE BREYER: My suspicion is that there is no such thing, but that's why I asked the question. I want to be sure. There might be.

MR. SLOAN: Well, let me make two points, which is that, first of all, Your Honor says what -- what do courts do? And I do think it's important that the general principle this Court was clear about in Hall, which is being informed by the medical community about diagnostic --

JUSTICE BREYER: I understand. But you are saying whatever they should do, it shouldn't be what went on here. Okay. I got that point.

I'm asking a different point. And if you want my true motive, I don't think there is a way to apply this kind of standard uniformly across the country, and therefore, there will be disparities, and

uncertainties, and different people treated alike, and -- and people who are alike treated differently. Okay?

Now, that's my whole story. And I want you to say, no, you're wrong, there is a way to do it.

What?

MR. SLOAN: Well, Your Honor, I -- I think actually the best places to look on this would be the AAIDD current manual, the 11th edition, as well as the pages in the DSM-5 that -- that address it. And it actually points up an important difference in the current standards because, for the first time, the 11th edition, because of this problem about stereotypes, that if people have strengths, they can't be considered intellectually disabled.

For the first time, the current 11th edition, the very one that the Court said was off limits here, has an entirely new chapter, chapter 12, about the issues and problems of people who have high IQ -- who are intellectually disabled, but they are at the high IQ end, exactly the group of people that Your Honor is talking about. And the user's guide accompanying that manual, for the first time, has a list of harmful stereotypes which includes exactly that.

And the other thing, Your Honor, though, that I do have to emphasize, is that whatever one thinks

about the application across the country, there is no question that Texas is very extreme and stands alone in its view that -- of basically disagreeing with the core premise of Atkins, and repeatedly in its decisions, drawing distinctions between those who are severely mentally retarded in many of the decisions, and those who are mildly, and saying that there is no bright line exemption for those who are mildly.

And also, in Briseno itself, the Court said -- the Court of Criminal Appeals said, our task is to decide what a consensus of Texas citizens thinks the line should be. And of course, this Court in Atkins had just decided for Eighth Amendment purposes the consensus of United States citizens.

Your Honor, I'd like to reserve the balance of my time.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

General Keller.

ORAL ARGUMENT OF SCOTT A. KELLER

ON BEHALF OF THE RESPONDENT

MR. KELLER: Thank you, Mr. Chief Justice, and may it please the Court:

Petitioner conceded that we could have used the DSM-IV instead of the current DSM-5 that answers the question presented. And Petitioner, in their reply

brief, says there is no material difference between the language in Texas's standard, which is based on the AAMR 9th Clinical Framework, and current clinical frameworks. So, essentially, this case has shifted to a discussion of the seven Briseno evidentiary factors.

And if I can put those into context, the seven Briseno factors are all grounded in this Court's precedents. As we point out in our bullet-point list at pages 53 to 55 of our brief, what those go to are the second prong of the clinical definition, the adaptive deficits inquiry.

All of those questions are asking, can someone function in the world? And that's precisely what the Pennsylvania Supreme Court noted when it also endorsed the Briseno factors.

JUSTICE GINSBURG: You describe these as coming from some source, but Briseno itself listed this -- these -- seven, was it? -- bullet points, did not give a single citation of where any one came from.

MR. KELLER: It did, however, and this Court -- in -- in pages 53 to 55 of our brief, we go factor by factor and quote this Court's precedence to show how they're congruent with factors that this Court itself has considered.

And also, at Petition Appendix 162a, the

trial court adopted Petitioner's proposed conclusions of law. And that said that analyzing the facts under that second prong, that adaptive deficit prong, even under the current AAIDD 11th, quote, "answered many of the Briseno factors," unquote.

So the analysis that's done under the second prong of the clinical framework, the adaptive deficits prong, that is going to overlap with the Briseno factors. And so this is not a free floating test that negates or obviates the three-prong established test that Texas uses, and it is part of the national consensus --

JUSTICE KAGAN: General, would you agree with this: That the Texas Court of Criminal Appeals, in Briseno and other places, has made clear its view that -- that Texas can choose to execute people whom a -- a complete consensus, a 100 percent consensus of clinicians, would find to be intellectually disabled?

Would you agree with that?

MR. KELLER: I -- I don't believe that's what the Briseno opinion said. What the Briseno opinion said was it was going to adopt clinical standards.

JUSTICE KAGAN: I'm -- I'm asking about Briseno and other court of appeals' decisions.

And I thought that you said this in your

brief, that the -- that your view of the point of State discretion is that a person who everybody -- every clinician would find to be intellectually disabled, the State does not have to find to be intellectually disabled because a consensus of Texas citizens would not find that person to be intellectually disabled.

Isn't that the premise of the court of appeals' decisions?

MR. KELLER: No. Quite the contrary. Let me very clearly state about the "Texas consensus" language in the opinion.

The Briseno opinion flags the issue about, would a Texas consensus materialize on an issue. But the Court then twice said it was not going to answer that question. It was not going to do that. That was for the legislature. And instead what the Court did was it adopted the AAMR 9th clinical standards and the Texas Health Safety Code definition.

JUSTICE KAGAN: Well, I guess I just don't understand this. And I really don't understand it in light of your brief, which I'm going to start to quote from pretty soon. But what the -- it seems to me what the Texas court did is to say, look, we're going to accept the three dimensions, the adaptive deficits and the IQ and the age. But with respect to the quality and

the degree of impairment -- I think that that's their language -- we're not going to accept the clinicians' view so that people with mild impairment can be executed, even though the clinicians would find those people to be intellectually disabled.

MR. KELLER: Briseno very clearly adopted the three-prong established test in cases since then that we've cited throughout our brief. We also applied that --

JUSTICE KAGAN: I know that they applied the three-prong test. The question is the degree of impairment as to each of these -- those prongs.

And again, it seems to me pretty clear from your brief when you're talking about Atkins didn't establish a national standard, that you're saying too that the Texas -- and if you're not, I mean, I -- I guess I'm surprised by that -- that you're saying that the Texas courts do need to follow clinical assessments of intellectual impairment? Because that's -- it's just not what you say on page 19 and 20 and 21 of your brief.

MR. KELLER: Justice Kagan, it's true this Court has recognized there is a different between a legal determination regarding Eighth Amendment culpability and a medical diagnosis. But Briseno adopted the clinical standards in the AAMR 9th --

JUSTICE SOTOMAYOR: I'm sorry. Go back to Justice Kagan's question.

JUSTICE KAGAN: Well, he was talking about my question.

So go on.

(Laughter.)

MR. KELLER: Thank you, Justice Kagan.

Also, even the DSM-5 itself, the current framework the Petitioner points to, says there is an imperfect fit between those two concepts, and this Court has cited that exact language in previous DSM versions for that same proposition.

And so, no, it is not the case that States have to categorically wholesale adopt the positions of current medical organizations, but what Briseno itself actually did was, in fact, adopt the AAMR 9th, the precursor to the AAIDD 11th. And Petitioner's reply brief now says there's really no material difference between the 11th and the ninth language.

And that's why we're not talking about the three-prong test, the facial text of the language. We're talking about the Briseno factors.

JUSTICE KAGAN: I have a follow-up unless you want to go, Justice Sotomayor.

JUSTICE SOTOMAYOR: Go ahead, and then I'll

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JUSTICE BREYER: Well, maybe I could ask a follow-up.

CHIEF JUSTICE ROBERTS: Justice Kagan, please.

JUSTICE KAGAN: Let me just take one of the Briseno factors, right? And it's the idea that what lay people think about the person growing up is relevant to an assessment of adaptive function.

Now, no clinician would ever say that. The clinicians say, no, that's sort of like stereotypical layperson view of adaptive functioning, which is different from the -- the clinical view of adaptive functioning. But the Briseno factors made very clear, sort of point one, that you're supposed to sort of -- that you're supposed to rely on -- on what the neighbor said and what the teacher with absolutely no experience with respect to intellectual disabilities said.

So that seems to me a very big difference between the Briseno factors and the clinical view of intellectual disability.

MR. KELLER: This Court in Hall looked at what siblings and teachers from the developmental period also did. And clinicians would also look to those. In fact, here there's testimony at the penalty-phase

retrial about people, lay witnesses that knew Petitioner at the time. So it's not that this is irrelevant evidence that's not probative.

Now, it's not going to be necessarily dispositive. That's going to depend on the totality of the circumstances and the record on adaptive deficits. But this is actually probative evidence of whether --

JUSTICE KAGAN: Because Briseno says essentially that this can trump everything, and it says that this can trump everything because of the underlying view of Briseno and other Texas Court of Appeals cases that we don't have to look at the clinical standards and that we can execute people whom clinicians would find to be disabled.

MR. KELLER: No, Briseno did not say that the seven evidentiary factors can trump the established three-pronged definition that Texas has consistently applied.

JUSTICE KAGAN: I'm sorry, Mr. General Keller, because you keep on saying the three-prong definition, but the three-prong definition just tells you, you have to look to IQ, you have to look to adaptive functioning, you have to look to youth. It doesn't tell you anything about what qualities you look to and the extent of impairment within those factors,

and that's where the Texas court has insisted upon its freedom to go out on its own.

MR. KELLER: Well, even in Briseno --

JUSTICE SOTOMAYOR: May I note that, as a footnote only, you can continue, that in Ex parte Sosa, the CCA sent back a case directing the lower court to apply the Briseno factors, even though that court had analyzed the case under the clinical standards. It appears to be acting as if those Briseno factors are the clinical factors and are controlling, even though there are stereotypes built into them.

MR. KELLER: There are not stereotypes built into them. The standards --

JUSTICE SOTOMAYOR: Well, the DMA and all the other clinicians recognized that some mentally disabled people can have some adaptive functioning. Idiot savants, for example. Is it your position that if someone can calculate math in their head they can't be intellectually disabled?

MR. KELLER: No, the point of the Briseno --

JUSTICE SOTOMAYOR: How about if that same person has a job in NASA calculating the air space shuttle launches? Is that person not intellectually disabled simply because they can use that particular skill in a way that gains them employment?

MR. KELLER: No. And as what Texas standard says, is it looks to actually the current frameworks and says for adaptive deficits you look at conceptual, social, and practical skills.

But if I can address Sosa, the CCA there reversed the trial court, because what the trial court had was that it categorically was prohibited from looking at the facts of the crime. It didn't say you had to use the Briseno factors. It said --

JUSTICE ALITO: Well, General, we are not reviewing Sosa. Could I ask a question about what the court did in this case?

Now, on pages 62a and 63a of the petition, the appendix to the petition, it sets out the three factors, and then it discusses those at length, and then on page 89, it says, in addition, our consideration of the Briseno evidentiary factors weighs heavily against the findings.

So is it clear that these evidentiary factors actually played an indispensable role in the decision in this case, which is what we were reviewing?

MR. KELLER: No, they did not. There were only two pages to bolster a second alternative holding on relatedness. And that "weighs heavily" language? That's only talking about weighs heavily on the

relatedness inquiry. The court had already concluded in pages of its analysis that there was sufficient intellectual functioning under the first prong, and there was sufficient adaptive deficits. Compton's testimony said, I do not have the deficits to find a diagnosis, and that was even before prison. That is a sufficient basis to affirm without getting into the relatedness inquiry or getting into the Briseno factors.

JUSTICE KENNEDY: Are you saying that the Briseno factors capture all individuals with intellectual disability?

MR. KELLER: No. The Briseno factors -- there could be other circumstances or other facts in the record that would bear on the adaptive deficits prong, and that's why the CCA said these are discretionary. These are different ways of phrasing how you do the conceptual, social, and practical --

JUSTICE GINSBURG: Isn't making it discretionary a huge problem in this area, because if you let one trial court judge apply it and another one does -- doesn't have to apply them, then you're opening the door to inconsistent results depending upon who is sitting on the trial court bench, something that we try to prevent from happening in capital cases.

MR. KELLER: No, Justice Ginsburg, we're --

it's discretionary. What the CCA said, and this is the Cathey case, it said the trial and appellate courts may ignore some or all of them if they are not helpful in a particular case. In other words, this is just looking at the record. Is there evidence on any of these factors? If there's not, that's not going to be a helpful factor on that case.

And, Justice Kennedy, as far as the -- the universe of people that would be or would not be covered by the Briseno factors, the CCA has used the Briseno factors to grant Atkins relief. That's the Van Alstyne case. And they have also affirmed trial court decisions -- this is Valdez, Bell, Plata, and Maldonado -- but the case now before you --

JUSTICE KENNEDY: But the theme is -- of -- of the -- the Petitioner's brief, that the Briseno factors are intended to really limit the classification of those persons with intellectual disability as defined by an almost uniform medical consensus.

MR. KELLER: And the CCA has never said that the purpose of these factors is to screen out individuals and deny them relief.

JUSTICE KENNEDY: But isn't that the effect?

MR. KELLER: No. Van Alstyne granted relief by looking at the Briseno factors. The four cases I

just mentioned, these are cited at page 422.

JUSTICE KENNEDY: Well, of course, General, there are going to be cases in which the Briseno factors will show disabled, but that's not the question.

The question is can they be an exhaustive list.

MR. KELLER: The Briseno factors are not an exhaustive list, and the CCA has never treated them like that.

JUSTICE KAGAN: But the -- but the genesis of these factors was that the court said the clinical standards are just too subjective and they don't reflect what Texas citizens think, both of those things. They are too subjective, and they just reflect what clinicians think; they don't reflect what Texas citizens think. That was the genesis of the standards, which suggests that Justice Kennedy is right about how they operate and also how they were intended to operate.

MR. KELLER: The court did mention subjectivity. The Texas consensus point though was not part of the basis to do it. What the CCA was really trying to do here was take the adaptive-deficit prong, which is phrased in the terms of related and significant limitations in adaptive functioning, and put that into more concrete terms where you could apply it to a

record.

JUSTICE BREYER: Basically, there are two things wrong, possibly, with the factors which we've heard. One I can't deal with at this moment in oral argument. You could go through them -- they're in the briefs -- one by one, and say reading them, actually, they're not consistent with or they reflect an error when compared with what the psychiatrists and psychologists think. Your answer is they don't. The other side says they do. Okay. I can't go further with that here.

The other is the question of, why did the Texas court write these standards? I have to admit that in reading through Briseno, I came to at least pause when I read the words that they are trying to figure out what to do in borderline cases, and what they have done is not -- you know, I understand it, but they say we have to figure out the level at which a consensus of Texas citizens would agree that a person should be exempted from the death penalty.

When I read that, and when I read, there are some other words -- that's on page 6 of the -- of the report, of the reported opinion -- when I read some other things that they said, I thought they were trying to do this, which we do often in law. But what's the

purpose of this? The whole purpose is to try to figure out who not to execute because of their functioning, the way they function. That's the purpose.

Let's look at what Texas citizens would think about this person, and let's try to get standards that reflect that. I really did think that's what they were trying to do in that opinion. And they are arguing that that's the wrong thing to try to do in this instance.

First, because it would produce nonuniformity among 50 states or among the many states that have the death penalty.

Second, because the question is not what the citizens of the state think about who should be executed. That has nothing to do with it. Oddly enough, in this case, what has to do with it is a technical matter about this individual, that would free some while subjecting others to the death penalty, irrespective of what Texas citizens think.

So do you see my question? What were they up to in this opinion? Briseno. I think they were up to going back to the citizens of Texas. You saw what I think they are up to. And you tell me if I'm right, wrong or why.

MR. KELLER: Justice Breyer, I -- I believe

that's mistaken, because there are two points after that discussion in Texas consensus where the Court says, and this is page 6 of Briseno, as a Court dealing with individual cases and litigants, we decline to answer that normative question about the Texas consensus without the significant greater assistance from the citizenry acting through its legislature. And then two pages later, it's again assessing the difference between legal determination and the medical diagnosis, and the Court says that definitional question is not before us in this case, because it goes on to adopt the AAMR 9th Clinical Standards.

JUSTICE SOTOMAYOR: Mr. General, going -- just -- is it your view that what Texas is trying to do is determine who is truly on the clinical borderline as opposed to trying to determine the type of mentally disabled people that it thinks should be executed --

MR. KELLER: Correct.

JUSTICE SOTOMAYOR: -- on the latter?

MR. KELLER: Yes. Texas has adopted clinical definitions in the AAMR 9.

JUSTICE SOTOMAYOR: All right. So is it fair to say that in Texas, a mildly disabled person is unlikely to be considered disabled by the CCA under the Briseno factors?

MR. KELLER: No. If there was a diagnosis of intellectual disability, even mild intellectual disability, that would satisfy the --

JUSTICE SOTOMAYOR: But you -- according to one of the cases that you've cited to me where someone was clinically diagnosed as mildly disabled, and the CCA said under the Briseno factors that they should not be executed. A lot of the cases that you provided me with, there was clinical evidence of moderate -- and mostly severe -- but moderate to severe disability. But there -- was there anyone with mild disability that the Briseno factors would find sufficiently disabled?

MR. KELLER: Well, Justice Sotomayor, the Van Alstyne case is the case that I can point to where the CCA looked at the Briseno factors and granted her leave.

If I can pull back up the question --

JUSTICE SOTOMAYOR: Did they find him mildly disabled?

MR. KELLER: The testimony there was on adaptive deficits. And I believe the mild -- whether it's mild or moderate would go more towards IQ scores.

If I can pull back out: So the question presented here is whether Texas has prohibited the current standards from being used and is erring by using

outdated standards. Petitioners concede we couldn't have used an older version. And Texas is not prohibiting the use of current standards. In this case, the CCA repeatedly quoted -- it cited --

JUSTICE SOTOMAYOR: So why did it go through so much trouble in saying that it wasn't going to use current standards, that it was only going to use the older standards and the Briseno factors?

MR. KELLER: Because the current standard used by AAIDD 11th does not have the relatedness inquiry. And now, that is an extraneous part of this case. It was a second alternative holding. But that was the main reason why the CCA said, trial court, you're not following our precedence. That's error.

JUSTICE SOTOMAYOR: Well, if we believe that its definition of relatedness has no support anywhere, would that have been a valid reason for discounting the current clinical standards?

MR. KELLER: Well, that was a second alternative holding. Here, it's facially valid for Texas and any other State to have a relatedness requirement. That's in the DSM-5. The DSM-5 talks about needing something to be directly related, but it doesn't flesh that out. So what we were talking about is the application of that.

And this would be an odd case to decide that issue. When it's a second alternative holding, there is no State consensus on this causation point. That's the Coleman case from the Tennessee Supreme Court cited in the reply brief. We are not aware of any case in which the relatedness inquiry was the dispositive point on which an Atkins claim was denied.

JUSTICE SOTOMAYOR: Well, I'm not sure how I can accept your characterization of the CCA decision when basically it's saying his poor intellectual functioning on IQ tests, which happened when he was younger, were not related to his intellectual abilities; they were related to his poverty, his -- his morbidity factors.

If they are saying that, how are you saying they weren't finding that he wasn't intellectually disabled because of those other factors?

MR. KELLER: Well, it wasn't just --

JUSTICE SOTOMAYOR: That's how I read their decision.

MR. KELLER: Well, it wasn't just the CCA saying that. It was relying on testimony. Here, Petitioner argued --

JUSTICE SOTOMAYOR: Well, wait a minute. The testimony of Compton was, having looked at all of

the IQ tests, was: I'm not sure. It's probable that he's intellectually disabled by IQ, but he wouldn't qualify in my judgment because of his adaptive skills. But even the State's own expert said that it was probable that he was intellectually disabled.

MR. KELLER: The State's expert said that it would have been borderline on intellectual functioning. But the CCA on relatedness -- and, again, this is a second alternative holding that the Court doesn't have to reach -- it looked at testimony from Petitioner's retrial in 2001 when Petitioner affirmatively argued that he was not intellectually disabled. And the expert there that was Petitioner's own expert agreed.

JUSTICE GINSBURG: It was a strategic advantage to doing that back in those days; right?

MR. KELLER: Well, actually, at the time, Penry would have been decided, and there would have been a valid basis to say, Petitioner, I'm intellectually disabled; therefore, use it as mitigation evidence. The strategy, which was a reasonable strategy from counsel, was to say that Petitioner would be able to grow in prison, and, therefore, that was mitigation evidence that he could be reformed.

But, right, the Petitioner expert agreed with the prosecutor the Petitioner was, quote, nowhere

near, unquote, intellectually disabled and that a lack of education was to blame. That's at Joint Appendix 269.

JUSTICE SOTOMAYOR: Well, that happened in Atkins, too. Regrettably, until we decided that mental disability was a ground to excuse execution, many mentally disabled defendants were represented by counsel who thought that arguing differently was a better strategy.

MR. KELLER: Of course, Penry would have been on the books, and so there would have been an advantage to argue that. And that's why that's a contradicting argument. Regardless, even if that's not controlling now here, the CCA credited Compton's testimony as the most reliable expert who is the only forensic psychologist who thoroughly reviewed the records and personally evaluated Petitioner for intellectual disability. And Compton said, I don't have the deficits for diagnosis.

But this is a fact-bound question of the application of the test. The question presented here is whether Texas' well-established, three-prong test for intellectual disability violates the Eighth Amendment. And Texas is well within the national consensus. There are only four States that have categorically wholesale

adopted one of the current frameworks. Two of them did so saying there's no material difference in the language between the current framework and that test. And that's the precise position the Petitioner has taken in the reply brief.

JUSTICE GINSBURG: Can you explain why Texas applies a different test to determine whether a school child is intellectually disabled, or a juvenile offender, to determine what to do with that offender, Texas applies a different test when compatible with current medical standards in both of those categories? Why does it have a different standard for capital cases only?

MR. KELLER: So first of all, the juvenile offender discharge rule that Petitioner cites at page 7 of the reply brief, that actually adopts the three-prong test that Briseno adopted. That's 37 Texas Administrative Code 380.8779(c)(1).

Now, there are other provisions that incorporate by reference the latest manual of the DSM. But as the DSM-5 itself noted, there is an imperfect fit between a determination of legal -- a legal determination of culpability for Eighth Amendment purposes and a medical diagnosis. And since you have those different purposes, it is valid for a State to

have a different definition of when someone is morally culpable under the Eighth Amendment versus when someone should be able to get social-services benefit.

JUSTICE BREYER: Well, that's the point. That's exactly the point. That's the point that we've been making, or at least I thought we were. That the whole point of Briseno is really to answer the question that you said -- probably should say, no, it isn't really there -- it's to help determine which persons suffering borderline cases of mental disability ought to be executed, or should not be because they are less morally culpable.

Now, I did think that's what they said. That does supply a reason for making differences, as Justice Ginsburg just pointed out. And then the question is, is it what the purpose of Atkins and the other case Hall was, was it to give each State the right to decide in borderline cases whom or whom not to execute in light of their feelings about capital punishment?

I thought it had a different purpose -- unusual in the law -- but which was to appeal to technical definitions of who and who is not mentally retarded or intellectually disabled. That's a real issue. But I think that this case does present that

issue.

MR. KELLER: And what Atkins and Hall said was there's a critical role for the States. And while States don't have unfettered discretion, they do have some discretion. And every time the DSM-5 or the next edition of the AAIDD 11th -- or 12th comes out, the States don't have to automatically wholesale about that, because there is a well-established three-prong test. This test has existed for 50 years. And the States -- there's a national consensus adopting that test. There's not a national consensus against the relatedness-inquiries causation. There is not a national consensus that the various factors of the Briseno factor-of-an-entry test can't be applied.

And on adaptive strengths in particular, no State prohibits the use of adaptive strengths. In fact, three of the States that use the current frameworks, that have adopted wholesale the current frameworks, still look at adaptive strengths. The Hackett case from Pennsylvania is the best example of that.

JUSTICE SOTOMAYOR: Well, the problem is that, as I read the CCA opinion, it's looking at adaptive strengths only and not at adaptive deficits and looking at the depth of them or how they form the intellectual disability component. Even Dr. Compton,

the State's expert, testified that Mr. Moore could not, from memory, recreate a clock.

Now, she says, I don't quite believe that, but she doesn't quite believe that of a person who, at 13's, father threw him out because he was dumb and illiterate: Couldn't tell the days of the week; couldn't tell the months of the year; couldn't tell time; couldn't do anything that one would consider within an average, or even a low average, of intellectual functioning, who is eating out of garbage cans repeatedly and getting sick after each time he did it, but not learning from his mistakes.

The -- the State's opinion does very little except say those are products of his poor environment; they're not products of his intellectual disability.

MR. KELLER: No. Compton's testimony was she did not have the adaptive deficits. In addition to analyzing, she said, there are limitations I see, whether it's academic ability or social skills, but there has to be significant limitations, and she said that wasn't there.

She noted Petitioner testified four different times in the course of these proceedings, even in a Faretta hearing, and filing pro se motions, and was responsive to questions and was understanding what was

going on. He lived on the streets. After the crime, he absconded to Louisiana.

JUSTICE SOTOMAYOR: The problem with Lennie, who the Briseno factors were -- were fashioned after -- Lennie was working on a farm. How is that different from mowing a lawn?

And -- and the State had no problem in saying that Lennie, even though he could work, earn a living, plan his trying to hide the death of the rabbit he killed, that he could do all of those things, and yet he was not just mildly, but severely disabled.

Why is the fact that he could mow lawns and play pool indicative of a strength that overcomes all the other deficits?

MR. KELLER: Lennie, and the character from Of Mice and Men, was never part of the test. It's not part of the test. It was an aside in the opinion, and the Court said it was not going to address that separate question and instead adopted the clinical standards.

JUSTICE SOTOMAYOR: But it informed its view of how to judge the lack or strength of adaptive functions. It used the Lennie standard.

MR. KELLER: No, it absolutely did not. And we can see that, not only from the fact that what happened in Briseno was the Lennie paragraph was an

aside, and then the Court adopted the clinical standards.

The CCA has only once since then ever cited Lennie, and it was in a footnote quoting a trial court, and the CCA granted Atkins relief in that case. The Lennie standard has never been part of a standard. That's one of the most misunderstood aspects of the briefing here.

JUSTICE KAGAN: General, can I ask -- I'm sort of trying to reconcile the various statements you made here, and in your briefs, and here's what I come up with, and tell me if it's right.

I think what you're saying is the Texas Court of Appeals is complying with Atkins because it used a three-pronged test, focusing on IQ and adaptive function and age. But within each of those prongs, in order to make this distinction between clinical disability and moral culpability within each of those prongs, the Court can choose how to apply that prong, and particularly what levels of impairment to use.

Is that a fair assessment?

MR. KELLER: Mr. Chief Justice, may I answer?

CHIEF JUSTICE ROBERTS: Sure. Sure.

MR. KELLER: I don't believe so, Justice

Kagan, because what the Court has done is it has adopted the clinical prongs. It has adopted the three-part test.

JUSTICE KAGAN: Right. I -- yes, it has adopted the three-part test. But within each of those prongs, you get to apply it.

I thought that that was the entire point of Hall: No, that's wrong. You don't get to apply it however you want.

MR. KELLER: But on intellectual functioning, Texas has never had an IQ cutoff. As Hall recognized, it applied the -- the error of measurement. And even on the adaptive prong analysis, that is going to account for conceptual, social, and practical skills as Texas has actually adopted the current standards.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Three minutes, Mr. Sloan.

REBUTTAL ARGUMENT OF CLIFFORD M. SLOAN

ON BEHALF OF THE PETITIONER

MR. SLOAN: Thank you, Your Honor. Just a few brief points.

First, there was a lot of discussion about the role of Briseno and the relationship to clinical standards in the Texas Court of Criminal Appeals' decisions.

And I would suggest that the Court look at the American Bar Association amicus brief because it goes through three decisions of the Court of Criminal Appeals where in each of those three decisions, the clinical testimony, the expert testimony, was unanimous that the individual was intellectually disabled, and the Texas courts used the Briseno factors to conclude that, in fact, he was eligible for execution notwithstanding the unanimity of that expert testimony.

Second, my friend said that I conceded that they could have just applied the DSM-IV and rejected the DSM-5. Just to -- to be clear, and just for the record, I did not concede that.

And in my response to Justice Kennedy, I was saying that if a court -- if a State is going to reject clinical consensus and in the current clinical standard, as in that example, then there would be a number of factors that the court would look at.

And what I didn't get to was, and very importantly, is the Eighth Amendment principles and concerns that this Court outlined in Hall and in Atkins, and the absolute requirement to ensure that somebody who is intellectually disabled is not going to be executed.

Third, one point about Chief Justice's initial question that I never quite got to about the

question presented, in addition to the fact that, as we did discuss, its interwoven with the Briseno decision.

In the cert papers themselves, in our cert petition and our reply, we repeatedly used the phrases like "nonclinical," "unscientific," "standards completely untethered to clinical consensus." And, indeed, the State, in its opposition to the cert petition, rested heavily on the Briseno factors. There is a few pages of their opposition that are specifically directed to that. So there -- that was very extensively discussed in the cert papers at the time.

JUSTICE ALITO: Could you just clarify what you said about DSM-IV and DSM-5, because I had a different impression from your initial argument.

So if we were to say today every State must adopt DSM-5, and then at some point in the future DSM-6 comes out, would it be your position that those States would all have to go back and reconsider what they're doing?

MR. SLOAN: They -- they would have to consider them as part of the diagnostic framework.

And, again, these new editions come out about once every 10 years. But, yes, Your Honor, because those editions represent the scientific method at work, people using their best clinical and medical

training to refine and to sharpen the tools, and with regard to intellectual disability, to identify the people --

JUSTICE KENNEDY: Is it your view that Briseno factors are all consistent with DSM-IV?

MR. SLOAN: No, Your Honor. They are completely inconsistent with clinical factors, and they have been from the day that they were announced. But it is even more clear that they are inconsistent with clinical factors in light of the current clinical standards.

And my friend also was suggesting that there is some question about -- based on Briseno -- may I finish this sentence, your Honor?

CHIEF JUSTICE ROBERTS: Sure.

MR. SLOAN: -- based on Briseno about whether, in fact, there is a bright line exemption for the intellectually disabled. He was suggesting that it's clear there is. And I just briefly wanted to call the Court's attention to what the Court of Criminal Appeals has said relying on Briseno.

In Ex parte Hearn, the Court said, and I quote: "This Court has expressly declined to establish a mental retardation bright line exemption from execution without significantly greater assistance from

the Legislature." Briseno 135 Southwest 3d., et seq.

And, similarly, in Ex parte Sosa, the Court said, "Answering questions about whether the defendant is mentally retarded for a particular clinical purpose is -- is instructive but not conclusive."

Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Thank you, counsel. The case is submitted.

(Whereupon, at 11:11 a.m., the case in the above-entitled matter was submitted.)