

BREYER, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 04–514

**RICKY BELL, WARDEN, PETITIONER *v.* GREGORY
THOMPSON**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT**

[June 27, 2005]

JUSTICE BREYER, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE GINSBURG join, dissenting.

This capital case arises out of unusual circumstances—circumstances of a kind that I have not previously experienced in the 25 years I have served on the federal bench. After an appellate court writes and releases an opinion, but before it issues its mandate, the writing judge, through happenstance, comes across a document that (he reasonably believes) shows not only that the court’s initial decision is wrong but that the decision will lead to a serious miscarriage of justice. What is the judge to do?

What the judge did here was to spend time—hundreds of hours (while a petition for certiorari was pending before this Court and during the five months following our denial of the petition for rehearing)—reviewing the contents of the vast record with its many affidavits, reports, transcripts, and other documents accumulated in the course of numerous state and federal proceedings during the preceding 20 years. The judge ultimately concluded that his initial instinct about the document was correct. The document was critically important. It could affect the outcome of what is, and has always been, the major issue in the case. To consider the case without reference to it could mean a miscarriage of justice.

The judge consequently wrote a lengthy opinion (almost

BREYER, J., dissenting

30,000 words) explaining what had happened. The other members of the panel did not agree with everything in that opinion, but they did agree that their initial decision must be vacated.

The Court commendably describes what occurred as follows: A “dedicated judge discovered what he believed to have been an error, and we are respectful of the Court of Appeals’ willingness to correct a decision that it perceived to have been mistaken.” *Ante*, at 18. The Court, however, does not decide this case in a manner consistent with that observation. A somewhat more comprehensive account of the nature of the “error”—of the matter at stake, of the importance of the document, of the mystery of its late appearance, of the potential for a miscarriage of justice—should help make apparent the difficult circumstance the panel believed it faced. It will also explain why there was no “abuse” of discretion in the panel’s effort to “correct a decision that it perceived to have been mistaken.”

I

Judge Suhrheinrich, the panel member who investigated the record, is an experienced federal judge, serving since 1984 as a federal trial court judge and since 1990 as a federal appellate judge. He wrote a lengthy account of the circumstances present here. To understand this case, one must read that full account and then compare it with the Court’s truncated version. I provide a rough summary of the matter based upon my own reading of his opinion. 373 F. 3d 688, 692–742 (CA6 2004).

A

The panel’s initial decision, issued on January 9, 2003, focused upon an issue often raised when federal habeas courts review state proceedings in a capital case, namely, the effectiveness of counsel at the original trial. 315 F. 3d 566, 587–594 (CA6 2003). See *Strickland v. Washington*,

BREYER, J., dissenting

466 U. S. 668 (1984). In this instance, the federal ineffective-assistance claim was that state trial counsel had not sufficiently investigated the background of the defendant, Gregory Thompson. Thompson claimed that an adequate investigation would have shown, to the satisfaction of testifying experts, that he suffered from episodes of schizophrenia at the time of the crime. The schizophrenia—though episodic—would have proved a mitigating circumstance at the penalty phase. 373 F. 3d, at 697–698, and n. 4.

Thompson’s trial took place in a Tennessee state court, where he was found guilty of murder and sentenced to death. His state-appointed counsel put on no defense at trial. At sentencing, however, counsel sought to show that Thompson was schizophrenic. State forensic psychologists examined Thompson and concluded that Thompson, probably “malingered,” did not show genuine and significant symptoms of schizophrenia at that time and was not mentally ill. A clinical psychologist hired by Thompson’s counsel examined Thompson for eight hours and reached approximately the same conclusion: he said that Thompson was not *then* mentally ill. *Id.*, at 692, 694–695.

Thompson raised the issue of his mental condition in state postconviction proceedings, which he initiated in 1990. His expert witness, Dr. Gillian Blair, testified (with much supportive material) that Thompson was by that time clearly displaying serious schizophrenic symptoms—voice illusions, attempts at physical self-mutilation, and the like. Indeed, the State conceded that he was under a regime of major antipsychotic medication. But Dr. Blair said that she could not determine whether Thompson had been similarly afflicted (*i.e.*, suffering from episodes of schizophrenia) at the time of the crime without a thorough background investigation—funds for which the state court declined to make available. The state court then ruled in the State’s favor. *Id.*, at 694–695.

BREYER, J., dissenting

Thompson filed a habeas petition in Federal District Court about eight months after the state court's denial of postconviction relief became final. As I said above, see *supra*, at 3, he claimed ineffective assistance of counsel. The Federal District Court appointed counsel, an assistant federal public defender. Counsel then obtained the services of two experts, Dr. Barry Crown and Dr. Faye Sultan. Both examined Thompson, and the latter, Dr. Sultan, conducted the more thorough background investigation that Dr. Blair had earlier sought. The State, after deposing Dr. Sultan, moved for summary judgment. 373 F. 3d, at 696, 700–704, 711.

The District Court granted that motion on the ground that “Thompson has not provided this Court with anything other than factually unsupported allegations that he was incompetent at the time he committed the crime,” nor “has Thompson provided this Court with any significant probative evidence that [he] was suffering from a significant mental disease that should have been presented to the jury during the punishment phase as mitigation evidence.” *Id.*, at 712–713 (quoting District Court's memorandum opinion (emphasis and internal quotation marks omitted)).

Thompson (now with a new public defender as counsel) appealed the District Court's grant of summary judgment in the State's favor. (A little over a year later, while the appeal was still pending, Thompson's new counsel, apparently having discovered that Dr. Sultan's deposition and report had not been included in the record before the District Court, filed a motion in that court for relief from judgment under Federal Rule of Civil Procedure 60(b), seeking to supplement the record with those documents. Counsel also filed a motion in the appellate court, with the Sultan deposition attached, requesting that the appeal be held in abeyance while the District Court considered the Rule 60(b) motion. Both motions were denied, and Thompson's counsel did not take an appeal from the Dis-

BREYER, J., dissenting

trict Court’s denial of the Rule 60(b) motion.) 373 F. 3d, at 714–715, and n. 10, 724–725.

The Court of Appeals reviewed the District Court’s grant of summary judgment. In doing so, the appellate panel examined the record before that court. It noted that Thompson’s federal habeas counsel had hired two experts (Crown and Sultan), and had told the court (in an offer of proof) that they would provide evidence that Thompson suffered from mental illness *at the time of the crime*. But the appellate panel found that neither expert had done so. Indeed, said the panel, Thompson had “never submitted to any court *any* proof that he suffered from severe mental illness at the time of the crime.” 315 F. 3d, at 590 (emphasis altered). Though Thompson’s several attorneys had made the same allegation for many years in several different courts (said the panel), “at each opportunity, counsel fail[ed] to secure an answer to the critical issue of whether Thompson was mentally ill at the time of the crime.” *Ibid.* That fact, concluded the panel (over a dissent), was fatal to Thompson’s basic ineffective-assistance-of-counsel claim. Obviously “trial counsel cannot be deemed ineffective for failing to discover something that does not appear to exist.” *Ibid.*; see also *id.*, at 595 (Moore, J., concurring in result) (“Thompson has presented no evidence that his [trial] counsel knew or should have known either that Thompson was mentally ill or that his mental condition was deteriorating at the time of his trial or at the time of his crime”). The dissenting judge thought Thompson had made out an ineffective-assistance claim by showing that his trial counsel had relied on an inadequate expert, that is, an expert without the necessary qualifications to counter the State’s experts’ conclusions. *Id.*, at 599–605 (opinion of Clay, J.).

The appeals court issued its opinion on January 9, 2003. Thompson’s appointed federal appeals counsel filed a rehearing petition, which the court denied on March 10,

BREYER, J., dissenting

2003. See App. to Pet. for Cert. 346 (Order in No. 00–5516 (CA6)). Thompson’s counsel then sought Supreme Court review. This Court denied review (and rehearing) about one year later. 540 U. S. 1051 (2003) (denying certiorari); 540 U. S. 1158 (2004) (denying rehearing).

B

The Court of Appeals, following ordinary appellate-court practice, withheld issuance of its mandate while the case was under review here, namely during calendar year 2003. During that time and in the months that followed, something unusual happened. Judge Suhrheinrich realized that the panel, in reaching its decision, seemed to have overlooked documents provided by Dr. Sultan that likely were relevant. In September 2003, the appellate court called for the entire certified record. Upon reviewing that record, Judge Suhrheinrich found Dr. Sultan’s deposition and accompanying report. 373 F. 3d, at 692–693; App. to Pet. for Cert. 347–348; see also Appendix, *infra*.

The Sultan documents filled the evidentiary gap that underlay the District Court’s and the appellate panel’s determinations. These documents made clear that Dr. Sultan had investigated Thompson’s background in depth and that in her (well-supported) opinion, Thompson *had* suffered from serious episodic bouts of schizophrenia *at the time the crime was committed*. Clearly the documents contained evidence supporting Thompson’s claim regarding his mental state at the time of the offense. Why had the District Court denied the existence of *any* such evidence? Why had Judge Suhrheinrich, and the other members of the panel (and the State, which took Dr. Sultan’s deposition) done the same?

Judge Suhrheinrich then drafted an opinion that sought to answer three questions:

Question One: Do these documents actually provide strong evidence that Thompson was schizophrenic (and

BREYER, J., dissenting

seriously so) at the time of the crime?

Question Two: If so, given the many previous opportunities that Thompson has had to raise the issue of his mental health, to what extent would these documents be likely to matter in respect to the legal question raised in Thompson's federal proceedings, *i.e.*, would they likely lead a federal habeas court to hold that Thompson's trial counsel was ineffective for failing to undertake a background investigation akin to that performed by Dr. Sultan?

Question Three: How did these documents previously escape our attention?

1

The panel answered the first question—regarding the importance of the documents—unanimously. Sultan's report and deposition were critically important. As Judge Suhrheinrich's opinion explains, these documents detail Thompson's horrendous childhood, his family history of mental illness, his self-destructive schizophrenic behavior (including auditory hallucinations) as a child, his mood swings and bizarre behavior as a young adult, and a worsening of that behavior after a serious beating to his head that he suffered while in the Navy. For example, Dr. Sultan's examination of Thompson and her interviews with Thompson's family members and others revealed that as a child Thompson would repeatedly bang his head against the wall to "knock the Devil out" after his grandmother yelled at him, "You have the Devil in you." 373 F. 3d, at 716 (internal quotation marks omitted). These documents explain how Thompson, as a young adult, would talk to himself and scream and cry for no apparent reason. They suggest that he had bouts of paranoia.

The documents provide strong support for the conclusion that Thompson suffered from episodes of schizophrenia at the time of the offense. And they thereby offer significant support for the conclusion that, had earlier

BREYER, J., dissenting

testifying experts had this information, they could have countered the State's experts' conclusion that Thompson was malingering at the time of trial. Thus, the Sultan materials seriously undermined the foundation of the State's position in respect to Thompson's mental condition.

The Sultan materials also revealed that trial counsel failed to discover other mitigating evidence of importance. Interviews with family members revealed repeated incidents of violence in the family, including an episode in which, as a young boy, Thompson witnessed his father brutally beat and rape his mother. His grandmother, with whom Thompson and his siblings lived after their mother died, subjected them to abuse and neglect. She would forget to feed the children, leaving them to steal money from under her bed to buy food. These and other circumstances are detailed in sections of the Sultan report and deposition reproduced in the Appendix, *infra*.

2

The panel also responded unanimously and affirmatively to the second question: Would federal-court access to the Sultan documents likely have made a significant difference in respect to the federal legal question at issue in Thompson's habeas petition, namely, the failure of Thompson's trial counsel to investigate his background? Trial counsel had had important indications that something was wrong. Indeed, counsel himself had sought an evaluation of Thompson's mental condition. He also was aware of Thompson's violent behavior in the military, and knew that Thompson had said he had had auditory hallucinations all his life. He was aware, too, of the changes in Thompson's behavior. Should counsel not then have investigated further?

The Sultan documents make clear that, had he done so, he would have had a strong answer to the State's experts. Thus the documents were relevant to the outcome of the

BREYER, J., dissenting

federal habeas proceedings. The Federal District Court based its grant of summary judgment on the premise that there was *no* evidence supporting Thompson's claim. The documents showed that precisely such evidence was then available.

3

The panel (while disagreeing about how to allocate blame) agreed in part about the answer to the third question: how these documents previously had escaped the panel's attention. The judges agreed that the Sultan documents were not in the initial record on appeal. The panel's original opinion, while mentioning both Dr. Sultan and Dr. Crown, assumed that neither expert had addressed Thompson's mental condition at the time of the crime. 315 F. 3d, at 583, n. 13 ("Sultan's affidavit does not discuss Thompson's mental state *at the time of the offense*" (emphasis added)); *ibid.* (explaining that Thompson filed a Rule 60(b) motion to supplement the record with Dr. Sultan's report, but not mentioning that the report addressed Thompson's mental condition at the time of the offense); see also *supra*, at 5.

How had the panel overlooked the copies of the Sultan deposition attached to (1) the rehearing petition and (2) the (Rule 60(b)-related) motion to hold the appeal in abeyance? As for the rehearing petition, the reason could well lie in the petition's (incorrect) suggestion that the panel had already considered the appended document as part of the original record. See Pet. for Rehearing and Suggestion for Rehearing En Banc in No. 2:00–5516 (CA6), p. 1 ("A majority of this panel overlooked other proof in the record, including but not limited to, the expert opinion of Dr. Faye E. Sultan"); see also *id.*, at 28–32. While the petition explains the importance of the documents, it does not explain the circumstances, namely, that the panel previously had not seen these documents. Instead, it gives the

BREYER, J., dissenting

impression that counsel was simply reemphasizing a matter the panel had already considered. To that extent, the petition reduced the likelihood that the panel would make the connection it later made and fatally weakened its argument for *re*-hearing.

As for the motion to hold the appeal in abeyance, the panel's failure to recognize the significance of the appended Sultan materials is also understandable. The motion gives the impression that the appellate court would have been able to handle any problem arising from the exclusion of these materials in an appeal taken from the District Court's Rule 60(b) decision. The appellate court, however, never had any such opportunity because counsel did not appeal the District Court's denial of the Rule 60(b) motion.

C

Once the panel understood the significance of the Sultan report, it had to decide what to do. An appellate court exists to correct legal errors made in the trial court. What legal error had the District Court committed? The appeal concerned its grant of summary judgment in the State's favor. The District Court made that decision on the basis of the record before it, and that record apparently lacked the relevant documents. How then could an appeals court say that the District Court was wrong to grant the summary judgment motion?

The panel answered this question by *not* holding that the District Court had erred. Finding that the Sultan documents had been "apparently negligently omitted" from the record, it exercised its equitable powers to supplement the record with the deposition. 373 F. 3d, at 691. It also found that, since the State itself had helped to create that document (because the State had taken Sultan's deposition), the District Court's reconsideration of the matter would not unfairly prejudice the State. And it

BREYER, J., dissenting

noted that this case is a death case. Then, relying on its “inherent power to reconsider” an opinion “prior to the issuance of the mandate,” the court issued a new opinion, vacating the District Court’s grant of summary judgment to the State and remanding the case to the District Court for further proceedings on the matter. *Ibid.*

II

The question before us is not whether we, as judges, would have come to the same conclusions as did the panel of the Court of Appeals. It is whether the three members of the appellate panel abused their discretion in reconsidering the matter and, after agreeing unanimously that they would have reached a different result had they considered the overlooked evidence, vacating the District Court’s judgment and remanding the case.

The Court concludes that the panel’s reconsideration of the matter and decision to vacate the District Court’s judgment amounted to an “abuse of discretion.” *Ante*, at 1. It therefore reverses the panel’s unanimous interlocutory judgment remanding a capital case to the District Court for an evidentiary hearing. The Court lists five reasons why the Court of Appeals “abused its discretion.” None of these reasons, whether taken separately or considered together, stands up to examination.

Reason One. *During the 5-month period after this Court denied rehearing of Thompson’s certiorari petition, during which time the Court of Appeals was reconsidering the matter, it gave “no indication that it might be revisiting its earlier decision.” Had it “notified” the parties, the court “could have spared the parties and the state judicial system considerable time and resources.” Ante*, at 10.

If this consideration favors the Court’s conclusion, it does so to a very modest degree. For one thing, the Federal Rules themselves neither set an unchangeable deadline for issuance of a mandate nor require notice when the

BREYER, J., dissenting

court enlarges the time for issuance. Compare Fed. Rule App. Proc. 41(b) (2005) (“The court may shorten or extend the time”), with Rule 41(b) (1968) (mandate “shall” issue “unless the time is shortened or extended *by order*” (emphasis added)). The Advisory Committee Notes to Rule 41 expressly contemplate that the parties will themselves check the docket to determine whether the mandate has issued. See Advisory Committee’s 1998 Note on subd. (c) of Rule 41 (“[T]he parties can easily calculate the anticipated date of issuance and verify issuance of the mandate[;] the entry of the order on the docket alerts the parties to that fact”). And Sixth Circuit Rules require the Circuit Clerk to provide all parties with copies of the mandate. See Internal Operating Procedure 41(a) (CA6 2005) (“Copies of the mandate are distributed to all parties and the district court clerk’s office”). Thus, the State’s attorneys knew, or certainly should have known, that the mandate had not issued, and, as experienced practitioners, they also knew, or certainly should have known, that a proceeding is not technically over until the court has issued its mandate. And if concerned by the delay (and some delay in such matters is not uncommon), they could have asked the Circuit Clerk why the mandate had not issued. If necessary, they could have filed a motion seeking that information or seeking the mandate’s immediate issuance.

For another thing, since notification is a clerical duty, the panel may have thought the parties *had* been notified. One of the judges on the panel could well have instructed the Circuit Clerk not to issue the mandate, and then simply have assumed that the Clerk would notify the parties of that fact (though the Clerk, perhaps inadvertently, did not do so). Why would the court want to hide what it was doing from the parties? Once we apply a presumption of regularity to the panel’s actions, we must assume that the failure to notify the parties was likely due

BREYER, J., dissenting

to a simple clerical error.

Further, the prejudice to the State that troubles the Court was likely small or nonexistent. The need to reset an execution date is not uncommon, and the state court's execution order explicitly foresaw that possibility. See 373 F. 3d, at 692 (Tennessee Supreme Court order set Thompson's execution date for August 19, 2004, "unless otherwise ordered by this Court or other appropriate authority" (internal quotation marks omitted)). Moreover, the State has not even argued—despite ample opportunity to do so—that the further proceedings ordered by the panel would actually have required it to set a new date.

Finally, the State did not, by way of a petition for rehearing, make any of its "failure to notify" arguments to the Court of Appeals. Although the law does not require the State to seek rehearing, such a petition would have permitted the panel to explain why the State was not notified and possibly to explore the matter of prejudice. There is no reason to reward the State for not filing a petition by assuming prejudice where none appears to exist.

Given the State's likely knowledge that the mandate had not issued, the existence of avenues for resolving any uncertainty, and the small likelihood of prejudice, the lack of notice does not significantly advance the Court's "abuse of discretion" finding. Indeed, if the Court believes that the Court of Appeals could have issued a revised opinion correcting its earlier judgment *if only it had given notice to the parties*, the sanction it now imposes—outright reversal—is far out of proportion to the crime.

Reason Two. The court's "opportunity to consider" the Sultan evidence "at the rehearing stage is yet another factor supporting" the abuse-of-discretion "determination." *Ante*, at 12. I agree that it is unfortunate that, upon review of the rehearing petition, the panel failed to make the connection that would have allowed it, at that time, to

BREYER, J., dissenting

reach the same conclusion it reached later. Still, the petition wrongly implied that the Sultan documents were part of the original appeal. Because it did not request rehearing on the ground that the documents were *not* in the record, it did not offer a genuine “opportunity to consider” the Sultan evidence.

Under these circumstances, I cannot agree that the court’s opportunity to consider these documents at the rehearing stage should militate in favor of finding an abuse of discretion. To the contrary, I believe we should encourage, rather than discourage, an appellate panel, when it learns that it has made a serious mistake, to take advantage of an opportunity to correct it, rather than to ignore the problem.

Reason Three. The “Sultan evidence . . . is not of such a character as to warrant [a] . . . departure from standard appellate procedures” because “the evidence was unlikely to have altered the District Court’s resolution of Thompson’s ineffective-assistance-of-counsel claim.” *Ante*, at 14. That is to say, given the expert testimony in the trial court, the Sultan evidence is unlikely meaningfully to have strengthened Thompson’s claim before the Federal District Court. *Ante*, at 14–15.

This conclusion is wrong. The Court argues the following: (1) Dr. Sultan’s conclusion rests in significant part upon interviews with three witnesses, Thompson’s grandmother and sister (with whom Dr. Sultan spoke directly) and his girlfriend (whose interview with a defense investigator Dr. Sultan reviewed); (2) since all three of these witnesses testified at sentencing, Thompson’s counsel must have consulted them at the time; and (3) “[c]onsultation with these witnesses, when combined with the opinions of [the State’s expert] and [Thompson’s expert], provided an adequate basis for Thompson’s attorneys to conclude that focusing on Thompson’s mental health was not the best strategy.” *Ante*, at 16. The Court

BREYER, J., dissenting

then says that trial counsel’s “strategy” may have been “a mistake,” *ante*, at 17, but apparently not enough of a mistake to amount to inadequate assistance of counsel.

But how do the Court’s conclusions follow from the premises? Dr. Sultan’s interview of the three witnesses apparently turned up new information, indeed, crucial information. Why does that fact not tend show that trial counsel’s own “consultation” with those witnesses was inadequate? Or, if trial counsel was aware of the information, why does that not tend to show that trial counsel hired an expert who was not qualified to assess Thompson’s mental condition, or that counsel failed adequately to convey the critical information to that expert? This Court in *Wiggins v. Smith*, 539 U. S. 510, 523–525 (2003), found trial counsel inadequate for failing to conduct a reasonable investigation, given notice that such an investigation would likely turn up important mitigating evidence. See also *Rompilla v. Beard*, *ante*, p. _____. Why is the same not true here, where Thompson’s trial counsel was fully aware of the need for a background investigation, and then either did not ask the right questions, or did not hire the right expert, or did not convey the right information to that expert? At the least, is there not a good argument to this effect—an argument that the Sultan documents significantly strengthened? All three judges on the panel thought so: They concluded that they would have reached a different result on Thompson’s ineffective-assistance-of-counsel claim had they been aware of the Sultan documents. The Court does not satisfactorily explain its basis for second-guessing the panel on this point.

Reason Four. *The Sultan evidence does “not come close to satisfying the miscarriage of justice standard under Calderon.”* *Ante*, at 17 (referring to *Calderon v. Thompson*, 523 U. S. 538 (1998)). As the Court apparently agrees, see *ante*, at 8–9, *Calderon* does not apply here. And the panel’s basic conclusion—that consideration of

BREYER, J., dissenting

Thompson's ineffective-assistance-of-counsel claim without the benefit of the Sultan evidence would constitute a grave miscarriage of justice—survives *any* plausible standard of review. I can find nothing in the Court's opinion that explains why the panel's conclusion is wrong.

Reason Five. *The Court of Appeals "did not accord the appropriate level of respect" to the State's "judgment."* *Ante*, at 19. If by "judgment" the Court means to refer to the state court's original judgment of conviction, this reason simply repeats Reason Four. The panel carefully examined the entire record and determined that there is a significant likelihood the Sultan evidence would demonstrate a violation of the Federal Constitution.

If the Court means to refer to the state court's judgment not to set aside the conviction in state postconviction proceedings, the Court is clearly wrong. The state court on collateral review refused to authorize funds for a background investigation, one for which Thompson's expert then showed a strong need, and which Thompson's expert now shows could well have demonstrated a significantly mitigating mental condition. How is it disrespectful of the State for a federal habeas court to identify a constitutional error that occurred in state-court proceedings in a capital case, by taking account of a key piece of evidence, mistakenly omitted from the record?

If the Court means to refer to the State's decision to proceed with the execution, I cannot possibly agree. The Court could not mean that *any* exercise by a federal court to correct an inadvertent, and important, evidentiary error is "disrespectful" of a State's effort to proceed to execution. But if it does not mean "any" exercise at all, then how can it say the present exercise is disrespectful? The present exercise embodies as thorough an examination of the record and as significant a piece of evidence as one is likely to find. The process—the detail and care with which the Court of Appeals combed the record—does not show

BREYER, J., dissenting

“disrespect.” It shows the contrary.

The upshot is that the Court’s five reasons are unconvincing. The Court simply states those reasons as conclusions. It fails to show how, or why, the unanimous panel erred in reaching diametrically opposite conclusions, all supported with detailed evidence set forth in Judge Suhrheinrich’s opinion. It does not satisfactorily explain the evidentiary basis for its own conclusions. And, in the process, it loses sight of the question before us: again, *not* whether we, as judges, would have reached the same conclusion that the three judges on the panel reached, but rather whether they, having unanimously agreed that their earlier decision was wrong, abused their discretion in setting it right.

III

Ultimately this case presents three kinds of question. The first is a narrow legal question. Has the Court of Appeals abused its discretion? For the reasons I have set forth, the answer to that question, legally speaking, must be “no.”

The second is an epistemological question. How, in respect to matters involving the legal impact of the Sultan report and deposition, can the Court replace the panel’s judgment with its own? Judge Suhrheinrich’s opinion demonstrates why any assessment of that legal impact must grow out of thorough knowledge of the record. He spent hundreds of hours with its numerous documents in order to make that assessment. Those of his conclusions that were shared by the other members of the panel are logical, rest upon record-based facts, and are nowhere refuted (in respect to those facts) by anything before us or by anything in the Court’s opinion. How can the Court know that the panel is wrong?

The third question is about basic jurisprudence. A legal system is based on rules; it also seeks justice in the indi-

BREYER, J., dissenting

vidual case. Sometimes these ends conflict. To take account of such conflict, the system often grants judges a degree of discretion, thereby providing oil for the rule-based gears. When we tell the Court of Appeals that it cannot exercise its discretion to correct the serious error it discovered here, we tell courts they are not to act to cure serious injustice in similar cases. The consequence is to divorce the rule-based result from the just result. The American judicial system has long sought to avoid that divorce. Today's decision takes an unfortunate step in the wrong direction.

Appendix to opinion of BREYER, J.

APPENDIX TO OPINION OF BREYER, J.

Excerpts from the Gregory Thompson Psychological Report prepared by Dr. Faye E. Sultan at the Riverbend Maximum Security Institution (RMSI) (July 22, 1999), App. 11–20.

“REFERRAL QUESTIONS:

“Mr. Gregory Thompson was referred for psychological evaluation in July, 1998 by attorney Mr. Stephen M. Kissinger of the Federal Defender Services of Eastern Tennessee Incorporated. Mr. Thompson was convicted of murder in 1985. This evaluation was requested to address the following questions:

“1. Mr. Thompson’s current psychological status[.]

“2. Mr. Thompson’s likely psychological status and mental state before and surrounding the time of the 1985 offense.

“3. Social, environmental, psychological, and economic factors in the life of Mr. Thompson which might have be[en] considered to be mitigating in nature at the time of his trial.

“PROCEDURE:

“Psychological evaluation of Mr. Thompson was initiated on August 20, 1998. This first evaluation session extended over a period of approximately four hours and consisted of clinical interview and the administration of the Minnesota Multiphasic Personality Inventory–2 (MMPI–2). Some review of prior psychological evaluation records was conducted to establish what formal psychological and neuropsychological testing had been administered to Mr. Thompson. Levels of current intellectual and neuropsychological functioning had been recently assessed by neuropsychologist, Barry Crown, Ph.D., so no attempt was

Appendix to opinion of BREYER, J.

made to replicate this type of assessment.

“Following the 8–20–98 initial evaluation session, a very extensive review of legal, military, medical, prison and psychiatric/psychological records was initiated. A list of the documents examined is attached to this report.

“... Two further interviews were conducted with Mr. Thompson for [the] limited purpose [of determining Thompson’s competence to participate in habeas proceedings], on 2–2–99 and 4–7–99, totaling approximately six hours of additional observation. Voluminous Tennessee Department of Corrections mental health, medical, and administrative records were reviewed at this time as well.

“[T]he extensive record review conducted, the ten hours of clinical observations made of Mr. Thompson during the preceding eleven months, the interviews conducted with collateral informants, and the recent and past psychological testing which had been administered provide enough data to make it possible to render professional opinions about Mr. Thompson’s mental state at and around the time of the 1985 offense.

“CLINICAL OBSERVATIONS:

“Mr. Gregory Thompson was cooperative with the assessment procedure. He answered all questions posed to him and appeared to be alert, watchful and interested in the interview process. His speech was sometimes tangential and rambling. Although motor behavior appeared controlled there was a manic quality to his verbalizations. Mr. Thompson was oriented as to person, place and time, but he repeatedly expressed his firm belief that he had written each and every song which played on the radio.

“Mr. Thompson displayed symptoms of psychosis during the two subsequent meetings. The details of these sessions will not be reviewed here.

Appendix to opinion of BREYER, J.

“FORMAL PSYCHOLOGICAL TESTING:

“The Minnesota Multiphasic Personality Inventory–2 (MMPI–2) was administered to Mr. Thompson on 8–20–98. It had been determined in other examination settings that Mr. Thompson’s level of reading competence exceeded the necessary level of 8th grade ability required for proper administration of this test.

“The MMPI–2 profile produced by Mr. Thompson is considered valid and appropriate for interpretation. Individuals producing similar profiles are described as experiencing significant psychological difficulties and chronic psychological maladjustment. Such individuals are considered to be highly suspicious of others, often displaying paranoid features. There is indication in this profile of the presence of a thought disorder and the inability to manage emotions. The world is perceived as a threatening and dangerous place and fears are viewed as externally generated and reality-based rather than as a product of an internally generated state. The behavior of such individuals is often described as hostile, aggressive, and rebellious against authority. Poor impulse control, lack of trust in others, and low frustration tolerance may result in such individuals displaying rage in interpersonal relationships.

“Individuals producing this testing profile are also described as experiencing depressed mood. There is the strong possibility that such individuals have contemplated suicide and report preoccupation with feeling guilty and unworthy. Testing items were endorsed which suggest memory and concentration problems, and an inability to make decisions.

“RELEVANT PSYCHOLOGICAL/PSYCHIATRIC DATA
CONTAINED IN RECORDS:

“The[re] is substantial documentation throughout the Tennessee Department of Corrections records that Mr. Greg Thompson has suffered from significant mental

Appendix to opinion of BREYER, J.

illness since at least the time of . . . his incarceration in 1985. He has been treated almost continuously with some combination of major tranquilizer and/or anti-depressant and/or anti-anxiety medications. He has received a variety of diagnostic labels including Psychosis, Psychosis Not Otherwise Specified, Paranoid Schizophrenia, Mania, Mixed Substance Abuse, Schizophrenia, BiPolar Affective Disorder, Schizoaffective Disorder, Malingering, and Adult Antisocial Behavior. This is clearly indicative of the Tennessee DOC mental health staff's view that Mr. Thompson has experienced major mental illness throughout at least most of his period of incarceration. Further, there is extensive documentation contained in these records of many episodes of bizarre aggressive and/or self-destructive behavior.

“INTERVIEWS WITH COLLATERAL WITNESSES:

“Five individuals were interviewed (either by telephone or face-to-face) who provided significant supplemental information about the life circumstances and past/present psychological functioning of Mr. Gregory Thompson.

“Ms. Maybelle Lamar

“Ms. Lamar is Mr. Thompson's maternal grandmother. She was interviewed by telephone on July 21, 1999. Ms. Lamar assumed total responsibility for the care and rearing of Mr. Thompson and his two older siblings after his mother was killed when Mr. Thompson was approximately five years old. Mr. Thompson remained in her home until he entered the military as a young adult.

“Ms. Lamar recalls the period following her daughter's fatal automobile accident as one of tremendous strain and disruption for her. She was unable to describe the reaction of the three young children to their mother's death because she ‘took to my bed’ for approximately five or six weeks following the accident. Ms. Lamar was unable to

Appendix to opinion of BREYER, J.

attend to these children in any way at that time. She did not recall how they obtained food or clothing, or whether they were in any distress. Ms. Lamar reported that she was drinking alcohol quite heavily during this period and that she left her bed to resume household activities only because the children contracted a serious medical illness.

“Ms. Lamar described Mr. Thompson as displaying significantly ‘different’ behavior when he returned to visit her following his discharge from the U. S. Navy. ‘Greg didn’t act the same’. Unlike the ‘eager to please’, passive, sometimes funny, gentle boy who she had reared, Mr. Thompson was ‘angry’, ‘sometimes sad’. ‘I don’t think he wanted me to know what was going on with him. He mostly just stayed away from me.’ Ms. Lamar reported that she noticed Mr. Thompson sometimes ‘staring off into space’ or ‘talking to himself’. She would ask him about these behaviors. ‘He’d deny it. He acted like he didn’t know what I was talking about.’ Ms. Lamar recalls being quite concerned about her grandson’s mental state during this time. She did not recall ever being asked these questions at any time before or during Mr. Thompson’s trial.

“Ms. Nora Jean Hall Wharton

“Nora Jean Wharton is Mr. Thompson’s older sister. A lengthy telephone interview was conducted with her on July 21, 1999. She grew up in the same home as Mr. Thompson and had continuous contact with him throughout his childhood. Mr. Thompson lived briefly in the home of his sister following his discharge from the military.

“Ms. Wharton described Mr. Greg Thompson as a highly sensitive, passive, timid, emotionally vulnerable child. She described a childhood of great hardship. According to her report, their grandmother, Ms. Maybelle Lamar[,] was verbally abusive, neglectful of the children’s basic daily needs, highly critical, and unable to care properly for the children. Ms. Wharton described many instances of such

Appendix to opinion of BREYER, J.

abuse and neglect. She described the period following their mother's death as particularly chaotic and neglectful, recalling that often there was no food in the home and that the children would take money from under their grandmother's mattress to go and buy food. In the period following their mother's death, Ms. Wharton reported that her grandmother was continuously drunk and unable to care for her grandchildren. According to Ms. Wharton, Greg Thompson frequently witnessed his sister Nora being beaten by their grandmother.

"Ms. Wharton further recalled that she and her younger brother had witnessed the brutal beating and rape of their mother by their biological father. She recalls Greg standing in the scene screaming and sobbing uncontrollably.

"Ms. Wharton reported that Greg would frequently cry at school during the early school years, and, as a result, was often the victim of intense mockery from his classmates. Because Ms. Wharton was in the same classroom as her brother she observed these behaviors and often intervened on her brother's behalf. She described Mr. Thompson's response to this abuse as quite passive.

"Of particular significance is Ms. Wharton's recollections about Mr. Thompson repeatedly banging his head against the wall of their home on many occasions during their early childhood. This behavior frequently followed their grandmother yelling at Greg 'You have the Devil in you.' Mr. Thompson would tell his sister that he was attempting to 'knock the Devil out' of his head in this way. Ms. Wharton recalls believing that this behavior was quite odd.

"Following his discharge from military service, Ms. Wharton described Mr. Thompson's behavior as significantly different than his prior conduct and attitude. She reported several episodes of bizarre behavior which included a sudden intense emotional reaction without obvious external provocation. Mr. Thompson would become ex-

Appendix to opinion of BREYER, J.

tremely angry, would cry and scream for a len[g]thy period of time, would appear as if he might or actually become quite physically violent or aggressive, and then would suddenly retreat. Ms. Thompson reported this behavior and her concerns about it to her grandmother. Ms. Lamar suggested that Ms. Wharton take her brother to the psychiatric unit of the local hospital for treatment. Ms. Wharton did not attempt to get any treatment for Mr. Thompson and reports feeling quite guilty about this.

“Nora Jean Wharton described her own struggles with mental illness throughout the past fifteen years. She has received counseling to assist her in coping with the effects of her abusive childhood and she has been treated with a combination of a major tranquilizer (Stellazine) and antidepressant medications. She reported that her younger half-sister Kim has also suffered from significant mental illness.

“CUSTODY OFFICERS AT RMSI

“Following the second interview conducted with Mr. Thompson on 2–2–99, I informally interviewed two custody officers who escorted Mr. Thompson back to his cell. These officers have not as yet been identified by name. Both reported that they were aware that Mr. Thompson was quite mentally ill and that they were concerned about him. They further reported that they believed it would be in his best interest to be housed in a prison facility better equipped to deal with individuals experiencing severe mental illness.

“MICHAEL CHAVIS

“Federal Defender Services of Eastern Tennessee investigator, Mr. Michael Chavis, was interviewed about his July 29 through August 2, 1998 interview with Ms. Arlene Cajulao in Honolulu, Hawaii. Ms. Cajulao and Mr. Thompson had an intimate relationship and lived together

Appendix to opinion of BREYER, J.

for approximately four years, from 1980 to 1984.

“Mr. Chavis reported that Ms. Cajulao described Mr. Thompson as displaying increasingly bizarre behavior during the latter part of their relationship. Similar to descriptions proved by Ms. Nora Wharton, Ms. Cajulao reported several episodes of ‘paranoid’ and aggressive behavior which had no apparent external antecedent. She reported that Mr. Thompson sometimes thought that people were ‘after’ him. He would close all the curtains in the house because he did not want the person who was ‘looking’ for him to see him through the curtains. She remembers being quite concerned about Mr. Thompson’s mental state.

“SUMMARY AND CONCLUSIONS:

“Mr. Gregory Thompson has experienced symptoms of major mental illness throughout his adult life. Indeed, there is information available which suggests that Mr. Thompson was displaying significant signs of mental illness from the time he was a small child. Self-injurious behavior is reported as early as six years old. There is extensive documentation contained within the records reviewed for this evaluation that Mr. Thompson has experienced a thought disorder and/or an affective disorder of some type for many years.

“It is my opinion that Mr. Gregory Thompson is most appropriately diagnosed, according to the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, as having Schizoaffective Disorder, Bipolar Type. As is typical of this illness, symptoms became apparent in early adulthood. Mr. Thompson was suffering serious mental illness at the time of the 1985 offense for which he has been convicted and sentenced. This mental illness would have substantially impaired Mr. Thompson’s ability to conform his conduct to the requirements of the law.

“Further, Mr. Thompson was the victim of severe child-

Appendix to opinion of BREYER, J.

hood emotional abuse and physical neglect. His family background is best described as highly neglectful and economically deprived. Mr. Thompson repeatedly witnessed episodes of violence during his childhood in which one family member assaulted or brutalized another. There are significant aspects of Mr. Thompson's social history that have been recognized as mitigating in other capital cases

"It is important to note that all of the information related to Mr. Thompson's early mental illness and social history was available at the time of his 1985 trial.

"[signed]

"Faye E. Sultan, Ph.D."

* * *

Excerpts from the Deposition of Dr. Faye E. Sultan (July 22, 1999), *Id.*, at 71–73, 76–80.

"Q. What indicates to you or what indicia are there for you that suggest Mr. Thompson was displaying significant signs of mental illness from the time he was a small child? How do you arrive at that conclusion?

"A. . . .

"By the time of the first grade, Mr. Thompson, when he was being yelled at by his grandmother, she was reportedly verbally abusive in the following fashion: She would yell at him you have the devil in you, boy. [His sister, Ms. Wharton] would then observe Mr. Thompson standing or sitting beside a wall repeatedly banging his head into the wall. She, in her role as protector of him, would ask him what was going on, and he would tell her he was trying to knock the devil out of his head. She recalls at the time, although she was quite young herself, being worried about his behavior and thinking of it as very odd.

Appendix to opinion of BREYER, J.

“Q. Sort of a self-punishment or a self-exorcism type thing?

“A. A self-injurious behavior is what we would call it I think. Mr. Thompson, when he was Greg, in the first and second and third grade had rather frequent hysterical crying episodes in classrooms that Ms. Wharton recalls also as very unusual in the context of his schoolroom situation. She describes him as being the subject of torment on the part of the students because he behaved in an odd fashion. Sometimes he would simply begin to cry and wail and scream and apparently made a sound like a fire engine when he was sobbing and developed the nickname Fire Engine. That’s reported in the trial transcript. She told me much more detail about actually the extent of those kind[s] of emotional outbursts.

“At home it was rather common for Mr. Thompson to begin to cry and scream during times when Ms. Wharton herself was being beaten by their grandmother. Ms. Wharton was the victim of physical abuse on the part of the grandmother. Mr. Thompson observed much of this since they were together virtually all of the time, and Nora Wharton was not really permitted much interaction outside of their home.

“Q. Your diagnosis for Mr. Thompson is schizoaffective disorder, comma, bipolar type. What leads you to that diagnosis from what you’ve reviewed and your testing results?

“A. What leads me to the diagnosis is that there is a long history, perhaps at this point almost a 20-year history, of simultaneous thought disorder on the part of Mr. Thompson documented throughout all the records, and affective disorder, emotional disorder, being unable to regulate his emotions, sometimes falling into the pits of despair and becoming suicidal, sometimes becoming

Appendix to opinion of BREYER, J.

highly agitated and manic and having too much energy, too much exuberance, and grandiose thinking. The thought disorder is manifested in persecutory ideas, delusions of grandeur—lots of different kinds of delusions actually—auditory hallucinations that he sometimes admits to, sometimes suspected by the doctors who are doing the examination.

“The psychological testing early on in Mr. Thompson’s incarceration confirm[s] the presence of a psychotic process. There was an MMPI administered to him by a prison psychologist in 1990 that is described as valid and indicative of psychotic process, and throughout the prison record he receives a variety of diagnoses that take into account both thought disorder and affective illness.

“The very best diagnosis to describe all of the complex of symptoms that I just talked to you about is schizoaffective disorder, bipolar type.

“Q. You note in your report Mr. Thompson was observed having a significant change in behavior after he was discharged from the Navy. What significance do you attach to that fact?

“A. Well. . . [p]rior to his entry into the military Mr. Thompson is described almost uniformly . . . as passive, as compliant, as eager to please, as gentle, as timid, as eager to run from attacks.

“At some point . . . he began to notice that people were trying to hurt him all the time, that officers and other people of his rank and slightly above his rank attempted to provoke him, that they sometimes physically assaulted him, that he thought he was being followed a lot, and that he sometimes struck out in what he thought was defense and then later found out from other people who he knew and trusted that there wasn’t anything to defend against or that there might not have been anything to defend against.

“Q. This is what he related to you during your interview

Appendix to opinion of BREYER, J.

last August?

“A. Right. The people who saw him after the military each were struck by how very different he seemed. That was the word that kept being used, ‘different.’ Sometimes the people I was speaking to were not able to describe what different meant, but, for example, the grandmother said that he was different as in not right, that he wasn’t himself. Ms. Wharton tells me that the grandmother was very well aware that he was in deep psychological distress, and, in fact, the grandmother suggested that he be taken to the psychiatric unit at Grady Hospital in Atlanta, I believe, for treatment. The grandmother observed him staring off into space for long periods of time. She observed him mumbling to himself. When she asked him what he was doing, he told her he had no idea what she was talking about. She said that was very different from the boy who left her to go into service.

“The sister has even a better glimpse of him than that, because he actually went to live with her for a while, and she said he was bizarre. She described him as paranoid. She said that he would explode for no reason at all, that she was afraid of him for the very first time in her life, that they had always been terribly close, the sort of close where if there was only one piece of bread to eat they would share it, that they always looked out for one another, and that suddenly he was behaving in ways that she simply could not identify. She described three very serious episodes of aggression and emotional upset that she said are what led her to approach her grandmother about what to do for treatment for him.

“Q. You state that the schizoaffective disorder, bipolar type, would substantially impair Mr. Thompson’s ability to conform his conduct to the requirements of the law. How so?

“A. There are points in time when Mr. Thompson is out

Appendix to opinion of BREYER, J.

of contact with reality. He is responding to situations that simply don't exist or that he perceives in extremely exaggerated or different form. A person is not able to conform one's conduct to the law if you are frankly delusional or hallucinating in some way. Mr. Thompson over the years has had both of those symptoms.

"Q. So it's this delusional aspect of this disorder that is the main factor that would keep him from having the ability to conform his conduct to the requirements of law, if I understand you correctly?

"A. Is it the main factor? Let me say that I think it's at least as potent a factor if not more as the other aspect of his mental illness, which is that he has emotional dysregulation.

"Q. Meaning?

"A. Meaning Mr. Thompson often is not in control of his emotions. He has episodes of rage, of aggression, that he doesn't understand or relate to very well. He's told about them later. Sometimes he remembers them, sometimes he doesn't. He is often embarrassed about his behavior afterwards, but there are points at which I believe he's not in control of what he's doing.

"Q. When you say 'he's not in control of what he's doing,' are you saying that it's impulsive behavior?

"A. If I am emotionally dysregulated, if I'm over-aroused and overreactive and I operate out of a faulty belief system, so that not only do I have the impulse to do things that I ordinarily wouldn't, but I also think things are going on that aren't, I have a combination in which yes, I suppose you could call it impulse, but you also have to take the notion into account that it might be an impulse to do something that doesn't make any sense.

"Q. Does this disorder prevent Mr. Thompson from planning his activities?

"A. Sometimes, yes, it does.

"Q. And so the inability to plan, would that be a factor

Appendix to opinion of BREYER, J.

that would prevent him from conforming his conduct to the requirements of the law?

“A. If that were in operation at some time. In the history of the Department of Corrections’ mental health records, when he’s properly medicated I don’t think that’s true about him.

“Q. Is it your professional opinion, then, that when he is medicated he has the ability to plan, but when he is not medicated he does not always have the ability to plan?

“A. Those two things are true. It’s also true that if he’s inadequately medicated or improperly medicated he doesn’t have the ability to plan anything. I don’t know whether he has impulses. I think he’s all impulse, so to have impulses implies that there’s a part of you that’s not impulsive. For example, when Mr. Chavis and I saw him during my second interview with him, he could not have planned anything at all, not beyond the nanosecond in which he was experiencing the world. But he was receiving psychotropic medications at the time, so that’s why I have to put that qualifier in there.”