No. 15-65

IN THE

Supreme Court of the United States

JUAN LIZCANO,

Petitioner,

v.

TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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The State's opposition confirms the need for this Court to grant the petition and review Texas's unsound approach to assessing intellectual disability. Although Texas claims that its courts have adopted a clinical definition, it does not dispute that Texas law permits courts to reject *Atkins* claims, even where clinicians would conclude that definition is satisfied, based on additional "non-diagnostic" criteria for adaptive functioning. *Ex parte Van Alstyne*, 239 S.W.3d 815, 820 (Tex. Crim. App. 2007) (per curiam). Those criteria have no basis in medical science and conflict with the approach followed in virtually all other States. And the State does not dispute that Texas's departure from clinical diagnostic standards has been dispositive in many cas-

es, allowing defendants to be sentenced to death who would not be eligible for that punishment in States where clinical standards govern. Most notably, the State does not deny that under clinical standards, Juan Lizcano is intellectually disabled and would not be executed in a State that applied those standards without Texas's "additional" factors. Absent review, Texas will continue to sentence intellectually disabled defendants to death in defiance of the prohibition recognized in *Atkins* v. *Virginia*, 536 U.S. 304 (2002), and confirmed in *Hall* v. *Florida*, 134 S. Ct. 1986 (2014).

I. THE STATE DOES NOT DISPUTE SEVERAL CORE PREMISES OF THE PETITION

A. Texas's Approach Departs From Accepted Clinical Practice

The State does not dispute that the evidentiary factors used in Texas courts to evaluate a defendant's adaptive functioning depart from clinical diagnostic standards. As explained by the American Association on Intellectual and Developmental Disabilities (AAIDD)—the organization responsible for the leading clinical manual on intellectual disability, which this Court cited in both *Atkins*, 536 U.S. at 308 n.3, and *Hall*, 134 S. Ct. at 2000—Texas's approach "is fundamentally inconsistent with the clinical understanding of intellectual disability, and has no support in the scientific and clinical literature in the field," AAIDD Br. 17. For example, contrary to accepted clinical practice, Texas law permits the factfinder to focus on isolated strengths rather than deficits and to rely on lay stereotypes of how a person with intellectual disability should seem or behave. Pet. 20-24; AAIDD Br. 16-19.

The State does not say otherwise. Rather, it acknowledges that the factors set out in *Ex parte*

Briseno, 135 S.W.3d 1 (Tex. Crim. App. 2004), are in "addition[]" to the "guidelines used by mental health professionals," Opp. 18, and that they were born of the Court of Criminal Appeals' suspicion that the diagnostic criteria applied by medical professionals are too "subjective." Opp. 17 (quoting *Briseno*, 135 S.W.3d at 8); *see also, e.g.*, *Ex parte Cathey*, 451 S.W.3d 1, 11 n.22 (Tex. Crim. App. 2014) (perceived "definitional subjectivity" of the adaptive-functioning prong prompted court to adopt "more objective" factors that are "[o]f course … not part of the definition"); *Ex parte Sosa*, 364 S.W.3d 889, 892 (Tex. Crim. App. 2012) ("whether the defendant is mentally retarded for particular clinical purposes is instructive" but not "conclusive").[1]

The State also acknowledges that under Texas law—contrary to clinical practice—factfinders "consider all of the person's functional abilities," including both "the defendant's adaptive strengths as well as his weaknesses." Opp. 18, 19; *cf.* AAIDD Br. 7 ("The clinical definition of adaptive behavior has long focused exclusively on adaptive *deficits*."); *id.* at 9 ("The clinician's diagnostic focus does not involve any form of 'balancing' deficits against the abilities or strengths which the individual may also possess.").

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[1] The expressed view that the *Briseno* factors are "more objective" than criteria employed by medical professionals is both curious and quite wrong. In fact, "[c]linicians have developed sophisticated and detailed methods for objectively answering the question of what deficits or limitations an examined individual may have." AAIDD Br. 8 & n.8; *see also id.* at 4-5 (discussing "substantial, consistent, and robust body of clinical and scientific literature on the meaning and application of this requirement"). These clinical methods include standardized assessments, like the one used to diagnose Lizcano. *Id.* at 8 n.8; Pet. 14-15 & n.4.

B. Texas Is An Outlier Among States

The State also does not dispute that Texas stands virtually alone in its express endorsement of nonclinical factors for evaluating adaptive-functioning deficits. As the petition demonstrated, most other States have adopted clinical standards and rejected the reliance on adaptive strengths and lay stereotypes that Texas law permits. Pet. 28-32. Federal courts outside the Fifth Circuit have also recognized that adherence to clinical standards is compelled by this Court's precedent. *Id.*

Indeed, even applying AEDPA's deferential standard, the Sixth Circuit has deemed an approach like Texas's to be unreasonable. In *Van Tran* v. *Colson*, 764 F.3d 594 (6th Cir. 2014), the Sixth Circuit held that the Tennessee Court of Criminal Appeals had unreasonably found the petitioner not intellectually disabled when that court—relying on Texas's *Briseno* factors, *see Van Tran* v. *State*, 2006 WL 3327828, at *23-25 (Tenn. Crim. App. Nov. 9, 2006); Pet. 28 n.12—rejected sound clinical evidence and standards and instead emphasized the petitioner's adaptive strengths and the facts of the crime. *See Van Tran*, 764 F.3d at 609-612. The Sixth Circuit explained that this Court's precedent "requires the courts and legislatures to follow clinical practices in defining intellectual disability." *Id.* at 612.

The State does not claim that its approach can be reconciled with the approach taken in these other States. Nor does it deny that Texas's outlier approach produces disparate outcomes across the country for similarly situated individuals.

C. Texas's Departure From Clinical Standards Permits The Execution Of Defendants Who Would Not Otherwise Be Eligible For The Death Penalty

Finally, the State does not dispute that its departure from clinical standards has allowed many defendants—including Juan Lizcano—to be sentenced to death even though they would be considered intellectually disabled under clinical standards.

Here, as the petition demonstrated, Lizcano presented overwhelming evidence of intellectual disability under recognized clinical standards. Pet. 9-12, 14-16. His IQ scores all fell within the range of intellectual disability, including scores as low as 48 and 53. Experts identified deficits in nine out of the ten relevant skill areas; deficits in just two suffice for a diagnosis of intellectual disability. *See* Pet. 11, 15. Those deficits were confirmed by a standardized assessment, Pet. 14 & n.4, and by testimony from family members and others who observed his lifelong difficulties mastering basic tasks in school, at work, and in everyday life, Pet. 9-10, 15-16. Four psychologists and a psychiatrist found him to be intellectually disabled. Had clinical standards applied, the jury and the Texas courts would have had "no rational basis to reject" a finding of intellectual disability, rendering Lizcano ineligible for the death penalty. Pet. App. 169a (Price, J., concurring and dissenting). The State does not say otherwise.

Nor does the State dispute that Texas's departure from clinical standards has determined the outcome of other cases. Texas courts have relied on the *Briseno* factors to reject *Atkins* claims despite compelling evidence of intellectual disability under the clinical standards. Pet. 24-25 & n.9. The State observes that some

individuals have obtained *Atkins* relief from the Texas courts, but that hardly demonstrates that the concerns animating the petition are "unfounded." Opp. 20.[2] The fact that some individuals who satisfy the clinical standards may also clear the additional hurdles Texas has erected does not show that those hurdles are consistent with *Hall* or *Atkins*. And whether or not some claimants have succeeded in spite of *Briseno*, Texas does not dispute that its departure from clinical practice has made the difference between life and death in other cases, including this one.

II. THE STATE'S DEFENSE OF THE MERITS OF ITS APPROACH CONFIRMS THE NEED FOR REVIEW

The State's attempts to defend the merits of its approach merely confirm the need for this Court's review, as they reflect an incorrect understanding of *Hall* and *Atkins* that other States have properly rejected.

The State relies principally on this Court's decision in *Atkins* to "'leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction'" on execution of persons with intellectual disability. 536 U.S. at 317. "But *Atkins* did not give the States unfettered discretion to define the full scope of the constitutional protection." *Hall*, 134 S. Ct. at 1998. To the contrary, as *Hall* made clear, "clinical definitions of intellectual disability … were a fundamental premise of *Atkins*." *Id.* at 1999. "[P]ersons who meet the 'clini-

[2] At least two of the State's examples should be discounted, as they involved such overwhelming evidence that the State declined to contest it. *See Ex parte Modden*, 147 S.W.3d 293, 295 (Tex. Crim. App. 2004); Tobolowsky, *A Different Path Taken*, 39 Hastings Const. L.Q. 1, 81, 84-86 (2011) (discussing *Ex parte Valdez*, 158 S.W.3d 438 (Tex. Crim. App. 2004) (per curiam)).

cal definitions' of intellectual disability" are categorically ineligible for execution because "'by definition'" they "'have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.'" *Id.* (quoting *Atkins*, 536 U.S. at 318).

State and federal courts outside Texas have correctly interpreted *Atkins* and *Hall* to prohibit the execution of individuals who satisfy the clinical criteria for a diagnosis of intellectual disability. Pet. 29-30. Texas law, in contrast, allows *Atkins* relief to be denied even to claimants, like Lizcano, who fully satisfy the clinical criteria for a diagnosis of intellectual disability. The State does not deny the existence of this conflict.

The State claims (at 18, 19) that consideration of the nonclinical factors announced in *Briseno* is "not … mandatory" in every case. Even if that were true, it would not weigh against granting the petition. Permitting but not requiring the factfinder to deny *Atkins* relief based on unscientific factors would still "create[] an unacceptable risk that persons with intellectual disability will be executed" in some cases, including this one. *Hall*, 134 S. Ct. at 1990. In any event, actual practice in Texas has shown that consideration of these factors is *not* optional—as illustrated by the very decision the State cites, which reversed a grant of *Atkins* relief solely because of the failure to consider a single *Briseno* factor (the facts of the crime) in assessing the second prong. *Sosa*, 364 S.W.3d at 894-895; Pet. 24-25.

The State also asserts (at 19) that review is not warranted because the Texas courts have adopted the three-part clinical definition of intellectual disability. So did Florida, yet that did not obviate the need for this

Court's intervention to correct Florida's "disregard[] [of] established medical practice" in its manner of applying the first prong of the definition. *Hall*, 134 S. Ct. at 1995-1996. Here, similar to *Hall*, it is the additional, nonclinical factors Texas courts employ to evaluate the second prong of the definition that are at issue—factors the Texas courts invented specifically for *Atkins* purposes, without any scientific basis. *See* AAIDD Br. 18 ("Under professional standards, diagnosticians are not free to replace the content of the clinical definition with their own impressionistic views.").

The State cites (at 18, 21) the Court of Criminal Appeals' suggestion that the *Briseno* factors assist the factfinder in determining whether deficits in adaptive functioning are "related to significantly sub-average general intellectual functioning rather than some other cause," such as a personality disorder. *Ex parte Moore*, 2015 WL 5449887, at *4 (Tex. Crim. App. Sept. 16, 2015); *see also Ex parte Hearn*, 310 S.W.3d 424, 428 (Tex. Crim. App. 2010). But *Briseno* did not claim that the factors it announced have any clinical or scientific basis—and they do not—let alone one that would assist in determining the "relatedness" of subaverage intellectual functioning to adaptive deficits.[3] To the contrary, by inviting a scientifically unfounded distinction between intellectual disability and co-occurring conditions such as personality disorders, Texas has departed even further from recognized clinical practice. Pet. 24.

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[3] In fact, the clinical function of the adaptive-deficits prong is to confirm that an individual's subaverage intellectual functioning (typically measured by IQ score) actually affects the individual's ability to function in society. AAIDD Br. 5-7. When both prongs are met concurrently, clinicians do not also then ask whether the first prong *caused* the second prong. *Id.*

Finally, granting the petition and requiring the Texas courts to conform to clinical guidelines would not "take the decision of whether a defendant is intellectually disabled out of the hands of the factfinder." Opp. 20. The question presented addresses the substantive issue of *what* must be decided when assessing intellectual disability for *Atkins* purposes, not the procedural issue of *who* must decide it. Lay stereotypes, isolated strengths unrelated to observed deficits, and the potentially atypical facts of a particular crime have no proper role in any factfinder's evaluation of intellectual disability. Numerous other States apply clinical criteria without jeopardizing the role of the factfinder.

III. THE QUESTION PRESENTED WARRANTS REVIEW WITHOUT DELAY

The State does not contend that there is any basis for delaying this Court's review of Texas's approach, and there is none. As the petition demonstrated, both state and federal courts in Texas have repeatedly ignored *Hall* or dismissed it as irrelevant and made clear that they do not intend to reconsider Texas's approach absent this Court's intervention. *See, e.g.*, *Mays* v. *Stephens*, 757 F.3d 211, 218 (5th Cir. 2014) ("the word 'Texas' nowhere appears in the [*Hall*] opinion"); Pet. 27-28. Indeed, since the petition for certiorari was filed in this case, the Court of Criminal Appeals has again reaffirmed its approach. In *Moore*, the court held that the lower court had "erred" by "consider[ing] only weaknesses in [the] applicant's functional abilities," as clinical guidelines would require, explaining that Texas courts "'consider *all* of the person's functional abilities,' including 'those that show strength as well as those that show weakness.'" 2015 WL 5449887, at *4; *cf.* AAIDD Br. 7, 9.

The Fifth Circuit has also reiterated, since the filing of the petition, that it will not put an end to Texas's nonclinical, outlier approach. In the Fifth Circuit's view, "[n]either *Atkins* nor *Hall* mandates that courts scrupulously follow clinical guidelines," and States are "allow[ed] … to set their own definitions of intellectual disability." *Butler* v. *Stephens*, 2015 WL 5235206, at *7 (5th Cir. Sept. 9, 2015) (per curiam). The court of appeals specifically deemed "consideration of [the applicant's] adaptive strengths alongside his limitations" to be constitutionally permissible. *Id.*; *see also id.* at *10 (declining to reconsider the "'constitutionality of the *Briseno* standard'" in light of *Brumfield* v. *Cain*, 135 S. Ct. 2269 (2015)). Given the entrenched views of the state and federal courts in Texas—"the State that carries out the most executions," *Glossip* v. *Gross*, 135 S. Ct. 2726, 2775 (2015) (Breyer, J., dissenting)—no amount of additional time or percolation will bring Texas into line with this Court's precedent and the standards applied by most other States.

The question whether Texas's nonclinical application of the second prong is consistent with *Hall* and *Atkins* is squarely presented in this case. The Court of Criminal Appeals held that Lizcano "clearly satisfied the first prong." Pet. App. 134a. His *Atkins* claim was rejected on direct appeal and collateral review solely on the basis of the second prong. *Id.* at 96a, 144a.[4] And as to that prong, the State does not dispute that Texas's application of nonclinical standards was dispositive of

[4] The courts did not reach the third prong, but given extensive evidence from Lizcano's family and childhood acquaintances and the diagnosis of five clinicians, there is little doubt that the third prong is satisfied. The State does not say otherwise.

the outcome.[5] Moreover, the case comes to the Court in an ideal posture to consider the question presented without the complications of the deferential review required by AEDPA. The Court granted certiorari to review similar state-court proceedings in *Hall*, 134 S. Ct. at 1992 (appeal from denial of *Atkins* claim), and in *Atkins*, 536 U.S. at 310 (appeal from resentencing).

It is irrelevant that this case was decided in a non-precedential opinion. Opp. 23-24. The state courts' rejection of Lizcano's *Atkins* claim rested on settled Texas precedent that the Court of Criminal Appeals and the Fifth Circuit have repeatedly reaffirmed. *See* Pet. App. 3a (Alcala, J., dissenting) ("In rejecting applicant's intellectual-disability claim on direct appeal and in this habeas application, this Court and the habeas court have each applied the standard this Court outlined in *Ex parte Briseno*[.]"). If anything, the fact that the Court of Criminal Appeals considers its approach to be so well-established as to no longer merit precedential treatment further confirms that the issue is ripe for this Court's review. Designating an opinion as non-precedential should not insulate it from review—particularly in a capital case, where the decision could not be more weighty for the petitioner whose life is at stake. *See, e.g.*, *Commissioner* v. *McCoy*, 484 U.S. 3, 7 (1987) (per curiam) (fact that a decision was un-

[5] The State claims (at 19) that "the trial court and Court of Criminal Appeals did not specifically cite to or rely on any *Briseno* factors," but that is misleading. In affirming Lizcano's death sentence, the Court of Criminal Appeals relied specifically on evidence it deemed "relevant to the factors laid out in *Briseno*," Pet. App. 140a, including evidence of Lizcano's isolated strengths that would not be considered by a clinician, Pet. 12. The state courts' denial of habeas relief similarly rested on *Briseno*. *See* Pet. App. 3a-4a (Alcala, J., dissenting).

published "carries no weight" in the "decision to review the case").

But for Texas's steadfast refusal to apply clinical standards, Lizcano would be ineligible for the death penalty. He almost certainly would not be executed in any other State. This Court should grant the petition to resolve whether Texas's outlier approach—and Lizcano's execution—are permissible under *Atkins* and *Hall*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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