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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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