No. 15-797

In the Supreme Court of the United States

BOBBY JAMES MOORE, PETITIONER

v.

STATE OF TEXAS

ON WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Atkins v. Virginia, 536 U.S. 304 (2002), held that the Eighth Amendment prohibits the execution of persons with intellectual disability. That holding rested on the Court's finding that state laws reflected a national consensus against executing offenders with that condition, as well as the Court's independent assessment that there was no reason to disagree with the States' judgment. *Id.* at 315-16, 321. The Court observed that any "serious disagreement" about this principle lay "in determining which offenders are in fact" persons with intellectual disability, and it "'le[ft] to the State[s] the task of developing appropriate ways to enforce the constitutional restriction.'" *Id.* at 317 (citation omitted).

Hall v. Florida, 134 S. Ct. 1986, 1998 (2014), reaffirmed the States' "critical role" in defining intellectual disability for Eighth Amendment purposes. And while the Court added that its independent evaluation of this question would also be "informed by the views of medical experts," it stressed that those views "do not dictate" the answer because "[t]he legal determination of intellectual disability is distinct from a medical diagnosis." *Id.* at 2000.

The question presented is whether the Eighth Amendment requires States to adhere precisely to a particular organization's most recent clinical definition of intellectual disability in determining whether a person is exempt from the death penalty under *Atkins* and *Hall*.

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INTRODUCTION

Atkins v. Virginia, 536 U.S. 304, 317 (2002), prohibited the execution of persons with intellectual disability, but the Court "'le[ft] to the State[s] the task of developing appropriate ways to enforce the constitutional restriction'" (citation omitted). Then, *Hall v. Florida*, 134 S. Ct. 1986, 1998 (2014), reaffirmed that the States play a "critical role" and retain "discretion" in crafting an *Atkins* standard. That discretion is not "unfettered," *id.*, and States should "consult the medical community's opinions" so that their standards are "informed" by that community's "diagnostic framework." *Id.* at 1993, 2000. But the Court stopped well short of requiring States to adhere precisely to any particular organization's clinical definition of intellectual disability, explaining that those definitions "do not dictate" the *Atkins* analysis because "[t]he legal determination of intellectual disability is distinct from a medical diagnosis." *Id.* at 2000.

Texas's standard for *Atkins* claims fully complies with these precedents. The Texas Court of Criminal Appeals (CCA) adopted a clinical definition of intellectual disability cited in *Atkins*—the one found in The American Association on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* (9th ed. 1992) ("AAMR 9th"). *Ex parte Briseno*, 135 S.W.3d 1, 7-8 & n.26 (Tex. Crim. App. 2004); *see Atkins*, 536 U.S. at 308 n.3. That definition contains the three settled criteria for intellectual disability recognized by the Court in *Atkins* and *Hall*: significantly subaverage intellectual functioning, deficits in adaptive functioning, and onset during the developmental period. *Id.*; *Hall*, 134 S. Ct. at 1994.

In applying this established three-part test here, the CCA did exactly as *Hall* instructed. The CCA consid-

ered medical experts' views on intellectual disability, including a more recent version of the resource the CCA relied upon in fashioning the three-part test—the 11th edition published by the renamed American Association on Intellectual and Developmental Disabilities (AAIDD).[1] And the CCA consulted the most recent version of the other clinical resource cited in *Hall*: The American Psychiatric Association ("APA"), *Diagnostic and Statistical Manual of Mental Disorders* (5th ed. 2013) ("DSM-5"). Pet. App. 3a-4a & nn.2-3, 6a-7a & n.5.

Based on that review, the CCA concluded that its existing legal standard "remains adequately 'informed by the medical community's diagnostic framework.'" Pet. App. 7a (quoting *Hall*, 134 S. Ct. at 2000). This conforms to the practice of 24 States that have not adopted wholesale either the AAIDD 11th's or DSM-5's definition of intellectual disability; in contrast, only four States have adopted either definition in full. *See infra* Part I.A.2; Appendix. Regardless, the CCA consulted those resources in adjudicating petitioner's claim. Pet. App. 64a & n.40, 65a, 73a & n.49, 87a & n.57.

Accordingly, the premise of the question presented, as articulated by petitioner, is fundamentally flawed. The CCA did not "prohibit the use of current medical standards on intellectual disability." Pet. Br. i. Petitioner's true grievance is that he disagrees with the conclusions that the CCA drew from the competing expert evidence. Under any relevant standard, that evidence refutes petitioner's claim of intellectual disability.

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[1] American Association on Intellectual and Developmental Disabilities, *Intellectual Disability: Definition, Classification, and Systems of Supports* (11th ed. 2010) ("AAIDD 11th").

STATEMENT

A. Factual Background

1. Petitioner had a troubled childhood. His father was an abusive alcoholic, Pet. App. 27a, and there was very little supervision at home, Pet. App. 140a. At age eleven, petitioner began sneaking out of the house in the middle of the night to see friends. Pet. App. 49a; 2.CR.705.[2] Lacking guidance, petitioner became attracted to "things on the street." Pet. App. 49a; 2.CR.705.

Petitioner struggled in school and disliked it. Pet. App. 50a. He began skipping school in fourth grade, and by seventh grade almost entirely stopped going. *Id.* Petitioner dropped out of school after ninth grade, at age fifteen or sixteen. Pet. App. 188a.

Petitioner was never diagnosed with an intellectual disability in his youth. The record contains three IQ test scores from petitioner's school years.[3] At age twelve he scored a 77 on the Otis-Lennon Mental Abilities Test (OLMAT); at age thirteen he scored a 57 on the Slosson Intelligence Test for Children (Slosson) and a 78 on the Wechsler Intelligence Scale for Children (WISC). Pet. App. 63a. The WISC was a full-scale, individually administered test described by one of petitioner's experts as "the gold standard." J.A. 116. In contrast, the OLMAT and Slosson were group tests, J.A.

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[2] All record citations designated "CR" are to the Clerk's Record for the state habeas proceedings. All record citations designated "RR" are to the Reporter's Record for the state habeas proceedings.

[3] Petitioner was also administered the Bender-Gestalt and Goodenough "Draw-a-Man" tests, but they were not IQ tests. J.A. 13, 144.

144, that petitioner's experts criticized, *e.g.*, J.A. 12, 57, 115. The administrator of the WISC observed that petitioner's scores "indicated that perhaps this is a child who has not been taught, but who can learn." Pet. App. 22a. The test administrator recommended that petitioner remain in regular classes with some modifications to address his academic weaknesses. Pet. App. 22a-23a.

Petitioner was permanently kicked out of the house at age fourteen and became part of "street life." Pet. App. 27a-28a. At age thirteen, petitioner began drinking alcohol. Pet. App. 47a. In junior high school, he started taking drugs, and by seventeen, petitioner was regularly abusing drugs and alcohol. Pet. App. 47a; 2.CR.694-95. He financed his drug habit with proceeds from stealing cars, burglarizing houses, and hustling pool. Pet. App. 51a. By age seventeen, petitioner was a four-time felon. Pet. App. 17a, 47a; 2.CR.887. He entered prison in 1977 and was paroled in 1979. 2.CR.887.

2. In April 1980, petitioner and two accomplices agreed to commit a robbery in order to make their car payments. Pet. App. 13a. Petitioner supplied the weapons for the robbery—a .32 caliber pistol and a shotgun—and the three men drove around Houston looking for a target. *Id.* They settled on Birdsall Super Market. *Id.* Donning a wig and sunglasses, and concealing his shotgun in plastic bags, petitioner entered the store with the other two robbers; petitioner approached the courtesy booth, staffed by seventy-year-old James McCarble and Edna Scott. Pet. App. 1a, 14a. Petitioner removed his shotgun from the plastic bags and pointed the weapon at McCarble and Scott. Pet. App. 14a. When Scott screamed that the store was being robbed, petitioner aimed the shotgun at McCarble and shot him in the head, killing him. *Id.*

Petitioner's accomplices were quickly arrested, but petitioner evaded capture. Pet. App. 15a. Authorities apprehended him in Louisiana ten days later, *id.*, after which petitioner made a written confession to the robbery and to killing McCarble, Pet. App. 16a.

B. Judicial Proceedings

1. *Conviction and First Appeal.* At trial, petitioner lied under oath, denying that he signed a confession, robbed the store, or killed McCarble, and asserting that he had been in Louisiana at the time of the robbery. Pet. App. 17a, 27a. The jury convicted petitioner of capital murder, and he was sentenced to death. Pet. App. 17a, 18a.

While petitioner's direct appeal was pending, petitioner filed numerous pro se motions and pleadings with the CCA concerning his desire to participate in the appeal, need for access to the record, growing displeasure with his counsel's representation, and dissatisfaction with the trial court's failure to appoint different counsel or allow petitioner to represent himself. Pet. App. 18a. In October 1983, petitioner filed a pro se mandamus petition seeking dismissal of his appellate counsel and permission to proceed with his appeal pro se. *Id.* In response, the CCA ordered the trial court to conduct a hearing pursuant to *Faretta v. California*, 422 U.S. 806 (1975). Pet. App. 18a. Petitioner represented himself at the *Faretta* hearing, and he presented five exhibits in support of his request to represent himself on appeal. *Id.* Petitioner also expressed a willingness to accept new counsel, so the trial court appointed new appellate counsel. Pet. App. 19a.

After considering the briefing of both his first and second appointed counsel as well as a pro se brief filed by petitioner, the CCA affirmed the conviction and sen-

tence. *Moore v. State*, 700 S.W.2d 193 (Tex. Crim. App. 1985) (en banc). This Court denied certiorari and an application to stay the execution date. *Moore v. Texas*, 474 U.S. 1113 (1986).

2. *First and Second Habeas Proceedings.* Petitioner's first state habeas application was denied by the CCA in 1986. Pet. App. 20a. After he filed a federal habeas petition, the district court stayed the execution and dismissed the petition without prejudice to allow petitioner to pursue an unexhausted claim in state court. *Id.*

Represented by new counsel, petitioner filed his second state habeas application in April 1992, in which he claimed ineffective assistance of trial counsel. Pet. App. 20a-21a. The CCA denied relief. Pet. App. 29a. Petitioner then filed a second federal habeas petition, raising the same claims. *Id.* The district court granted relief on petitioner's penalty-phase ineffective-assistance claim, and the Fifth Circuit ultimately affirmed. Pet. App. 29a-30a.[4]

3. *Penalty-Phase Retrial and Appeal.* At his penalty-phase retrial in 2001, petitioner affirmatively argued that he was *not* intellectually disabled. Pet. App. 42a.

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[4] The Fifth Circuit initially ruled that the district court had failed to give sufficient deference to the state court fact findings under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *Moore v. Johnson*, 194 F.3d 586, 590-91 (5th Cir. 1999). But shortly after that decision, this Court decided *Lindh v. Murphy*, 521 U.S. 320 (1997), which held that AEDPA did not apply to pending claims. After this Court granted, vacated, and remanded petitioner's case to the Fifth Circuit in light of *Lindh*, 521 U.S. 1115 (1997), the Fifth Circuit affirmed the district court's judgment, *Moore v. Johnson*, 194 F.3d at 622.

One of petitioner's experts, Bettina Wright, a clinical social worker, interviewed petitioner for four hours and reviewed his IQ tests and school records. Pet. App. 41a; J.A. 269. Wright concluded that petitioner is "nowhere near" intellectually disabled, as "it is his lack of education" that is to blame for his low performance. Pet. App. 41a; J.A. 269. Petitioner's other expert, Dee Dee Halpin, an educational diagnostician, concluded that petitioner had low-average intellectual functioning and that he "definitely had some ability to learn that wasn't tapped early in his school years." Pet. App. 41a.

Petitioner's counsel thus argued that petitioner "wasn't really [intellectually disabled] at all, he was capable of learning." Pet. App. 42a. Petitioner's troubled childhood explained his learning deficits, his counsel asserted, and petitioner's experience in prison proved that he could "learn and grow and become the kind of person that he could have become had he come from a safe environment." Pet. App. 42a-43a.

Petitioner was again sentenced to death. Pet. App. 43a. The CCA affirmed. *Moore v. State*, No. 74,059, 2004 WL 231323, at *12 (Tex. Crim. App. Jan. 14, 2004) (en banc). This Court denied certiorari. *Moore v. Texas*, 543 U.S. 931 (2004).

4. *Third Habeas Proceeding and* Atkins *Hearing.* In June 2003, with new counsel, petitioner filed his third state habeas application, raising 48 claims for relief, including—for the first time—a claim that he is intellectually disabled. 1.CR.3-228. Petitioner's counsel attached affidavits of Gina Vitale, a social worker, and Richard Garnett, a clinical psychologist—but neither met with petitioner or diagnosed him as intellectually disabled. Pet. App. 44a. The state habeas court allowed petitioner's claim to proceed and granted funding for

petitioner to hire additional mental health experts. Pet. App. 46a, 52a.

In the course of these proceedings, the State released petitioner's prison records, which reflected that petitioner had been administered two IQ tests while in prison. In 1984, petitioner scored a 71 on an abbreviated Wechsler Adult Intelligence Scale-Revised (WAIS-R). Pet. App. 23a & n.16. In 1989, petitioner was given a complete WAIS-R and scored a 74. Pet. App. 24a.

a. At the *Atkins* hearing in January 2014,[5] three experts testified for petitioner: Robert Borda and Shawanda Williams Anderson, both clinical neuropsychologists, plus Stephen Greenspan, a retired professor of educational psychology, Pet. App. 24a, 52a.[6] None of petitioner's experts administered a full-scale IQ test, and only Borda met with petitioner (briefly) for the purpose of assessing intellectual functioning. Greenspan refused to diagnose petitioner, and Anderson examined petitioner only for brain injuries or anomalies. Moreover, their diagnostic approaches conflicted in several respects.

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[5] The delay between the filing of petitioner's third state habeas application and the *Atkins* hearing is attributable to a number of factors, including petitioner's pro se motions to discontinue the habeas proceeding and waive further appeals, his refusal to participate in a psychological examination ordered by the court, substitution of habeas counsel, and supplemental briefing. Pet. App. 45a-47a.

[6] A federal district court recently found Greenspan to be "completely lacking in credibility," and the court issued a warning about Greenspan to other courts. *United States v. Candelario–Santana*, 916 F. Supp. 2d 191, 203-06 (D.P.R. 2013); *see also* J.A. 131-32.

First, Borda, a neuropsychologist who had acknowledged that forensic psychology was not his specialty, J.A. 7, admitted that he did not know much about the case, J.A. 48-49, 57, and conducted only a "very, very brief assessment" of petitioner, J.A. 28. Borda concluded that petitioner was intellectually disabled. J.A. 39. But Borda administered only a "very limited test battery" that included a partial IQ test called the Raven's Colored Progressive Matrices (RCPM), on which petitioner scored an 85. J.A. 15-16; Pet. App. 53a. Borda did not conduct any effort or malingering testing because he assumed that petitioner had a low IQ. J.A. 54. Borda admitted on cross examination that "adaptive skills" were not absent in petitioner, but were "probably below average" for his age. J.A. 47. Borda also adopted a stringent adaptive-functioning standard by directly equating executive functioning to adaptive functioning. J.A. 24-25; *see* Pet. App. 87a n.57.

Second, Greenspan conceded that he had never met or communicated with petitioner, nor had he read the transcripts from petitioner's trials. J.A. 119-20. He therefore refused to diagnose petitioner as intellectually disabled. J.A. 120. Regarding the IQ tests petitioner had been administered, Greenspan described the Slosson test as "not the greatest test. It's more of a screening test," J.A. 115, and also stated that the OLMAT is a group test that "should not be given a lot of weight." 2.RR.192. In contrast, Greenspan described the WISC test, on which petitioner scored a 78, as the "gold standard. It's the test that's most wildly [*sic*] given by psychologists and neuropsychologists and it's the one that's most relied upon in high stakes settings such as a court case." J.A. 116.

Much of Greenspan's testimony was in tension with Borda's. Contrary to Borda's dismissal of conducting effort testing regarding IQ scores,[7] Greenspan testified that effort testing is recommended in forensic psychology. Pet. App. 68a-69a; 3.RR.45. Greenspan also disagreed with Borda's equation of executive functioning with adaptive functioning. J.A. 121. And Greenspan criticized the mental-age concept relied upon by Borda. J.A. 116; 2.RR.196.

Third, Anderson testified that she had originally been retained to determine whether petitioner suffered from a brain anomaly or traumatic brain injury, and she met with petitioner for that purpose but not to determine intellectual disability. J.A. 91-92. Anderson did not administer an IQ test. J.A. 90. Only after Anderson met with petitioner did she evaluate the data for intellectual disability (at the request of counsel) and concluded that petitioner "more likely than not" met the criteria. J.A. 73, 89. Like Greenspan, Anderson apparently disagreed with Borda's equation of executive functioning with adaptive functioning. J.A. 85.

b. Unlike petitioner's experts, the State's expert, Kristi Compton, specialized in forensic psychology. 3.RR.83-84. She had served as an expert in over 70 cases and performed over 3,000 forensic evaluations, primarily for defendants and courts. J.A. 134-35, 224-28. Compton met with petitioner for six hours to assess intellectual disability, at which time she administered a battery of tests, including a full-scale IQ test. J.A. 142,

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[7] "Effort testing" refers to assessments to determine if a person used normal effort, as opposed to purposely using less effort, on a test so that the results are a "true representation of this person's ability." J.A. 141.

Pet. App. 53a. Based on her full review of petitioner's records and her lengthy personal assessment of him, Compton determined that petitioner's intellectual functioning was in the borderline range and there were insufficient adaptive deficits to diagnose petitioner as intellectually disabled. J.A. 185, 186.

Compton administered the Wechsler Adult Intelligence Scale, Fourth Edition IQ test (WAIS-IV), which Compton described as the most current test. J.A. 142. Her assessment included effort testing. J.A. 140-42. Petitioner scored a 57 (54, adjusted for the "Flynn Effect," *see infra* p.31). J.A. 154. Compton was surprised by this outlier score, which she expected to be higher given her observations along with petitioner's history and education level. J.A. 154. Based on "discrepancies throughout the test that [she] saw that indicated suboptimal performance in addition to the effort testing that was conducted," J.A. 154, Compton concluded that petitioner's result was not a valid score, J.A. 203.

Compton testified that the WISC at age thirteen (on which petitioner scored a 78) deserved greater weight because it was the only full-scale standardized test administered in the development period. J.A. 143-44. Like Greenspan, Compton criticized the other two IQ tests given to petitioner in his youth—the Slosson and OLMAT—as group tests without high validity. J.A. 144. Regarding the IQ tests administered while petitioner was incarcerated, Compton explained that depression commonly reduces IQ scores and that there was no effort testing to avoid malingering. J.A. 145-46.

Addressing the evidence of petitioner's adaptive functioning prior to his arrest, Compton testified that while he had academic limitations and adaptive deficits in social interaction, he also lived on the streets, played

pool for money, and mowed lawns, which required adaptive behavior, such as the "ability to understand money concepts and work." J.A. 146. Compton also found it significant that petitioner's experts from his penalty-phase retrial, Halpin and Wright, attributed his withdrawn behavior as a child to emotional problems—not intellectual disability—and that his adaptive functioning improved since going to prison. J.A. 184. Compton further testified that petitioner's behavior during the crime—"[w]earing the wig, covering up the gun[,] and going to Louisiana"—indicated abstract thought. J.A. 147. Petitioner's conduct in the course of his judicial proceedings, including representing himself pro se, further indicated adaptive skills. J.A. 147-48, 182-83. And petitioner's prison records also indicated adaptive skills, including social skills, according to Compton. J.A. 160-62, 168-69.[8]

c. The state habeas trial court adopted wholesale petitioner's proposed findings of fact and conclusions of law, which addressed only his *Atkins* claim, and recommended that the CCA grant habeas relief. Pet. App. 2a-4a. The court did not address petitioner's second and third claims, and it recommended that relief be denied on his remaining 45 claims. Pet. App. 4a-5a.

5. *The Court of Criminal Appeals' Opinion.*

a. Acting as ultimate fact finder, the CCA engaged in a detailed examination of the evidence, carefully con-

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[8] In addition to reviewing petitioner's records, Compton also personally administered a functional living skills test to assess petitioner's adaptive functioning. J.A. 155-56. Petitioner scored 2.5 standard deviations below the mean, but Compton determined that the score was "not an accurate reflection of his abilities" because she had to give him zeros for two areas in which he lacked exposure (check writing and microwave use). J.A. 155-56.

sidered the testimony and the credibility of the experts, and denied petitioner's *Atkins* claim (along with his other 47 claims). Pet. App. 62a-93a.

The CCA began by addressing Texas's legal standard for *Atkins* claims. The CCA explained that petitioner had to show by a preponderance of the evidence that:

> (1) he suffers from significantly sub-average general intellectual functioning, generally shown by an [IQ] of 70 or less; (2) his significantly sub-average general intellectual functioning is accompanied by related and significant limitations in adaptive functioning; and (3) the onset of the above two characteristics occurred before the age of eighteen.

Pet. App 5a-6a. This three-part definition for intellectual disability in Texas, originally adopted in *Ex parte Briseno*, 135 S.W.3d 1, 7 (Tex. Crim. App. 2004), incorporates two similar definitions found in the AAMR 9th and the Texas Health and Safety Code.[9] Pet. App. 5a.

Petitioner incorrectly asserts that the CCA "prohibit[ed] consideration of the medical community's *current* 'diagnostic framework.'" Pet. Br. 24. The CCA quoted this Court's holding in *Hall* and expressly examined the APA's and AAIDD's most recent intellectual-disability definitions—in the DSM-5 and AAIDD 11th, respectively—to determine whether Texas's legal standard "remains adequately 'informed by the medical community's diagnostic framework.'" Pet. App. 3a-4a n.2 (DSM-5), 4a n.3 (AAIDD 11th), 7a (quoting *Hall*, 134 S. Ct. at 2000), 7a n.5. The court observed that Texas's standard "re-

[9] Tex. Health & Safety Code § 591.003(7-a) (formerly codified at *id.* § 591.003(13)) (governing state services for persons with intellectual disabilities).

mains generally consistent" with the AAIDD 11th. Pet. App. 7a n.5. The court acknowledged that the AAIDD had dropped the requirement that adaptive deficits be "related" to intellectual deficits, but it noted that Texas's standard remains "consistent with the APA's current position on the issue" because the DSM-5 added this relatedness requirement. Pet. App. 7a n.5.

Turning to the first element of the three-part definition—significantly subaverage general intellectual functioning—the CCA conducted a detailed analysis of petitioner's IQ tests and the related expert testimony. Pet App. 63a-75a. Based on the expert testimony and relying largely upon Compton's thorough analysis, the CCA concluded that the record supported consideration of only petitioner's "78 IQ score on the WISC at age 13 in 1973 and his 74 IQ score on the WAIS-R at age 30 in 1989." Pet. App. 73a. Applying a five-point standard error of measurement (SEM), the court concluded that petitioner's IQ score on the WISC ranged from 73-83. Pet. App. 74a. Considering evidence that might place his score at the higher or lower end of that range, the court concluded that there was no reason to think petitioner's score of 78 was inaccurate or an unfair representation of his intellectual functioning during the developmental stage. *Id.* The CCA further concluded that petitioner's results on the 1989 WAIS-R confirmed the accuracy of his 1973 WISC score. Pet. App. 74a-75a.

The CCA proceeded to consider the second prong of the intellectual-disability standard—significant and related limitations in adaptive functioning—and concluded that petitioner again failed to meet his burden. Pet. App. 75a. After carefully reviewing the expert testimony, *see* Pet. App. 75a-85a, the court found "Compton's opinion far more credible and reliable than those of ap-

plicant's experts who testified at the 2014 evidentiary hearing," Pet. App. 85a. The CCA alternatively held that even if petitioner's adaptive deficits had satisfied the standard, he still failed to show the necessary link between such adaptive deficits and intellectual-functioning deficits. Pet. App. 88a-89a. The court added that its conclusion on this "relatedness" inquiry was also supported by the optional "*Briseno* evidentiary factors," which are not part of Texas's three-part definition of intellectual disability. Pet. App. 89a; *see infra* Part III.

b. Judge Alcala dissented. Pet. App. 94a-126a. The dissent argued that the court "must consult the medical community's current views and standards," Pet. App. 104a, but did not grapple with the fact that the majority had cited and considered the APA's and AAIDD's current definitions of intellectual disability before concluding that the existing standard remained valid, *see* Pet. App. 6a-7a.

With respect to the intellectual-functioning prong, the dissent faulted the court for using "a strict cutoff based on IQ scores" in rejecting petitioner's claim, Pet. App. 107a, but such a holding appears nowhere in the court's opinion, *see* Pet. App. 74a-75a. The dissent also accused the CCA of cherry-picking petitioner's highest IQ scores and disregarding the others. Pet. App. 108a. But the substance of this criticism was that the dissent would have weighed the competing expert evidence differently. Pet. App. 108a-110a.

Addressing the adaptive-functioning prong, the dissent chided the CCA for not giving enough weight to adaptive deficits, in accord with the DSM-5. Pet. App. 112a. But the majority's determination regarding adaptive deficits expressly relied upon the expert testimony

of Compton, who placed a greater emphasis on adaptive functioning than on intellectual functioning. *See* J.A. 136, 185-86.

Finally, the dissent criticized *Briseno*'s reference to the character "Lennie" from John Steinbeck's novel *Of Mice and Men*. Pet. App. 116a-118a. But the dissent did not claim that the CCA here relied on, or even made reference to, that remark. The dissent also criticized *Briseno*'s optional evidentiary factors. Pet. App. 119a.

SUMMARY OF ARGUMENT

I. A. Petitioner's articulation of the question presented rests on a false premise. The CCA did not "prohibit the use of current medical standards on intellectual disability." Pet. Br. i. The CCA actually considered the clinical definitions that petitioner labels "current medical standards"—the DSM-5 and AAIDD 11th—and relied on them to apply certain concepts. What the CCA did not do is adopt those definitions wholesale as Texas's legal standard for *Atkins* claims.

Neither the Eighth Amendment nor this Court's decisions in *Atkins* and *Hall* require States to adhere precisely to a particular organization's clinical definition of intellectual disability. *Atkins* gave States latitude to develop substantive standards implementing the prohibition on executing persons with intellectual disability. 536 U.S. at 317. *Hall* explained that States must consider the views of medical experts so that their *Atkins* standards are "informed by the medical community's diagnostic framework." 134 S. Ct. at 2000. But neither case directed States to strictly follow a particular clinical definition of intellectual disability. To the contrary, the Court confirmed in *Hall* that those definitions "do not dictate" the *Atkins* analysis, and

"[t]he legal definition of intellectual disability is distinct from a medical diagnosis." *Id.*

Since *Hall* was decided, no consensus has developed among the States that resolution of *Atkins* claims requires application of the APA's or AAIDD's latest clinical definitions. *See* Appendix. To the contrary, only four States that impose the death penalty have adopted either the DSM-5 or the AAIDD 11th as their substantive *Atkins* standards. By contrast, 24 States—including Texas—still employ a definition modeled on the established three-prong test contained in previous versions of those texts.

In any event, requiring States to adhere precisely to the latest APA or AAIDD clinicial definitions would be both unworkable and unwarranted. The DSM-5 acknowledges that there is an "imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis." DSM-5 at 25. More problematic, the DSM-5 and AAIDD 11th definitions differ in many important respects, creating a dilemma as to which definition would count as the requisite "current medical standard." The AAIDD itself considered those inconsistencies "disastrous," warning that they "would create havoc in the . . . courts (especially in death penalty cases)." *See infra* Part I.A.3.

Texas's *Atkins* standard thus comports with Eighth Amendment requirements. This test tracks the long-settled three-part test for intellectual disability that the Court recognized in *Atkins*. It does not use a strict IQ score cutoff or ignore the SEM, which were the defects invalidated in *Hall*. Rather, the CCA applied Texas's standard here just as *Hall* contemplates: it considered the most recent clinical definitions, consulted them when necessary, and determined that the Texas defini-

tion of intellectual disability "remains adequately 'informed by the medical community's diagnostic framework.'" Pet. App. 7a (quoting *Hall*, 134 S. Ct. at 2000).

B. Petitioner's *Atkins* claim fails under any relevant standard. Here, the State's expert was the only forensic psychologist to examine him and the only expert to administer a full-scale standardized test for intellectual functioning, and she concluded that he does not have intellectual disability. The CCA reasonably relied on that clinical assessment, as well as the considerable record evidence, in holding that petitioner failed to meet his burden to show either significantly subaverage general intellectual functioning or significant and related deficits in adaptive functioning.

II. Even if the Court were to conclude that the CCA did not sufficiently consider the DSM-5 or AAIDD 11th in applying Texas's *Atkins* standard to petitioner, it should not impose part or all of those definitions on the States as a national standard. Instead, the appropriate remedy would be to remand this case so that the CCA may give those definitions whatever additional consideration is due and further explain how those definitions inform Texas's standard.

III. Petitioner incorrectly contends that the "*Briseno* evidentiary factors" represent Texas's rejection of current medical standards. The CCA has made clear that these additional factors are not part of its three-prong intellectual-disability definition and are entirely optional. And in this case, the factors were not relevant to the outcome. Regardless, each factor may be traced to considerations that this Court has identified as relevant to the *Atkins* analysis.

ARGUMENT

I. The Court of Criminal Appeals Correctly Denied Petitioner's *Atkins* Claim.

Texas's legal standard for determining whether a capital offender has intellectual disability, and the CCA's application of that standard to petitioner, comply with the Eighth Amendment and this Court's decisions in *Atkins* and *Hall*.

A. Texas's Definition of Intellectual Disability Properly Implements *Atkins*.

Atkins did not adopt a national standard defining intellectual disability for Eighth Amendment purposes. To the contrary, the Court observed that "[t]o the extent there is serious disagreement" among the States about the execution of persons with intellectual disability, it is "in determining which offenders are in fact [persons with intellectual disability]," and that not all persons who claim to have intellectual disability "will be so impaired as to fall within the range of . . . offenders [with intellectual disability] about whom there is a national consensus." 536 U.S. at 317. Accordingly, the Court "'le[ft] to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'" *Id.* (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)).

The CCA undertook that task for Texas in *Briseno*. There the court held that it would follow two similar definitions of intellectual disability that it had employed before *Atkins* in the context of considering the mitigating effect of intellectual disability in capital sentencing. 135 S.W.3d at 7-8 & n.23 (citing *Ex parte Tennard*, 960 S.W.2d 57, 60-61 (Tex. Crim. App. 1997) (en banc)).

The first definition was one of the clinical definitions cited in *Atkins* itself: the AAMR 9th. *Id.* at 7; *see Atkins*, 536 U.S. at 308 n.3. The AAMR 9th described intellectual disability as characterized by "(1) 'significantly subaverage' general intellectual functioning; (2) accompanied by 'related' limitations in adaptive functioning; (3) the onset of which occurs prior to the age of 18." *Briseno*, 135 S.W.3d at 7 & n.26 (quoting AAMR 9th at 5) (footnotes omitted). The second definition, which appears in a Texas social-services statute, similarly defines intellectual disability to mean "'significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period.'" *Id.* at 7 & n.27 (quoting Tex. Health & Safety Code § 591.003(13) (now recodified at § 591.003(7-a))). The court also noted that the APA had defined "[s]ignificantly subaverage intellectual functioning" to mean "'an IQ of about 70 or below (approximately 2 standard deviations below the mean)'"—another clinical definition cited in *Atkins*. *Id.* at 7 n.24 (quoting APA, *Diagnostic and Statistical Manual of Mental Disorders* 39 (4th ed., Text Revision 2000) ("DSM-IV-TR")); *see Atkins*, 536 U.S. at 308 n.3.

The CCA applied the three-part test contained in the AAMR 9th, along with the DSM-IV-TR definition of significantly subaverage intellectual functioning, and rejected petitioner's *Atkins* claim. Pet. App. 5a, 63a-89a. Petitioner contends that the CCA erred because Texas's three-part test embodies "superseded medical standards," and by continuing to apply it today, the CCA "prohibits" the use of "current medical standards." Pet. Br. 27-31. In petitioner's view, those current standards are found in the most recent clinical defini-

tions adopted by the APA (in the DSM-5) and the AAIDD (in the AAIDD 11th). Pet. Br. 29-30.

But the Court has never required States to adopt particular clinical definitions or diagnostic criteria to implement *Atkins*. Moreover, any such requirement would be both unworkable and unwarranted. Petitioner's two preferred clinical definitions do not align with each other, much less represent a general consensus among the States or even the medical community.

1. *Atkins* and *Hall* do not require States to adopt wholesale the latest intellectual-disability definitions published by select professional groups.

The States' "task" in implementing *Atkins* is not confined to adopting wholesale the latest clinical definition of intellectual disability published by a particular organization. *Cf.* Pet. Br. 29-31. Rather, *Atkins* gave States latitude to define intellectual disability in their respective laws within certain limits.

The Court has "traditionally left to legislators the task of defining terms of a medical nature that have legal significance." *Kansas v. Hendricks*, 521 U.S. 346, 359 (1997). Consequently, "[l]egal definitions, . . . which must 'take into account such issues as individual responsibility . . . and competency,' need not mirror those advanced by the medical profession." *Id.* (quoting APA, *Diagnostic and Statistical Manual of Mental Disorders* xxiii, xxvii (4th ed. 1994) ("DSM-IV")).

The Court's precedents on intellectual disability follow this tradition. *Atkins* acknowledged that "serious disagreement" remained in determining which offenders have intellectual disability, and that the national consensus that formed the cornerstone of *Atkins*'s rule

existed only as to a "range" of offenders. 536 U.S. at 317. The Court also noted that the States' definitions of intellectual disability were "not identical" and only "generally conform[ed]" to the clinical definitions. *Id.* at 317 n.22.

Indeed, at the time *Atkins* was decided, two States that the Court cited as part of the national consensus—Indiana and Tennessee—had expressly refused to adopt clinical definitions. *Compare id.* at 314 n.12 (citing Tenn. Code Ann. § 39-13-203 and Ind. Code §§ 35-36-9-2 through 35-36-9-6), *with Rondon v. State*, 711 N.E.2d 506, 516 n.14 (Ind. 1999) ("We do not adopt the DSM–IV's definition of adaptive functioning as the definition of adaptive behavior."), *and State v. Smith*, 893 S.W.2d 908, 917 (Tenn. 1994) (declining to adopt the AAMR's definition of "deficits in adaptive behavior").

The Court later confirmed that *Atkins* "did not provide definitive procedural or *substantive* guides for determining when a person who claims [intellectual disability] 'will be so impaired as to fall [within *Atkins*'s compass].'" *Bobby v. Bies*, 556 U.S. 825, 831 (2009) (quoting *Atkins*, 536 U.S. at 317) (emphasis added). Circuit courts have likewise acknowledged that *Atkins* does not install any particular clinical definition as the legal standard.[10]

Hall did not displace or diminish the States' role in substantively defining intellectual disability for *Atkins* purposes, as petitioner contends. *See* Pet. Br. 29-31. Ra-

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[10] *See, e.g.*, *Hooks v. Workman*, 689 F.3d 1148, 1172 (10th Cir. 2012); *Chester v. Thaler*, 666 F.3d 340, 347 (5th Cir. 2011); *Hill v. Humphrey*, 662 F.3d 1335, 1351-52 (11th Cir. 2011) (en banc); *Sasser v. Norris*, 553 F.3d 1121, 1125 n.3 (8th Cir. 2009), *abrogated on other grounds by Wood v. Milyard*, 132 S. Ct. 1826 (2012); *Larry v. Branker*, 552 F.3d 356, 369 (4th Cir. 2009).

ther, the Court reaffirmed the States' "critical role in advancing protections and providing the Court with information that contributes to an understanding of how intellectual disability should be measured and assessed." 134 S. Ct. at 1998.

To be sure, *Hall* described clinical definitions as "a fundamental *premise* of *Atkins*," and it clarified that "*Atkins* did not give the States *unfettered* discretion to define the full scope of the constitutional protection" or "*complete* autonomy to define intellectual disability as they wished." *Id.* at 1998, 1999 (emphases added). But those qualifiers prove that petitioner's argument cannot be correct. If States were required to adhere strictly to the APA's and AAIDD's latest clinical definitions, they would have *no* discretion or autonomy in defining intellectual disability.

Hall describes a more limited function for clinical definitions than petitioner suggests. The Court emphasized that "[t]he legal determination of intellectual disability is distinct from a medical diagnosis" and "the views of medical experts . . . do not dictate" whether a particular intellectual-disability standard is valid. *Id.* at 2000. Instead, in exercising its "independent judgment" to evaluate a State's standard, the Court's analysis is "*informed* by the medical community's diagnostic framework." *Id.* (emphasis added); *see id.* ("'[T]he science of psychiatry . . . informs but does not control ultimate legal determinations . . . [.]'") (quoting *Kansas v. Crane*, 534 U.S. 407, 413 (2002)). To that end, it is proper to "consider" and "consult" professional studies and opinions in assessing whether a State's definition of intellectual disability appropriately implements *Atkins*. *Id.* at 1993.

The "consideration" and "consultation" required by *Hall* is not a mandate to adopt wholesale the APA's or AAIDD's most recent definition of "intellectual disability." *Hall* itself makes that clear. Florida's statutory definition, at issue in *Hall*, was adopted in 2001, 2001 Fla. Laws ch. 2001-202 (C.S.S.B. 238) (codified at Fla. Stat. § 921.137(1)), and appears to have been modeled on the *1983* version of the AAIDD's definition.[11] Yet the Court held that "[o]n its face this statute could be interpreted consistently with *Atkins* and with the conclusions this Court reaches in the instant case." *Hall*, 134 S. Ct. at 1994. Florida's *application* of the statute was unconstitutional, however, because it imposed a strict IQ cutoff of 70 and failed to account for the standard error of measurement in IQ scores (SEM). *Id.* at 2001. Those practices did not merely depart from current clinical standards, but also ran "counter to the clinical definition *cited throughout Atkins*," which "have *long included* the SEM." *Id.* at 1999 (emphases added).[12]

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[11] *See* American Association on Mental Deficiency, *Classification in Mental Retardation* 1 (8th ed. 1983) ("AAMD 8th") (defining "mental retardation" as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior, and manifested during the developmental period," a period further defined as "period of time between conception and the 18th birthday"). The DSM-IV is also cited in the definition's legislative history. Fla. Staff Analysis, S.B. 238 (Feb. 14, 2001).

[12] As with *Atkins*, most circuit courts generally have not interpreted *Hall* as requiring strict adherence to clinical definitions of intellectual disability. *See, e.g.*, *Smith v. Duckworth*, No. 14-6201, 2016 WL 3163056, at *8 (10th Cir. June 6, 2016); *Ledford v. Warden, Ga. Diagnostic & Classification Prison*, 818 F.3d 600, 637 (11th Cir. 2016); *Mays v. Stephens*, 757 F.3d 211, 218 (5th Cir. 2014); *but see Van Tran v. Colson*, 764 F.3d 594, 612 (6th Cir. 2014).

2. No national consensus requires wholesale use of a particular organization's latest clinical definition.

Not only has the Court never required States to adopt or adhere precisely to the APA's or AAIDD's latest clinical definition of intellectual disability for *Atkins* purposes, but there is presently no national consensus embracing such an approach. Only four States have adopted either the APA's or AAIDD's latest clinical definition wholesale, while 24 States that have the death penalty continue to use an earlier articulation of the test like Texas. This "essential instruction" from the States, *Roper v. Simmons*, 543 U.S. 551, 564 (2005), weighs heavily against petitioner's claim that the Eighth Amendment requires every State to conform its legal standard to those particular definitions.

Only four States have adopted the DSM-5 or AAIDD 11th clinical standards wholesale as their legal definition of intellectual disability for *Atkins* claims. La. Code Crim. Proc. art. 905.5.1(H) (DSM-5); *Chase v. State*, 171 So. 3d 463, 471 (Miss. 2015) (en banc) (DSM-5 and AAIDD 11th); *State v. Agee*, 364 P.3d 971, 990 (Or. 2015) (DSM-5); *Commonwealth v. Bracey*, 117 A.3d 270, 273 (Pa. 2015) (approving AAIDD 11th as alternative to DSM-IV-TR).[13] And of those four, only Oregon did so

[13] Petitioner incorrectly counts Florida as a State whose high court has "held that current medical standards should be considered in resolving *Atkins* claims." Pet. Br. 48 & n. 25 (citing *Oats v. State*, 181 So. 3d 457, 467-68 (Fla. 2015) (per curiam)). In *Oats*, the court explained that "the Supreme Court has now stated that courts must consider all three prongs in determining an intellectual disability, as opposed to relying on just one factor as dispositive." 181 So. 3d at 467 (citing *Hall*, 134 S. Ct. at 2001). That is, the court adopted that standard specifically because it believed

for the reason advanced by petitioner—"that current medical standards should be considered in resolving *Atkins* claims," Pet. Br. 48. *See Agee*, 364 P.3d at 989-90.

By contrast, the Mississippi and Pennsylvania high courts adopted the most recent definitions only after determining that they did not effect a substantive change. *Chase*, 171 So. 3d at 471 ("The new definitions have not materially altered the diagnosis of intellectual disability but have provided new terminology."); *Bracey*, 117 A.3d at 273 n.4 ("As there is no substantive change to the definition of intellectual disability between the AAIDD and AAMR Manuals, we approve of the AAIDD Manual's definition." (citation omitted)). Notably, the Pennsylvania Supreme Court took the opposite approach from the Oregon Supreme Court regarding the DSM-5: it refused to apply the DSM-5 definition to an *Atkins* claim, or remand for a new hearing under that standard, because the DSM-5 had not been published at the time of the original *Atkins* hearing—even though the court believed that the DSM-5 had

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Hall requires it, not because that is the "current medical standard." Florida's substantive definition of intellectual disability has remained unchanged since 2001. Fla. Stat. § 921.137(1) (codifying 2001 Fla. Laws ch. 2001-202 (C.S.S.B. 238)).

North Carolina now mandates application of "[a]ccepted clinical standards" in "diagnosing significant limitations in intellectual functioning and adaptive behavior," N.C. Gen. Stat. § 15A-2005(a)(2), but the statute neither incorporates nor mirrors the DSM-5 or AAIDD 11th definitions. Rather, it still requires "significantly subaverage general intellectual functioning" and defines "significant limitations in adaptive functioning" as "[s]ignificant limitations in two or more . . . adaptive skill areas," *id.* § 15A-2005(a)(1), contrary to the DSM-5 and AAIDD 11th.

since "altered the DSM–IV's definition of adaptive functioning." *Bracey*, 117 A.3d at 273 & n.4.

In contrast to those four States, 24 of the States that have the death penalty employ definitions similar to Texas's both in their wording and in their apparent reference to older versions of the DSM or AAIDD formulations. *See* Appendix. In addition, while Pennsylvania has embraced the AAIDD 11th as one alternative definition, it has retained the DSM-IV definition as the other option—even after publication of the DSM-5. *Commonwealth v. Hackett*, 99 A.3d 11, 26-27 (Pa. 2014).[14]

Given that only four of the thirty States that impose the death penalty have adopted or required wholesale use of either the DSM-5 or the AAIDD 11th intellectual-disability definitions, and only one has done so in the name of following "current standards," there is nothing close to a national consensus that States must adopt either definition as the legal standard for *Atkins* claims.

3. Requiring States to strictly adhere to either the APA's or AAIDD's latest clinical definition would be unworkable and unwarranted.

As in *Atkins*, the Court's "independent evaluation of the issue" should "reveal[] no reason to disagree with the judgment" of the States. 536 U.S. at 321. A rule requiring States to strictly follow the APA's or AAIDD's latest clinical definition for *Atkins* purposes would be both unworkable and unwarranted.

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[14] Montana and New Hampshire have not defined intellectual disability specifically for *Atkins* purposes. New Hampshire's statutory definition for social services tracks the AAMD 8th definition. *See* Appendix.

The DSM-5 itself acknowledges that there is an "imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis." DSM-5 at 25. This Court has relied on and quoted identical language from previous DSM versions for this same proposition. *See Clark v. Arizona*, 548 U.S. 735, 775-76 (2006) (DSM-IV-TR); *Crane*, 534 U.S. at 413-14 (DSM-IV). Accordingly, the DSM-5 cautions that "[i]n most situations, the clinical diagnosis of a DSM-5 mental disorder such as intellectual disability . . . does not imply that an individual with such a condition meets legal criteria for the presence of a mental disorder or a specified legal standard (e.g. . . . disability)." DSM-5 at 25. The DSM-5's own "imperfect fit" disclaimer undermines petitioner's claim that States must strictly follow any published clinical definition of intellectual disability for *Atkins* claims.

Forcing the States to adopt a particular organization's latest clinical definition would create a dilemma, in any event, because the organizations' latest clinical definitions differ in many important aspects. Petitioner's preferred definitions—those found in the DSM-5 and the AAIDD 11th—differ in both terminology and substance:

- The DSM-5 provides that "[t]o meet diagnostic criteria for intellectual disability, the deficits in adaptive functioning must be *directly related* to the intellectual impairments described in Criterion A [intellectual functioning]." DSM-5 at 38 (emphasis added). The AAIDD 11th omits the relatedness requirement (which had appeared in the AAMR 9th).

- The AAIDD 11th provides that "significant limitations in adaptive behavior should be established through the use of standardized measures" and is "operationally defined as performance that is approximately two standard deviations below the mean." AAIDD 11th at 43. The DSM-5 does not set any performance threshold for standardized testing of adaptive functioning. *See* DSM-5 at 37-38.
- The AAIDD 11th requires intellectual disability to "originate[] before age 18." AAIDD 11th at 1. The DSM-5 requires onset of intellectual and adaptive deficits during the "developmental period." DSM-5 at 33.

Petitioner and some amici now attempt to downplay the differences between the definitions. *E.g.*, Pet. Br. 44 n.22; American Psychological Association Amicus Br. 7 n.3. But the AAIDD itself considered those inconsistencies "***disastrous from a public policy and service eligibility perspective***" when it commented on the final draft of the APA's DSM-5.[15] In particular, the AAIDD recommended that the DSM-5 definition be in "direct alignment" with the AAIDD 11th, because "[h]aving the two most authoritative manuals in the country defining 'intellectual disability' using different terminology and different definitions would create havoc in the . . . courts (especially in death penalty cases)." AAIDD May

[15] Letter from Sharon Gomez, President, AAIDD Bd. of Dirs., & Margaret A. Nygren, Exec. Dir. & CEO, AAIDD, to John Oldham, President, APA, at 3 (May 16, 2012), https://aaidd.org/docs/default-source/comments/aaidd-dsm5-comment-letter.pdf?s fvrsn=2 ("AAIDD May 2012 Letter") (emphasis in original).

2012 Letter, at 2. Petitioner's amicus The Arc of the United States shared that concern, urging that differences between the APA's and AAIDD's definitions "would cause significant confusion in . . . the courts."[16] Nonetheless, the published DSM-5 definition is not in "direct alignment" with the AAIDD 11th.

The AAIDD directed more pointed criticisms at the DSM-5 diagnostic criteria. For example, the AAIDD complained that the draft adaptive-deficit criterion was "neither consistent with either the AAIDD position nor with current psychometric literature." AAIDD May 2012 Letter, at 3. To that end, the AAIDD recommended that the DSM-5 be modified so that "a significant limitation in adaptive behavior is defined as deficits of approximately 2 or more standard deviations below the population mean in one or more aspects of adaptive behavior." *Id.* As noted above, the APA did not adopt that definition. Also, the AAIDD urged that the age of onset be changed to 18 years because the DSM-5's "lack of specificity in defining the end of the developmental period is fraught with potential for inconsistency in interpretation and application, and is inconsistent with the AAIDD position." *Id.* at 4; *accord* Arc 2012 Action Alert (explaining that the DSM-5's lack of a specific age of onset "will cause confusion and result in inconsistent use of developmental periods across states and jurisdictions"). That recommendation was also rejected.

The AAIDD's criticisms of the DSM-5 definition of intellectual disability are emblematic of the lack of con-

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[16] The Arc of the United States, *Action Alert: Voice Your Opinion on How Intellectual Disability is Defined* (June 11, 2012), http://www.thearcofshelby.org/news/?newsID=82 ("Arc 2012 Action Alert").

sensus within the medical community. In April 2013, the National Institute of Mental Health (NIMH) announced that "NIMH will be re-orienting its research away from DSM categories."[17] And the British Psychological Society criticized the DSM-5's reliance on "social norms" and "subjective judgments."[18]

The lack of medical consensus extends to the so-called "Flynn Effect." The DSM-5 officially recognizes that an IQ test score may be inflated by the "Flynn Effect," an observed rise in test scores over time "due to out-of-date test norms." DSM-5 at 37. Likewise, the AAIDD 11th provides that "best practices require recognition of a potential Flynn Effect" and recommends correcting IQ scores on older tests. AAIDD 11th at 37. Yet scholars continue to express "competing views" on this issue, *Ledford*, 818 F.3d at 638, and "it is not common practice to adjust IQ scores by a specific amount to account for the phenomenon," *McManus v. Neal*, 779 F.3d 634, 653 (7th Cir. 2015). In fact, a circuit split has arisen on whether, and how, to address the Flynn Effect.[19]

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[17] Thomas Insel, *Director's Blog: Transforming Diagnosis*, National Institute of Mental Health (Apr. 29, 2013), http://www.nimh.nih.gov/about/director/2013/transforming-diagnosis.shtml.

[18] The British Psychological Society, *Response to the American Psychiatric Association:* DSM-5 Development 2 (June 2011), http://apps.bps.org.uk/_publicationfiles/consultation-responses/DSM-5%202011%20-%20BPS%20response.pdf.

[19] *Compare Smith v. Ryan*, 813 F.3d 1175, 1185 & n.14 (9th Cir. 2016) (accepting, but not requiring, Flynn Effect evidence); *Ledford*, 818 F.3d at 640 (the Flynn Effect may be considered, but adjusting scores is not required); *Pruitt v. Neal*, 788 F.3d 248, 267 & n.2 (7th Cir. 2015) (the Flynn Effect need not be accepted and applied); *Hooks*, 689 F.3d at 1170 (adjusting scores for the

Similarly, the medical community criticized the DSM-5's lack of field testing. The DSM-5 neurodevelopmental workgroup used "literature review and expert opinion to reach consensus" on the revised intellectual disability diagnosis, but "[n]o field trials were conducted."[20] The Arc of the United States strongly opposed that decision, asserting that changes to the diagnostic criteria should not have been made "without first assessing the feasibility, clinical utility, reliability, and validity of the draft criteria." Arc 2012 Action Alert.

In sum, given the "imperfect fit" between clinical diagnoses and legal determinations, the disparities between the APA's and AAIDD's intellectual-disability definitions, and the divergent views in the medical community about those definitions' validity and reliability, the Court should not expand the role of the APA and AAIDD manuals in the *Atkins* analysis beyond what *Hall* already provides. It is proper for courts to "consult" and "consider" those resources, but they "do not dictate" the "legal determination of intellectual disability." *Hall*, 134 S. Ct. at 1993, 2000. Indeed, "it is precisely where such disagreement exists" among medical professionals "that legislatures have been afforded the widest latitude." *Hendricks*, 521 U.S. at 360 n.3.

Flynn Effect is not required); *Gray v. Epps*, 616 F.3d 436, 446 n.9 (5th Cir. 2010) (not accepting the Flynn Effect as scientifically valid), *with Black v. Bell*, 664 F.3d 81, 95 (6th Cir. 2011) (the Flynn Effect should be considered); *Walker v. True*, 399 F.3d 315, 323 (4th Cir. 2005) (requiring consideration of Flynn Effect evidence).

[20] James C. Harris, *New Terminology for Mental Retardation in DSM-5 and ICD-11*, 26 Current Op. in Psychiatry 260, 260-62 (2013).

4. Texas's definition of intellectual disability satisfies *Atkins* and *Hall*.

a. Texas's intellectual-disability standard for *Atkins* claims satisfies the Eighth Amendment, as the CCA has expressly adopted one of the clinical definitions—the AAMR 9th—cited in *Atkins* itself:

> [Intellectual disability] is a disability characterized by: (1) "significantly subaverage" general intellectual functioning; (2) accompanied by "related" limitations in adaptive functioning; (3) the onset of which occurs prior to the age of 18.

Briseno, 135 S.W.3d at 7 (quoting AAMR 9th at 5) (footnotes omitted); *see Atkins*, 536 U.S. at 308 n.3. And the Texas statutory definition that the CCA also approved for use in *Atkins* claims describes intellectual disability in very similar terms. *Briseno*, 135 S.W.3d at 7.[21] Moreover, in elaborating on the meaning of "significantly subaverage general intellectual functioning," which appears in both definitions, the CCA quoted the other clinical definition cited in *Atkins*—the DSM-IV-TR—in determining that this prong is "defined as an IQ of about 70 or below." *Id.* at 7 & n.24; *see Atkins*, 536 U.S. at 308 n.3. By selecting these particular criteria, Texas has closely heeded the "substantial guidance" that *Atkins* provides "on the definition of intellectual disability." *Hall*, 134 S. Ct. at 1999.

Since adopting these standards in *Briseno* in 2004, the CCA has applied them to grant relief on numerous

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[21] Tex. Health & Safety Code § 591.003(13) (now recodified at § 591.003(7-a)) (defining intellectual disability to mean "significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period").

Atkins claims.[22] Texas has thus fulfilled its role in "'developing appropriate ways to enforce the constitutional restrictions'" from *Atkins*, 536 U.S. at 317 (quoting *Ford*, 477 U.S. at 416-17).

b. Nothing in *Hall* calls into doubt Texas's intellectual-disability definition.

Hall identified two constitutional defects in Florida's *Atkins* standard. First, Florida employed a "strict IQ test score cutoff of 70," under which a person with a score above 70 conclusively "does not have an intellectual disability and is barred from presenting other evidence that would show his faculties are limited." *Hall*, 134 S. Ct. at 1994. Second, when considering IQ scores, Florida failed to account for the SEM, treating the score as "a fixed number" rather than "a range of scores on either side of the recorded score" "within which one may say an individual's true IQ score lies." *Id.* at 1995-96.

Neither defect afflicts Texas's *Atkins* jurisprudence or the CCA's decision here. *See infra* Part I.B.1. First, as this Court recognized in *Hall*, Texas does not have a strict IQ cutoff. *See* 134 S. Ct. at 1996-98 (list of States

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[22] *See, e.g.*, *Ex parte Martinez*, No. WR–58,358–02, 2016 WL 3457224 (Tex. Crim. App. June 15, 2016); *Ex parte Maldonado*, No. WR–51612–02, 2013 WL 2368771 (Tex. Crim. App. May 22, 2013); *Ex parte Smith*, No. AP-76906, 2012 WL 5450895 (Tex. Crim. App. Nov. 7, 2012); *Ex parte Plata*, No. AP-75820, 2008 WL 151296 (Tex. Crim. App. Jan. 16, 2008); *Ex parte Van Alstyne*, 239 S.W.3d 815 (Tex. Crim. App. 2007); *Ex parte Simms*, No. AP-75625, 2007 WL 602814 (Tex. Crim. App. Feb. 28, 2007); *Ex parte DeBlanc*, No. AP-75113, 2005 WL 768441 (Tex. Crim. App. Mar. 16, 2005); *Ex parte Valdez*, 158 S.W.3d 438 (Tex. Crim. App. 2004); *Ex parte Bell*, 152 S.W.3d 103 (Tex. Crim. App. 2004); *Ex parte Modden*, 147 S.W.3d 293 (Tex. Crim. App. 2004).

with impermissible IQ score cutoff did not include Texas); *see also Mays*, 757 F.3d at 218 ("Texas has never adopted the bright-line cutoff at issue in *Hall*."). When the CCA first adopted an intellectual-disability definition in *Briseno*, it expressly recognized that "[p]sychologists and other mental health professionals are flexible in their assessment of [intellectual disability]; thus, sometimes a person whose IQ has tested above 70 may be diagnosed as [having intellectual disability]." 135 S.W.3d at 7 n.24 (citing AAMD 8th at 23); *accord Ex parte Cathey*, 451 S.W.3d 1, 10 (Tex. Crim. App. 2014). To that end, the CCA has held that "[t]he IQ score is not . . . the exclusive measure of [intellectual disability]" and "applicants should be given the opportunity to present clinical assessment to demonstrate why his or her full-scale IQ score is within th[e test's] margin of error." *Ex parte Hearn*, 310 S.W.3d 424, 428, 431 (Tex. Crim. App. 2010).

Second, Texas law accounts for the SEM. The CCA acknowledged in *Briseno* that "IQ tests differ in content and accuracy." 135 S.W.3d at 7 n.24. Accordingly, the CCA accounts for the SEM in assessing IQ scores. *E.g.*, *Cathey*, 451 S.W.3d at 18 ("We agree that, taking the SEM into account, applicant's IQ score range is between 72 and 82."); *Hearn*, 310 S.W.3d at 428 (recognizing that "any score could actually represent a score that is five points higher or five points lower than the actual IQ").

c. Beyond rejecting a strict IQ score cutoff of 70 and requiring consideration of the SEM, *Hall* does not impose any general mandate that States adhere precisely to the latest clinical definitions promulgated by the APA and AAIDD. *See supra* Part I.A.1. Rather, *Hall* instructs States "to *consult* the medical community's

opinions" so that "the legal determination of intellectual disability," while "distinct from a medical diagnosis," is "*informed by* the medical community's diagnostic framework." 134 S. Ct. at 1993, 2000 (emphases added). The CCA complied with that directive here.

The state habeas trial court had departed from the CCA's precedent in recommending that petitioner's *Atkins* claim be granted. It reasoned that, because the CCA had adopted the AAMR 9th definition, the latest edition of that resource—the AAIDD 11th—necessarily provided the governing standard. Pet. App. 149a-150a. That was error, the CCA explained, not because the AAIDD 11th should be entirely disregarded, but for the more fundamental reason that a lower court cannot decide that controlling precedent no longer applies. Pet. App. 6a-7a; *cf. Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) (holding that circuit courts should "leav[e] to this Court the prerogative of overruling its own decisions").

Taking up the question of changing standards itself, the CCA did exactly as *Hall* instructed. It acknowledged that, since its 2004 adoption of legal definitions of intellectual disability for *Atkins* claims, the APA and AAIDD had revised their diagnostic manuals. Pet. App. 3a-4a & nn.2-3 (quoting DSM-5 and AAIDD 11th), 6a-7a. But the CCA concluded that those revisions did not warrant a change in Texas's legal standard, reasoning that "the legal test we established in *Briseno* remains adequately 'informed by the medical community's diagnostic framework.'" Pet. App. 7a (quoting *Hall*, 134 S. Ct. at 2000).

To that point, the CCA elaborated that Texas's standard "remains generally consistent with the

AAIDD's current definition." Pet. App. 7a n.5. A comparison of the two definitions confirms that assessment:

> Texas: Intellectual disability is "characterized by: (1) significantly subaverage general intellectual functioning; (2) accompanied by related limitations in adaptive functioning; (3) the onset of which occurs prior to the age of 18." *Briseno*, 135 S.W.3d at 7 (footnotes and internal quotation marks omitted).
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> AAIDD 11th: Intellectual disability is "characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18." AAIDD 11th at 1.

The AAIDD 11th itself recognizes that these "three criteria" in its current definition "have not changed substantially over the last 50 years," citing as proof a chart that includes the AAMR 9th definition Texas has adopted. *Id.* at 8, 12. Even most courts applying the latest clinical definitions agree, noting that those versions have not materially changed the intellectual-disability standard described in *Atkins*. *See Brumfield v. Cain*, 808 F.3d 1041, 1058 n.25 (5th Cir. 2015) (describing Louisiana's DSM-5-based statute); *Chase*, 171 So. 3d at 471; *Bracey*, 117 A.3d at 273 n.4. *But see Agee*, 364 P.3d at 988.

The CCA also correctly noted that Texas's requirement that adaptive deficits be "related" to intellectual impairments "is consistent with the APA's current position on this issue." Pet. App. 7a n.5, 10a n.9; *see Briseno*, 135 S.W.3d at 7; DSM-5 at 38 (explaining that "the deficits in adaptive functioning must be *directly*

related to the intellectual impairments described in Criterion A" (emphasis added)). Thus, although the AAIDD 11th definition omits that requirement, the CCA chose to retain it. Pet. App. 6a, 7a n.5.

After noting those definitional consistencies, the CCA relied on both the AAIDD 11th and the DSM-5 to explain specific clinical concepts relating to its analysis of petitioner's evidence. Pet. App. 64a & n.40 (citing AAIDD 11th at 38 regarding the "practice effect" on IQ testing); Pet. App. 73a & n.49 (citing AAIDD 11th at 35 to discredit the "mental age" method of deriving IQ scores); Pet. App. 87a & n.57 (citing DSM-5 to clarify "executive-functioning" measures).

Having thus "consider[ed]" various clinical definitions of intellectual disability and "consult[ed]" them where it deemed appropriate, the CCA complied with *Hall*. 134 S. Ct. at 1993. The CCA's informed decision not to go further and adopt either the AAIDD 11th or DSM-5 wholesale as Texas's legal standard presents no error.

B. The Court of Criminal Appeals Correctly Concluded That Petitioner Did Not Meet His Burden to Prove Intellectual Disability.

The CCA correctly held that petitioner failed to establish that he is exempt from execution under *Atkins*. He failed to prove by a preponderance of the evidence that he has either significantly subaverage intellectual functioning or significant and related limitations in adaptive functioning. Pet. App. 63a-91a.

In reaching that conclusion, the court relied primarily on expert testimony. *See id.* That reliance pretermits petitioner's complaint that the CCA erred by not using the DSM-5 or AAIDD 11th definitions of intellectual disability. Pet. Br. 32. Both resources emphasize the

importance of clinical assessment in evaluating intellectual and adaptive functioning. DSM-5 at 37 (explaining that "[c]linical training and judgment are required to interpret test results and assess intellectual performance" and that "[a]daptive functioning is assessed using both clinical evaluation and individualized, culturally appropriate, psychometrically sound measures"); AAIDD 11th at 11 (noting "the essential role of clinical judgment"). And there is no suggestion that the experts here employed outdated definitions to deliver unreliable opinions.

Only one of the three experts that met with petitioner for the purpose of assessing intellectual disability concluded that he is intellectually disabled.[23] Wright, one of petitioner's experts in his penalty-phase retrial, concluded that petitioner is "nowhere near" intellectually disabled. J.A. 269. Compton, the only forensic psychologist to examine petitioner and the only expert to administer a full-scale standardized test for intellectual functioning, also concluded that petitioner is not intellectually disabled. J.A. 185. Borda, one of petitioner's experts at his *Atkins* hearing, concluded that petitioner is intellectually disabled after conducting only a "very, very brief assessment" of him. J.A. 28. Acting in its role as fact finder, the CCA weighed the evidence and the experts' credibility and reasonably concluded that petitioner did not meet his burden under *Atkins*.

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[23] Anderson met with petitioner, but did so for the purpose of determining whether petitioner had a brain anomaly or traumatic brain injury. J.A. 91-92.

1. The CCA correctly held that petitioner failed to meet his burden on intellectual functioning.

For the first prong of the intellectual-disability standard, petitioner had to show "significantly subaverage general intellectual functioning." Pet. App. 5a. That is "generally shown" by an IQ score of 70 or less, Pet. App. 5a-6a, taking into account a SEM of five points, Pet. App. 8a. That standard was confirmed by Compton's testimony, *see* J.A. 135, and generally conforms to the latest clinical definitions, DSM-5 at 37 (explaining that, "[o]n tests with a standard deviation of 15 and a mean of 100" and a SEM of 5 points, persons with intellectual disability will have "a score of 65-75 (70 ±5)"); AAIDD 11th at 31 (recognizing that "intellectual functioning is currently best represented by IQ scores" and the criterion for an intellectual-disability diagnosis is "an IQ score that is approximately two standard deviations below the mean, considering the [SEM]"). The CCA correctly held that petitioner failed to meet this standard.

Relying on expert testimony, the CCA determined that petitioner's only reliable IQ scores were the 78 on the WISC at age 13 and the 74 on the WAIS-R at age 30. Pet. App. 73a. Those exams were full-scale, individually administered tests. J.A. 143-44; Pet. App. 24a; *cf.* AAIDD 11th at 31 (recognizing that intellectual functioning is "best represented by IQ scores when they are obtained from appropriate, standardized[,] and individually administered" tests); DSM-5 at 37 (calling for IQ tests that are "individually administered"). Petitioner's expert Greenspan described the WISC as the "gold standard." J.A. 116.

The CCA did not consider petitioner's remaining scores—including scores of 77 and 85—because they all suffered from some expert-identified flaw: they came from exams that were non-comprehensive, group-administered, or neuropsychological tests rather than IQ tests; the scores were derived using discredited methods; or petitioner exhibited suboptimal effort. Pet. App. 64a-73a; J.A. 12-13, 55, 57, 115-16, 144, 154, 203. This decision to rely only on certain scores was not "cherry picking," as petitioner insists. Pet. Br. 36. The CCA declined to consider scores both below *and above* the scores from the two tests it found most reliable, and this analysis was based on the record and expert guidance. *Cf. Hall*, 134 S. Ct. at 1992 (noting uncritically that "the sentencing court excluded the two scores below 70 for evidentiary reasons").

Consistent with *Hall* and its own precedent, the CCA then applied the SEM to petitioner's valid IQ scores to derive ranges of possible results: the WISC score of 78 yielded a 73-83 range, and the WAIS-R score of 74 yielded a 69-79 range. Pet. App. 74a-75a. Thus, petitioner's claim that the CCA "ignor[ed] that [his] IQ scores must be treated as ranges, not precise numbers," Pet. Br. 37, is wrong.

Rather than applying a strict IQ cutoff to those scores or their ranges, the CCA considered other factors to get a complete picture of petitioner's intellectual functioning. Pet. App. 74a-75a. The court noted that the use of "now-outmoded version[s]" of the tests may have placed petitioner's true score in the lower portions of those ranges, *id.*—a reference to the disputed Flynn Effect recognized by the DSM-5 and AAIDD 11th, *see supra* p.31, which the court discussed earlier in its opinion, Pet. App. 8a. But other factors referenced by ex-

perts tended to place petitioner's true score in the higher reaches of those ranges. Pet. App. 74a-75a. Those factors included: petitioner's "impoverished" background, Pet. App. 74a, which Greenspan observed could cause an IQ score to underestimate intelligence, Pet. App. 67a; his "history of academic failure," Pet. App. 75a, which Greenspan testified could adversely affect testing effort, Pet. App. 69a, and which implicated Borda's testimony that the Wechsler tests were "oriented towards academic abilities," J.A. 23; and his traumatic childhood and depressive behavior in prison, Pet. App. 74a-75a, both of which Compton testified could have negatively affected his testing performance, J.A. 144-45. In light of all these considerations, the CCA reasonably concluded that petitioner's valid IQ scores fairly represented his intellectual functioning as being above the range of intellectual disability. Pet. App. 75a.

Petitioner ultimately concedes that the CCA treated his IQ scores as ranges, but complains that the court "did not give [him] the benefit of this range." Pet. Br. 37-38. Nothing in *Hall*, however, requires courts to treat a SEM-based range of scores whose lower end extends below 70 as the end of the intellectual-functioning inquiry. To the contrary, in those circumstances *Hall* contemplates that other evidence of intellectual capacity may be considered. *See* 134 S. Ct. at 1995. Clinical definitions likewise do not treat application of the SEM as conclusive. *See* AAIDD 11th at 36, 41 (explaining that the SEM "must be *part of* any decision concerning a diagnosis" and that assessing intellectual functioning "may, at times, require information from multiple sources" (emphasis added)).

Additional analysis may yield a finding that the upper end of the SEM range better reflects the offender's

true intellectual functioning. *See Ledford*, 818 F.3d at 640-41 (holding that the SEM "is merely a factor to consider when assessing an individual's intellectual functioning—one that may benefit or hurt that individual's *Atkins* claim, depending on the content and quality of expert testimony presented"); *Mays*, 757 F.3d at 218 n.17 (observing that the SEM "is not a one-way ratchet" and that even an offender with a score range that extends below 70 may fail to meet the first prong if "other evidence presented provides sufficient evidence of his intellectual functioning"). That is what the CCA concluded here based on a thorough analysis of the expert evidence. Pet. App. 74a-75a.

To the extent petitioner's complaint is that the CCA treated his intellectual functioning (not just IQ scores) as dispositive of his *Atkins* claim, and did not allow him to prove intellectual disability through a stronger showing on *adaptive functioning*, *see* Pet. Br. 36-37 & n.17, he misreads the Court's decisions in *Hall* and *Brumfield v. Cain*, 135 S. Ct. 2269 (2015). As an initial matter, the CCA fully considered and rejected his adaptive-functioning arguments. Pet. App. 75a-89a; *see infra* Part I.B.2. Regardless, *Hall* and *Brumfield* establish that, due to the inherent imprecision in IQ testing, a score between 70 and 75 *alone* cannot defeat an *Atkins* claim, and in that circumstance a sufficient showing on the adaptive-functioning prong may establish intellectual disability. *Hall*, 134 S. Ct. at 2000 (concluding that "an individual with an IQ test score between 70 and 75 or lower may show intellectual disability by presenting additional evidence regarding difficulties in adaptive functioning" (citation and internal quotation marks omitted)); *Brumfield*, 135 S. Ct. at 2278 (finding it unreasonable to conclude that "Brumfield's reported IQ

score of 75 somehow demonstrated that he could not possess subaverage intelligence"). But those cases do not hold that such a score is conclusive in the other direction—that is, a court is foreclosed from considering other evidence that would place an individual's true intellectual-functioning above that represented by an IQ score of 75. *See Hall*, 134 S. Ct. at 1996 (noting that "States which use a bright-line cutoff at 75 or greater . . . are not included alongside Florida in this analysis").

2. The CCA correctly held that petitioner failed to meet his burden on adaptive functioning.

For the second prong of the intellectual-disability standard, petitioner had to establish "significant limitations in adaptive functioning." Pet. App. 6a. This inquiry "refers to the ordinary skills that are required for people to function in their everyday lives." Pet. App. 9a. Here the CCA noted its "approval [of] the AAIDD's grouping of adaptive behavior into three areas (conceptual skills, social skills, and practical skills) for purposes of making a clinical diagnosis." *Id.*; *accord* AAIDD 11th at 1. That standard was confirmed by Compton's testimony, *see* J.A. 135, and further conforms to the APA's current standard, DSM-5 at 37 ("Adaptive functioning involves adaptive reasoning in three domains: conceptual, social, and practical."). The CCA correctly held that petitioner failed to satisfy this prong as well.

The CCA relied almost exclusively on expert evidence in concluding that petitioner did not prove significant limitations in adaptive functioning. Pet. App. 75a-88a. The court exhaustively recounted each expert's testimony, Pet. App. 75a-85a, and ultimately found Compton's opinion "far more credible and reliable" than those of petitioner's experts, Pet. App. 85a. That finding

rested on Compton's status as the only expert who specialized in forensic psychology, who fully reviewed petitioner's records (including those from judicial proceedings and prison), and who personally evaluated petitioner at length for the purpose of assessing intellectual disability. *Id.*; *see* J.A. 141-45. In contrast, the court found petitioner's experts to be less credible because, among other things, they reviewed "relatively limited material" and only Borda had examined petitioner for an intellectual-disability diagnosis, and then only briefly. Pet. App. 86a.[24]

Compton noted adaptive behavior in various ways, such as that petitioner lived on the streets, played pool for money, and mowed lawns. J.A. 146. The facts of the crime (wearing a wig, concealing the gun, absconding to Louisiana) and petitioner representing himself pro se, Compton testified, confirmed that petitioner was capable of abstract thought. J.A. 147-48, 182-83. Compton also found it significant that petitioner's experts from his penalty-phase retrial both attributed his withdrawn behavior to emotional problems, rather than intellectual disability, and recognized that his adaptive functioning improved in prison. J.A. 184. Petitioner's prison records indicated adaptive skills, including social skills, according to Compton. J.A. 160-62, 168-69. Because Compton determined that "[petitioner's] level of adaptive functioning had been too great, even before he went to pris-

[24] Greenspan refused to offer a diagnosis because he did not personally assess him. J.A. 120. Vitale's and Garnett's affidavits state that they reviewed some of petitioner's judicial-proceeding and prison records, but the CCA did not consider their affidavits because they did not testify at the hearing and therefore their opinions were not tested through the adversarial process. Pet. App. 85a n.56.

on, to support an intellectual disability diagnosis," the court held that he had failed to satisfy the adaptive-functioning prong. Pet. App. 88a; J.A. 185.

Given the DSM-5's and AAIDD 11th's emphasis on clinical judgment, the CCA's reasonable finding that Compton's qualifications and depth of review made her expert opinion the most credible, and the absence of any indication that Compton applied outdated methodology, petitioner's claim that the CCA "completely ignored the current diagnostic framework in assessing [his] adaptive deficits" falls flat. Pet. Br. 41. Moreover, the three arguments petitioner makes to support that charge should be rejected.

Petitioner's primary complaint is that the CCA purportedly weighed his adaptive deficits against his adaptive strengths to reject his showing on adaptive functioning. Pet. Br. 40-42. But all the "weighing" that petitioner attributes to the CCA occurs in its narrative recounting of Compton's testimony. Pet. App. 80a-88a. That discussion matters less than the CCA's ultimate endorsement of Compton's expert *conclusion* based on her credibility and reliability. Pet. App. 85a-86a, 88a. That conclusion was "I do not have the adaptive *deficits* for a diagnosis [of intellectual disability]," J.A. 185 (emphasis added), which comports precisely with petitioner's view of the proper standard, Pet. Br. 39-40.

In all events, because petitioner's *Atkins* claim calls for a "legal determination" rather than a "medical diagnosis," *Hall*, 134 S. Ct. at 2000, a discussion of petitioner's adaptive strengths was not impermissible even if a clinician would not consider them. This Court has suggested that the "degree of advanced planning" and "acquisition of a car and guns" for a crime would at least "arguably" be evidence of "adaptive skills" that "cut

against [a] claim of intellectual disability." *Brumfield*, 135 S. Ct. at 2280-81. Various circuits agree that adaptive strengths may be considered in evaluating *Atkins* claims. *See, e.g.*, *Hooks*, 689 F.3d at 1172 ("Both strengths and deficiencies enter into this equation because they make up the universe of facts tending to establish that a defendant either has 'significant limitations' or does not."); *Ortiz v. United States*, 664 F.3d 1151, 1169 (8th Cir. 2011) ("Consideration of an individual's strengths may often prove necessary to provide context and definition for consideration of reported deficits."); *Clark v. Quarterman*, 457 F.3d 441, 447 (5th Cir. 2006) (noting that "evidence of a strength in a particular area of adaptive functioning necessarily shows that the defendant does not have a weakness in that particular area").

Petitioner also faults the CCA's reference to his adaptive skills in prison. Pet. Br. 42. Again, though, that reference appeared in the recounting of testimony from Compton, Pet. App. 80a-85a, who ultimately concluded that "[e]ven before prison" petitioner's adaptive functioning would not support an intellectual-disability diagnosis, J.A. 185. That explanation comports with the DSM-5, which states that assessing adaptive functioning in prison settings is "difficult" (not impossible) and that "corroborative information reflecting functioning outside those settings should be obtained." DSM-5 at 38.

Finally, petitioner claims that the CCA's analysis somehow conflicts with clinicians' current "greater emphasis on the crucial role of adaptive deficits in a diagnosis of intellectual disability." Pet. Br. 42. But once again, the CCA's conclusion on adaptive functioning rested almost entirely on the expert opinion of Comp-

ton, who testified that "the majority of the emphasis" in diagnosing intellectual disability "is now with adaptive deficits or adaptive functioning." J.A. 136. And petitioner's lack of adaptive deficits was the central basis for her determination that he is not intellectually disabled. J.A. 185.

3. The CCA correctly held that petitioner failed to meet his burden to show that his asserted adaptive functioning deficits are directly "related" to his asserted intellectual functioning deficits.

Even if petitioner had met his burden to prove significantly subaverage intellectual functioning and significant limitations in adaptive functioning, he was still required to show further that the adaptive deficits are "related" to limited intellectual functioning. Pet. App. 6a. As discussed above, the CCA originally adopted this "relatedness" requirement from the AAMR 9th, *Briseno*, 135 S.W.3d at 7 (quoting AAMR 9th at 5), and it currently appears in the DSM-5's discussion of diagnostic features, DSM-5 at 38 ("To meet diagnostic criteria for intellectual disability, the deficits in adaptive functioning must be *directly related* to the intellectual impairments described in Criterion A." (emphasis added)). The CCA correctly concluded, as a second alternative holding, that petitioner also failed to satisfy this relatedness prong. Pet. App. 88a.

The CCA found that the record "overwhelmingly" showed that numerous factors affected petitioner's adaptive functioning before age 18. Pet. App. 88a-89a. Those factors included emotional and physical abuse, undiagnosed learning disorders, frequent transfers to different schools, racially motivated harassment and

violence, and drug abuse. *Id.* The CCA also noted that, when those factors were largely removed from petitioner's life due to his imprisonment, he showed "significant advances" in adaptive behavior. Pet. App. 89a. Thus, the CCA reasonably concluded that petitioner had not proven by a preponderance of the evidence that his asserted adaptive deficits were "related" to limitations in intellectual functioning. Pet. App. 88a-89a.

Petitioner complains that the CCA's reading of the relatedness requirement is "clinically unwarranted." Pet. Br. 43. Without citing authority, petitioner contends that the clinical relatedness inquiry is "routine and unexceptional," and serves only to exclude "common-sense" explanations for adaptive deficits, such as blindness or cultural differences. *Id.* And he urges that the CCA's view imposes an unreasonable causation requirement given that "environmental challenges and other disorders" can co-exist with intellectual disability. *Id.* at 44-45.

Petitioner's call for a strict clinical application of the relatedness requirement is misplaced. Because a clinical diagnosis of intellectual disability is directed at "develop[ing] a profile of needed supports" to "improve" "life functioning," *see* AAIDD 11th at 1, it may indeed "make[] clinical sense" to examine only whether adaptive deficits are related to "a wholly different factor," Pet. Br. 43, so that inapt or ineffective support systems are not prescribed. But the law requires more. Simply because environmental challenges and other disorders "can" co-exist with intellectual disability, *id.* at 44, does not mean that they always do. And the law does not exempt from execution a person whose adaptive deficits are associated with environmental challenges or per-

sonality disorders, as opposed to intellectual-functioning deficits.

On this prong, then, the "distinct[ion]" between "a legal determination" and a "medical diagnosis" is significant. *See Hall*, 134 S. Ct. at 2000. Accordingly, the CCA reasonably requires *Atkins* claimants to show a direct relationship between adaptive deficits and limitations in intellectual functioning "rather than some other cause." Pet. App. 10a. Petitioner failed to do that here.

II. Alternatively, This Court Could Remand for the Court of Criminal Appeals to Give Further Consideration to the Most Recent Clinical Definitions of Intellectual Disability.

As explained above, the CCA's careful analysis of the legal standard and expert testimony "consult[ed] the medical community's opinions," *Hall*, 134 S. Ct. at 1993, as reflected in the APA's and AAIDD's latest intellectual-disability definitions. If the Court concludes that the CCA did not sufficiently consult these sources, then the appropriate remedy would not be to install part or all of those definitions as a national *Atkins* standard. After all, the alleged error that petitioner asks this Court to review and correct is the CCA's purported "decision to prohibit consideration of the medical community's *current* 'diagnostic framework.'" Pet. Br. 24. By definition, then, the redress for that claimed injury would be a remand with instructions to give due "consideration" to that framework.

In that sense, this issue resembles judicial review of an administrative agency's action. Just as this Court reserves a "critical role" for States to exercise some discretion in substantively implementing *Atkins*, *Hall*, 134 S. Ct. at 1998, courts do not substitute their judg-

ment for that of an agency in reviewing a rule or policy, *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009). And just as the Court expects States to "consult the medical community's opinions" in "determining who qualifies as intellectually disabled," *Hall*, 134 S. Ct. at 1993, so must an administrative agency "examine the relevant data and articulate a satisfactory explanation for its action," *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

If an agency fails to provide a sufficiently reasoned explanation, the proper remedy is to remand to the agency for additional explanation. *E.g.*, *id.* at 34. Similarly, if the Court concludes that the CCA did not sufficiently consider the latest clinical guidance in resolving this *Atkins* claim, it should remand so that the CCA may sufficiently "consult" those sources and provide further explanation regarding whether its intellectual-disability definition remains "informed by the medical community's diagnostic framework." *Hall*, 134 S. Ct. at 1993, 2000.

III. The Optional *Briseno* "Relatedness" Factors Do Not Render Texas's Three-Part Definition of Intellectual Disability Unconstitutional.

Petitioner and his amici focus significant portions of their arguments on optional evidentiary factors that the CCA in *Briseno* approved for use in analyzing whether adaptive deficits are "related" to limitations in intellectual functioning. *E.g.*, Pet. Br. 49-59; ABA Amicus Br. 10-16; ACLU Amicus Br. 8-30; American Psychological Association Amicus Br. 16-26; AAIDD Amicus Br. 29-33. Those efforts are misdirected.

A. When the CCA in *Briseno* adopted standards for resolving *Atkins* claims, it noted that the court would not simply be choosing between competing expert opinions, but also would be considering "all of the evidence" that bore on the question. 135 S.W.3d at 8-9. To that end, the court identified seven optional "evidentiary factors" that factfinders "might also focus upon in weighing evidence as indicative of [intellectual disability] or of a personality disorder." *Id.* at 8.

Those factors will be discussed below, but one aspect of the CCA's prefatory statement warrants significant attention. The words "might also" mean that the *Briseno* factors are purely an optional suggestion that is not part of Texas's three-part definition of intellectual disability. *Cf.* Pet. Br. 49. The CCA has expressly confirmed this:

> [T]hose factors are not part of the definition of "intellectual disability," and trial and appellate courts may ignore some or all of them if they are not helpful in a particular case.

Cathey, 451 S.W.3d at 10 n.22; *accord Ex parte Sosa*, 364 S.W.3d 889, 892 (Tex. Crim. App. 2012) (noting that "we did not make consideration of any or all of these factors mandatory").

The CCA's discussion of the *Briseno* factors in this case demonstrates their optional nature and limited purpose. The CCA first determined that petitioner failed to carry his burden on the intellectual-functioning prong, and that failure alone was fatal to his *Atkins* claim. Pet. App. 63a-75a. The court went on to hold, in the alternative, that petitioner had not established significant limitations in adaptive functioning under the second prong. Pet. App. 75a-88a. That, too, independently sufficed to defeat petitioner's claim. The

court then held, in the *further* alternative, that even if petitioner had shown the requisite significant adaptive deficits, he had not made the necessary "relatedness" showing that any adaptive deficits "were linked to significantly sub-average intellectual functioning." Pet. App. 88a. That conclusion was based primarily on the court's overall review of the record. Pet. App. 88a-89a & n.58.

Only then did the court note that, "[i]n addition," the optional *Briseno* factors weighed against a finding that petitioner's adaptive deficits were "related" to significantly subaverage general intellectual functioning. Pet. App. 89a. The ensuing discussion of those factors covers approximately two pages in the 92-page majority opinion. Pet. App. 89a-91a. To summarize, the CCA applied the optional *Briseno* factors to *bolster* a *second alternative* holding on petitioner's *Atkins* claim. The optional *Briseno* factors therefore had an attenuated and extraneous role in this case and have no bearing on the question presented.

B. To the extent that the optional *Briseno* factors' validity is at issue here, they are a legitimate tool developed to help courts implement *Atkins*. Each of the factors is grounded in this Court's precedent:

- "Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he [had an intellectual disability] at that time, and, if so, act in accordance with that determination?" *Briseno*, 135 S.W.3d at 8. *Hall* endorsed this sort of inquiry, noting that Hall's "substantial and unchallenged evidence of intellectual disability" included "that his teachers identified him on numerous occa-

sions as '[m]entally retarded'" and that "Hall's siblings testified that there was something 'very wrong' with him as a child." 134 S. Ct. at 1990-91.

- "Has the person formulated plans and carried them through or is his conduct impulsive?" *Briseno*, 135 S.W.3d at 8. *Atkins* referred to the diminished capacity to "control impulses" as a reason to exempt persons with intellectual disability from execution. 536 U.S. at 318, 320; *see also id.* at 306.
- "Does his conduct show leadership or does it show that he is led around by others?" *Briseno*, 135 S.W.3d at 8. *Atkins* observed that "in group settings" persons with intellectual disability "are followers rather than leaders." 536 U.S. at 318.
- "Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?" *Briseno*, 135 S.W.3d at 8. *Atkins* noted that persons with intellectual disabilities "have diminished capacities to understand and process information" and "to understand the reactions of others." 536 U.S. at 318; *see also id.* at 320.
- "Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?" *Briseno*, 135 S.W.3d at 8. *Atkins* explained that persons with intellectual disabilities "have diminished capacities to understand and process information," "to communicate,"

and "to engage in logical reasoning." 536 U.S. at 318; *see also id.* at 320.

- "Can the person hide facts or lie effectively in his own or others' interests?" *Briseno*, 135 S.W.3d at 8. This factor reflects *Atkins*'s comment that "the cold calculus that precedes the decision" to commit capital murder "is at the opposite end of the spectrum from behavior of [offenders with intellectual disability]." 536 U.S. at 319-20.
- "Putting aside any heinousness or gruesomeness surrounding [his] capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?" *Briseno*, 135 S.W.3d at 8-9. *Brumfield* states that the evidence that "cut against" intellectual disability included that "the underlying facts of Brumfield's crime might arguably provide reason to think that Brumfield possessed certain adaptive skills, as the murder for which he was convicted required a degree of advanced planning and involved the acquisition of a car and guns." 135 S. Ct. at 2280-81.

These optional *Briseno* evidentiary factors track specific applications of this Court's precedents regarding *Atkins* claims. Thus, the Fifth Circuit has repeatedly confirmed—both before and after *Hall*—that the *Briseno* factors present no constitutional concern. *Williams v. Stephens*, 761 F.3d 561, 572 (5th Cir. 2014); *Mays*, 757 F.3d at 217; *Chester*, 666 F.3d at 346-47.

But even if the Court were to disapprove of these optional *Briseno* factors, that would not warrant either

a rejection of Texas's three-part intellectual-disability standard (initially recognized separately in *Briseno*) or a reversal in this case. Those factors "are not part of the definition of 'intellectual disability'" in Texas, *Cathey*, 451 S.W.3d at 10 n.22, and the CCA's brief discussion of them here was unnecessary to its decision, *see* Pet. App. 89a.

C. In all events, any assessment of the optional *Briseno* factors—or Texas's separate three-part test for intellectual disability—should not be tainted by the strained efforts of petitioner and amicus ACLU to link them to *Briseno*'s fleeting mention of the character "Lennie" from the novel *Of Mice and Men*. *See* Pet. Br. 1, 21 n.15, 24, 26, 54 n.27, 56; ACLU Br. 3-7, 16-27. That lone literary reference has never been part of Texas's *Atkins* standard.

The context in which the "Lennie" reference appears in *Briseno* proves its irrelevance. The CCA began by noting that *Atkins* had left to the States "the task" of developing ways to implement the prohibition on executing persons with intellectual disability. 135 S.W.3d at 5 (quoting *Atkins*, 536 U.S. at 317). Because the CCA was undertaking that task in the Legislature's stead, it believed that the standard it adopted should reflect "a consensus of Texas citizens." *See id.* at 5, 6. Here, the CCA remarked: "Most Texas citizens might agree that Steinbeck's Lennie should, by virtue of his lack of reasoning ability and adaptive skills, be exempt." *Id.* at 6. "But," the court went on, the question remained whether there was "a national or Texas consensus" that the legal standard for *Atkins* claims should be co-extensive with the clinical standard for social services. *Id.* The court "decline[d] to answer that normative question without significantly greater assistance from the citi-

zenry acting through its Legislature." *Id.* The court therefore appropriately consulted the Legislature's intellectual-disability definition in the Texas Health and Safety Code, which it adopted for *Atkins* purposes along with the "similar" AAMR 9th definition. *Id.* at 6-8.

The "Lennie" comment should be understood for what it actually was: an aside. If redacted, the meaning of the paragraph would be unchanged—the CCA did not want to adopt an *Atkins* standard without consulting guidance from the Legislature. *Id.* The remark has nothing to do with the pre-existing definitions of intellectual disability that the CCA endorsed, *id.* at 8, nor does it inform the optional *Briseno* evidentiary factors that the court described later in the opinion, *id.* at 8-9.

If further proof were needed that petitioner's "Lennie" arguments are baseless, it may be found in the fact that the reference appears again only once in the CCA's majority opinions—while quoting a trial court's discussion, which appears in a footnote, in a case where the CCA *granted* an *Atkins* claim following the trial court's recommendation. *Van Alstyne*, 239 S.W.3d at 822 n.21.

CONCLUSION

The judgment of the Court of Criminal Appeals of Texas should be affirmed.

Respectfully submitted.

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Appendix

APPENDIX

COMPARISON OF STATE *ATKINS* STANDARDS AND CLINICAL DEFINITIONS[1]

STATE	CLOSEST CLINICAL DEFINITION	STATE *ATKINS* STANDARD
AL	DSM-IV-TR[2] or AAMR 9th[3]	*Ex parte Perkins*, 851 So. 2d 453, 456 (Ala. 2002)[4]
AZ	DSM-III-R[5]	Ariz. Rev. Stat. § 13-753(K)[6]
AR	DSM-III-R	Ark. Code § 5-4-618(a)(1)

[1] For each State that currently imposes the death penalty, this table identifies the clinical definition of intellectual disability that most closely corresponds to the State's standard for determining whether an offender is exempt from execution under *Atkins v. Virginia*, 536 U.S. 304 (2002). The "closest clinical definition" is the one that the State has either incorporated by reference or that uses the most similar language. Significant variations between a state standard and the closest clinical definition are noted.

[2] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed., Text Revision 2000).

[3] American Association on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* (9th ed. 1992).

[4] In *Perkins*, the Alabama Supreme Court adopted the clinical definitions cited in *Atkins*.

[5] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (3d ed., Rev. 1987).

[6] Arizona's standard also echoes the AAMD 8th definition in that it refers to "adaptive behavior" rather than "adaptive functioning" and uses the AAMD 8th definition of "adaptive behavior."

CA	DSM-IV-TR or AAMR 9th	*In re Hawthorne*, 105 P.3d 552, 556-57 (Cal. 2005)[7]
CO	AAMD 8th[8]	Colo. Rev. Stat. § 18-1.3-1101(2)
FL	AAMD 8th	Fla. Stat. § 921.137(1)
GA	DSM-III[9]	Ga. Code § 17-7-131(a)(3)[10]
ID	DSM-IV-TR	Idaho Code § 19-2515A(1)
IN	AAMR 10th[11]	Ind. Code § 35-36-9-2[12]
KS	AAMD 8th	Kan. Stat. § 76-12b01[13]

[7] California's statute appears to be modeled on the AAMD 8th definition. Cal. Penal Code § 1376(a). But the California Supreme Court has held that the standard derives from the two clinical definitions cited in *Atkins* (DSM-IV-TR and AAMR 9th) and that an adaptive-behavior showing must meet those formulations. *Hawthorne*, 105 P.3d at 556-57.

[8] American Association on Mental Deficiency, *Classification in Mental Retardation* (8th ed. 1983).

[9] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (3d ed. 1980).

[10] The third prong of Georgia's standard resembles the AAMD 8th more closely than the DSM-III in that it requires the first two prongs to have "manifested during the developmental period" rather than "before the age of 18."

[11] American Association on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* (10th ed. 2002).

[12] Indiana's definition differs from the AAMR 10th in that (1) it requires "substantial impairment of adaptive behavior" rather than "significant limitations . . . in adaptive behavior as expressed in conceptual, social, and practical skills"; and (2) the age of onset is 22. But the Indiana Supreme Court has described the two definitions as "very similar." *Pruitt v. State*, 834 N.E.2d 90, 108 (Ind. 2005).

KY	AAMD 8th	Ky. Rev. Stat. § 532.130(2)
LA	DSM-5[14]	La. Code Crim. Proc. art. 905.5.1(H)
MS	DSM-5 or AAIDD 11th[15]	*Chase v. State*, 171 So. 3d 463, 471 (Miss. 2015)
MO	AAMR 9th	Mo. Stat. § 565.030(6)
MT	None	None
NV	DSM-IV-TR and AAMR 10th	*Ybarra v. State*, 247 P.3d 269, 273-74 & n.6 (Nev. 2011) (en banc)[16]
NH	None	None[17]
NC	AAMR 9th	N.C. Gen. Stat. § 15A-2005(a)(1)
OH	AAMR 9th	*State v. Lott*, 779 N.E.2d 1011, 1014 (Ohio 2002) (per curiam)

[13] Kansas recently eliminated the age-of-onset requirement. 2016 Kan. Laws ch. 108 (H.B. 2049).

[14] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed. 2013).

[15] American Association on Intellectual and Developmental Disabilities, *Intellectual Disability: Definition, Classification, and Systems of Supports* (11th ed. 2010).

[16] Nevada's statute appears to be modeled on the AAMD 8th definition. Nev. Rev. Stat. § 174.098(7). But the Nevada Supreme Court has held that the DSM-IV-TR and AAMR 10th "provide useful guidance in applying" the statute because of the definitions' "similarities." *Ybarra*, 247 P.3d at 274.

[17] New Hampshire's intellectual-disability definition for social services, N.H. Rev. Stat. § 171-A:2(XI-a), tracks the AAMD 8th, but it has not been adopted for or applied to *Atkins* claims.

OK	AAMR 9th	Okla. Stat. tit. 21, § 701.10b(A)-(B)
OR	DSM-5	*State v. Agee*, 364 P.3d 971, 990 (Or. 2015) (en banc)
PA	DSM-IV-TR or AAIDD 11th	*Commonwealth v. Bracey*, 117 A.3d 270, 273 & n.4 (Pa. 2015)
SC	AAMD 8th	S.C. Code § 16-3-20(C)(b)(10)
SD	AAMR 9th	S.D. Codified Laws § 23A-27A-26.2
TN	AAMD 8th	Tenn. Code § 39-13-203(a)[18]
TX	AAMR 9th	*Ex parte Briseno*, 135 S.W.3d 1, 7-8 & n.26 (Tex. Crim. App. 2004)
UT	DSM-IV-TR	Utah Code § 77-15a-102[19]
VA	AAMR 10th	Va. Code § 19.2-264.3:1.1(A)[20]

[18] The Tennessee Supreme Court has stated that its interpretation of this statute is consistent with the AAIDD 11th and the DSM-IV-TR. *Coleman v. State*, 341 S.W.3d 221, 244-47 (Tenn. 2011).

[19] Utah's statute is unlike any clinical definition in that (1) it requires adaptive deficits "that exist primarily in the areas of reasoning or impulse control, or in both of these areas"; and (2) the age of onset is 22. But the Utah Supreme Court has opined that the DSM-IV-TR definition is "much like our statute." *State v. Maestas*, 299 P.3d 892, 948 n.245 (Utah 2012).

[20] The first prong of Virginia's standard resembles the AAMR 9th more closely than the AAMR 10th in that it requires "significantly subaverage intellectual functioning" as opposed to "significant limitations . . . in intellectual functioning."

WA	AAMD 8th	Wash. Rev. Code § 10.95.030(2)
WY	AAMD 8th	Wyo. Stat. § 8-1-102(a)(xiii)