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IN THE SUPREME COURT OF THE UNITED STATES

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BOBBY JAMES MOORE, :

Petitioner : No. 15-797

v. :

TEXAS, :

Respondent. :

- - - - - x

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.

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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

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12 requires outdated medical standards.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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