

Facts: Error/Omission

Did the opinion rely on a material mischaracterization of or failure to consider facts in the lower court record? (“Material”: it’s reasonably likely the error(s) affected the result.)

Reviewing the proceedings below, an appellate court identifies “all the significant facts” in light of the appeal. (*In re S.C.* (2006) 138 Cal.App.4th 396, 402.) What’s “significant” in the record is a matter of context: a reviewing court must “ferret[] out all of the operative facts that affect the resolution of issues tendered on appeal.” (*Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 113, disapproved on another ground as recognized in *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 41-42.) But the appellate “ferreting” must be accurate and materially complete; after all, a judicial ruling based on an erroneous view of the facts – or where “all the material facts in evidence” aren’t “both known and considered” – is itself erroneous. (*People v. Cluff* (2001) 87 Cal.App.4th 991, 998; *In re Cortez* (1971) 6 Cal.3d 78, 85-86 [re abuse of trial court discretion]; see also *Cooter & Gell v. Hartmarx Corp.* (1990) 496 U.S. 384, 405 [110 S.Ct. 2447, 110 L.Ed.2d 359] [same, re “clearly erroneous assessment of the evidence”].) So evidence can’t be arbitrarily disregarded. (*People v. Cross* (2005) 127 Cal.App.4th 63, 73 [same].)

Where reviewing courts “plainly misapprehend or misstate the record in making their findings, and the misapprehension goes to a material factual issue that is central to [a] claim, that misapprehension can fatally undermine the fact-finding process, rendering the resulting factual finding unreasonable. [Citations.]” (*Taylor v. Maddox* (9th Cir. 2004) 366 F.3d 992, 1001.) Thus, the “failure to consider, or even acknowledge, ... highly probative [evidence] casts serious doubt on the state-court fact-finding process and compels the conclusion that the state-court decisions were based on an unreasonable determination of the facts.” (*Id.* at 1005.)

The Rules of Court acknowledge that a Court of Appeal opinion might be marred by “omission or misstatement of” a record fact: a party who believes that sort of error has occurred normally must cite it in a petition for rehearing before arguing the point to the Supreme Court. (Rule 8.500(c)(2).)