Appellate Factfinding
Did the court improperly make its own factual or credibility determinations instead of leaving them to the trier of fact?

"The appellate court cannot reweigh the credibility of witnesses or resolve conflicts in the evidence. [Citation.]" (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 622; *People v. Young* (2005) 34 Cal.4th 1149, 1181: "Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.]") In effectively revisiting and reevaluating the evidence so as to revise judicial findings, the reviewing court errs. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 319: "[T]he Court of Appeal improperly reweighed the evidence and substituted its judgment for that of the juvenile court. Its decision cannot stand.")

As a relatively unusual exception, a reviewing court may find insufficient evidence to support a judgment or finding where "the testimony is physically impossible or inherently improbable[.]" (*People v. Young, supra,* 34 Cal.4th 1149, 1181.) And its "falsity must be apparent without resorting to inferences or deductions. [Citation.]" (*People v. Brown* (2014) 59 Cal.4th 86, 105, internal quotes omitted.) For example, "where an accurate video recording completely and clearly contradicts a party's testimony, that testimony becomes incredible." (*Morton v. Kirkwood* (11th Cir. 2013) 707 F.3d 1276, 1284; *Scott v. Harris* (2009) 550 U.S. 372, 380-381: "The Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape.") Also distinguished here: an appellate court's extremely limited authority, on a party's motion, to make independent factual findings and take additional evidence. (Code Civ. Proc., § 909; Cal. Rules of Court, rule 8.252(b), (c); see *In re Zeth S.* (2003) 31 Cal.4th 396, 405 [power to receive new evidence "should be exercised sparingly" and only in "exceptional circumstances" (internal quotes omitted)]; *id.* at 406 [facts of case "afforded no basis for the Court of Appeal to deviate from the settled rules on appeal in the manner in which it did"].)

Improper appellate factfinding may undermine harmless error analysis; that is, where the reviewing court finds or assumes error occurred, it can't properly be deemed harmless based on the court's reweighing of the evidence to reach conclusions not made below. (See also next error category, Prejudice: Selective vs. Whole-Record Review.) Indeed, in a criminal case, an appellate court is constitutionally prohibited from engaging in factfinding, assessing credibility, or weighing competing inferences. A defendant has a "Sixth Amendment right to have essential facts found by a jury beyond a reasonable doubt" (*Dillon v. United States* (2010) 560 U.S. 817, 828 [130 S.Ct. 2683, 2692, 177 L.Ed.2d 271]; so "it is the responsibility of the jury – not the court – to decide what conclusions should be drawn from evidence admitted at trial." (*Cavazos v. Smith* (2011) 565 U.S. 1 [132 S.Ct. 2, 4, 181 L.Ed.2d 311; *Weiler v. United States* (1945) 323 U.S. 606, 611 [65 S.Ct. 548, 89 L.Ed. 495]: "We are not authorized to look at the printed record, resolve conflicting evidence, and reach the conclusion that the error was harmless because we think the defendant was guilty. That would be to substitute our judgment for

that of the jury and, under our system of justice, juries alone have been entrusted with that responsibility.") Nor can appellate factfinding be properly framed as a determination of what a reasonable jury "would surely have found" absent the error. "The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty. [Citation.]" (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 280 [113 S.Ct. 2078, 2082, 124 L.Ed.2d 182], italics omitted; see also *California v. Roy* (1996) 519 U.S. 2, 7 [117 S.Ct. 337, 136 L.Ed.2d 266] (conc. opn. of Scalia, J.): "To allow the error to be cured in that fashion would be to dispense with trial by jury.")