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1 P R O C E E D I N G S

2 (10:09 a.m.)

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

5 Mr. Sloan.

6 ORAL ARGUMENT OF CLIFFORD M. SLOAN

7 ON BEHALF OF THE PETITIONER

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

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

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

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

5 CHIEF JUSTICE ROBERTS: Those are --

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

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12 requires outdated medical standards.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

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

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

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

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

12 That was very important to the Court in its  
13 determination here. It's at 6a of the Petition Appendix  
14 --

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

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

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

25 Am I right about that, that that's your

1 theory?

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

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

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

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

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

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

3 But, secondly, Your Honor --

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

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

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

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

1     shouldn't.

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

5                     MR. SLOAN:  No, that's correct.

6                     CHIEF JUSTICE ROBERTS:  Okay.

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

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

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

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

24                    JUSTICE ALITO:  Then I don't know --

25                    MR. SLOAN:  It's because --



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

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

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

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

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

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

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

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

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

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

12                  MR. SLOAN: No, Your Honor.

13                  JUSTICE SOTOMAYOR: It was making up --

14                  MR. SLOAN: They -- they --

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

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

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

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

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

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

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

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

4 And, Justice Alito --

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

13 Is that how you read it?

14 MR. SLOAN: Yes, exactly, Your Honor.

15 And --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

23 CHIEF JUSTICE ROBERTS: Justice Sotomayor?

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

1 moment?

2 Let's take the decision of the CCA here.

3 All right? They found two prongs that Mr. Moore had not  
4 met: That he couldn't prove that he was clinically  
5 intellectually disabled, that his IQ was higher than  
6 what was generally recognized clinically. What did they  
7 do wrong with respect to that prong?

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

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

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

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

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



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

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

18           JUSTICE SOTOMAYOR: There is no medical rule  
19 to that.

20           MR. SLOAN: That's --

21           JUSTICE SOTOMAYOR: No medical support.

22           MR. SLOAN: There's no medical support.

23 There's no clinical basis for that. And the court  
24 points to what it views as a depressive episode from  
25 2005, which was 16 years after he took the exam in 1989.

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

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

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

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

19 MR. SLOAN: Thank you, Your Honor.

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

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

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

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

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

25           MR. SLOAN: Yes, Your Honor.

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

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

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

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

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

20                  MR. SLOAN: Yes, Your Honor.

21                  And, in fact --

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

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

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

8 MR. SLOAN: Um --

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

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

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

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

6 MR. SLOAN: Well, I --

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

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

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

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

25 MR. SLOAN: Sure.

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

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

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

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

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

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

9                     MR. SLOAN:  Yes, Your Honor.

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

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

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

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



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

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

5                     What?

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

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

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

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

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

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

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
18 General Keller.

19 ORAL ARGUMENT OF SCOTT A. KELLER

20 ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

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

25                   And also, at Petition Appendix 162a, the

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

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

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

19 Would you agree with that?

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

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

25 And I thought that you said this in your

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

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

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

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

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

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

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

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

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

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

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

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

5 So go on.

6 (Laughter.)

7 MR. KELLER: Thank you, Justice Kagan.

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

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

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

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

25 JUSTICE SOTOMAYOR: Go ahead, and then I'll

1     --

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

4                   CHIEF JUSTICE ROBERTS: Justice Kagan,  
5 please.

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

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

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

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



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

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

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

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

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

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

3 MR. KELLER: Well, even in Briseno --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

23 JUSTICE KENNEDY: But isn't that the effect?

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

1 just mentioned, these are cited at page 422.

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

5 The question is can they be an exhaustive  
6 list.

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

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

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

1 record.

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

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

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

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

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

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

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

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

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



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

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

18                 MR. KELLER: Correct.

19                 JUSTICE SOTOMAYOR: -- on the latter?

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

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

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

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

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

17                   If I can pull back up the question --

18                  JUSTICE SOTOMAYOR: Did they find him mildly  
19 disabled?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 near, unquote, intellectually disabled and that a lack  
2 of education was to blame. That's at Joint Appendix  
3 269.

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

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

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

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

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

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

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

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

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

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

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



1 issue.

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

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

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

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

3 Now, she says, I don't quite believe that,  
4 but she doesn't quite believe that of a person who, at  
5 13's, father threw him out because he was dumb and  
6 illiterate: Couldn't tell the days of the week;  
7 couldn't tell the months of the year; couldn't tell  
8 time; couldn't do anything that one would consider  
9 within an average, or even a low average, of  
10 intellectual functioning, who is eating out of garbage  
11 cans repeatedly and getting sick after each time he did  
12 it, but not learning from his mistakes.

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

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

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

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

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

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

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

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

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

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

1     aside, and then the Court adopted the clinical  
2     standards.

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

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

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

21                    Is that a fair assessment?

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

24                    CHIEF JUSTICE ROBERTS: Sure. Sure.

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

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

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

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

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

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.

17 Three minutes, Mr. Sloan.

18 REBUTTAL ARGUMENT OF CLIFFORD M. SLOAN

19 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15 CHIEF JUSTICE ROBERTS: Sure.

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

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



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

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

6 Thank you, Your Honor.

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

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

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