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3 Telephone: [Redacted]
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5
6 Attorney of Defendant, [Redacted]

7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 IN AND FOR THE COUNTY OF LOS ANGELES, SOUTH JUDICIAL DISTRICT
10

11 PEOPLE OF THE STATE OF CALIFORNIA)
12 Plaintiff,)
13 v.)
14 [REDACTED])
15 Defendant)
16)
17)
18)

Case No.: [Redacted]
NOTICE OF MOTION AND MOTION FOR
A NEW TRIAL
(Penal Code §§ 1179-1182)
Date:
Time:
Dept:

19 TO THE HONORABLE COURT, PLAINTIFF THE PEOPLE OF THE STATE OF CALIFORNIA,
20 AND THEIR ATTORNEY OF RECORD:

21 PLEASE TAKE NOTICE that at _____ o'clock on the morning/afternoon of
22 _____, in Department ____ of the Superior Court of the State of
23 California in and for the County of Los Angeles, South Judicial District, located at the Long Beach
24 Courthouse, 415 West Ocean Boulevard, Long Beach, California 90802, Defendant [Redacted]
25 _____, by and through his attorney of record, ___[Redacted]_____, will move and
26 hereby moves this Honorable Court for a new trial. This motion is brought on the grounds, firstly,
27 that the admission of ___[Redacted]___'s testimony from the preliminary hearing was improper
28 because it denied Defendant _____[Redacted]_____ his right to confront the witnesses against

1 him; and, secondly, that the admission of testimony by Detective [Redacted] as an expert on criminal
2 street gangs, including and especially testimony about and the criminal records of [Redacted] and
3 _____[Redacted]_____, Exhibits 50 and 51, respectively, was improper because it was unduly
4 prejudicial; and, thirdly, that the evidence presented in the People’s case-in-chief does not support a
5 verdict pursuant to Penal Code section 1181, subdivisions (6) and (7); and, fourthly, that [Redacted],
6 the alleged victim, who was previously unavailable to testify at trial, is now available and that this
7 constitutes “newly discovered evidence” within the meaning of Penal Code section 1181(a)(8); and,
8 fifthly, that the Defendant received ineffective assistance of counsel. This motion is based on this
9 notice of motion, the accompanying memorandum of points and authorities, the affidavits submitted
10 herewith, the “Reporter’s Transcript of Proceedings,” the other records and files of this case, and
11 such other evidence as the court may admit at the hearing on this motion.

12 Respectfully submitted,

13
14 _____[Redacted]_____, Attorney for Defendant
15
16

17 Date: _____
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1 [Redacted]
[Redacted]
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[Redacted]

3 Telephone: [Redacted]
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6 Attorney of Defendant, [Redacted]

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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 IN AND FOR THE COUNTY OF LOS ANGELES, SOUTH JUDICIAL DISTRICT
10

11 PEOPLE OF THE STATE OF CALIFORNIA)
12 Plaintiff,)
13 v.)
14 [REDACTED])
15 Defendant)
16)
17)
18)

Case No.: [Redacted]

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANT CHRISTOPHER WILSON'S
MOTION FOR A NEW TRIAL

(Penal Code §§ 1179-1182)

Date:
Time:
Dept:

19 TO THE HONORABLE COURT, PLAINTIFF THE PEOPLE OF THE STATE OF CALIFORNIA,
20 AND THEIR ATTORNEY OF RECORD:

21 Defendant _____[Redacted]_____, by and through his attorney of record, _____[Redacted]
22 _____, hereby submits the following Memorandum of Points and Authorities in support of
23 Defendant _____[Redacted]_____'s Motion for a New Trial filed of even date.

24 ///

25 ///

26 ///

27 ///

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1 returned a verdict of guilty.

2 ARGUMENT

3 Penal Code sections 1179 through 1182, inclusive, set forth the procedures and grounds for
4 granting a criminal defendant a new trial. Although Penal Code section 1181 specifies nine grounds
5 for ordering a new trial and expressly limits the grant of a new trial to only the listed grounds (“the
6 court may . . . grant a new trial, in the following cases only”) the appellate courts have consistently
7 held that the statute in no way limits the constitutional duty of trial courts to insure that defendants
8 are accorded due process of law. *People v. Fosselman*, 33 Cal.3d 572 (1983); *People v. Dennis*, 177
9 Cal App 3d 863 (1986). In *People v. Simon*, 208 Cal.App.3d 841, 848 (1989), the Court of Appeal
10 acknowledged that “there are certain nonstatutory grounds for a new trial motion.” In *People v.*
11 *Oliver*, 46 Cal.App.3d 747, 751 (1975), the Court of Appeal recognized

12 new trials are frequently granted on nonstatutory grounds where the failure to do so
13 would result in a denial of a fair trial to a defendant in a criminal case. The duty of a
14 trial court to afford every defendant in a criminal case a fair and impartial trial is of
15 constitutional dimension. Where the procedure has fallen short of that standard, an
accused has been denied due process, and the inherent power of the court to correct
matters by granting a new trial transcends statutory limitations.

16 In *People v. Davis*, 31 Cal.App.3d 106, 109-110 (1973), the Court of Appeal observed, “The power
17 to grant a new trial on such nonstatutory grounds obviously is derived from the trial court’s
18 constitutional duty to insure an accused a fair trial. . . . And, of course, a constitutional duty may not
19 be abridged by statute.” (Citations omitted.)

20 A. The admission of __[Redacted]__’s testimony from the preliminary hearing was
21 improper because it denied Defendant ____[Redacted]____ his right to confront the
22 witnesses against him.

23 A new trial may be granted when the court “has erred in the decision of any question of law
24 arising during the course of the trial.” Pen. Code § 1181(6). In addition, a new trial may be granted
25 for denial of constitutional due process.

26 The United States Constitution, amendment 6, and the California Constitution, article 1,
27 section 15 both protect the right of a criminal defendant to confront the witnesses against him. *See*
28 *also e.g. Barber v. Page*, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968) (Right of

1 confrontation and cross-examination is essential and fundamental.); *People v. Tran*, 47 Cal.App.4th
2 759 (1996) (Right to confront prosecution witnesses is fundamental.); *see also* Pen. Code § 686. The
3 purpose of the confrontation clause is to protect the defendant from being tried with secret evidence,
4 ex parte affidavits or depositions, and also to permit the *jury* to consider the demeanor and manner of
5 the witnesses and to judge for itself whether or not the witnesses ought to be believed. *See e.g.*
6 *Barber v. Page*, 390 U.S. 719; *Douglas v. Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934
7 (1965); *United States v. Hamilton*, 107 F.3d 499 (7th Cir. 1997) (Purposes of the Sixth Amendment
8 include ensuring reliability of evidence by allowing the trier of fact to observe the witness’
9 demeanor, nervousness, expressions, and other body language.); *People v. Arreola*, 7 Cal.4th 1144
10 (1994); *In re Terry*, 4 Cal.3d 911 (1971); *People v. Green*, 3 Cal.3d 981 (1971); *People v. Kegler*,
11 197 Cal.App.3d 72 (1987) (Hearsay rules and the confrontation clause are generally designed to the
12 further accuracy of the fact-finding process.). Generally, courts have held that admitting prior
13 testimony, especially that offered at a preliminary hearing where the defendant had the right to cross-
14 examine the witness, is not a violation of either the Sixth Amendment of the United States
15 Constitution, nor article 1, section 15 of the California Constitution, *Barber*, 390 U.S. at 722; *People*
16 *v. Cromer*, 24 Cal.3d 889, 892 (2001), nor Penal Code section 686, nor of the hearsay rule, Evid.
17 Code § 1200. However, a necessary prerequisite to this exception is that the witness must be
18 unavailable. *Ohio v. Roberts*, 448 U.S. 56, 65, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980); *Cromer*, 24
19 Cal.3d at 897. “This exception, however,” admonished the California Supreme Court, “must be
20 narrowly construed: ‘The ability of the fact finder to evaluate a witness's credibility is severely
21 hampered when such witness is absent and when his prior testimony is read into evidence. Only if
22 the necessity is clearly demonstrated may the defendant's right of confrontation be overcome.’”
23 *Cromer*, 24 Cal.3d at 983 citing *In re Montgomery*, 2 Cal.3d 863, 867 (1970).

24 In relevant part, Evidence Code section 240(a)(1) defines an “unavailable” declarant as a
25 “declarant [who] is . . . [e]xempted or precluded on the ground of privilege from testifying
26 concerning the matter to which his or her statement is relevant.” However, a witness may be deemed
27 unavailable ““only after [the court and/or the parties] taking reasonable steps to induce the witness to
28 testify unless it is obvious that such steps would be unavailing. Such action is required, else the

1 defendant is denied his Sixth Amendment right to confrontation.” *People v. Francis*, 200
2 Cal.App.3d 579, 585 (1988) quoting *Mason v. United States*, 408 F.2d 903 (10th Cir. 1969) citing
3 *People v. Sul*, 122 Cal.App.3d 355, 354-365. “We find,” the Court of Appeal held, “that a witness
4 who is physically available yet refuses to testify, *after the court has used all available means to*
5 *coerce such testimony*, is unavailable.” *Francis*, 200 Cal.App.3d at 587. The Court of Appeal
6 approved the trial court declaring two witnesses unavailable and permitting their preliminary hearing
7 testimony to be read at trial because the trial court took “reasonable steps to secure the attendance of
8 the witness.” *Id.* In *Mason*, the Government called four witnesses, each refused to testify on the
9 grounds of privilege, specifically the privilege against self-incrimination. All the witnesses were
10 granted immunity. Only one agreed to testify. As to the other three, the court granted each reluctant
11 witness counsel and afforded them time to consult, The three witnesses still refused to testify and the
12 trial court held them in contempt, and permitted the three witnesses’ earlier testimony to be read into
13 the record. *Mason*, 408 F.2d at 905. In *Sul*, a witness also refused to testify. The trial court found
14 the witness unavailable and permitted his preliminary testimony to be read at trial. The Court of
15 Appeal reversed the conviction on the grounds that the trial court did not use all the tools available to
16 it to coerce the witness to testify. *Sul*, 122 Cal.App.3d at 367. In the case *People v. Shoals*, 8
17 Cal.App.4th 475, 487 (1992), the Court of Appeal specifically held that a witness who had asserted
18 her privilege against self-incrimination was “legally unavailable as a witness” and that her testimony
19 at a later retrial would constituted “‘newly discovered’ evidence” within the meaning of *People v.*
20 *Williams*, 57 Cal.2d 263, 273-274 (1962) and *People v. Hayes*, 172 Cal.App.3d 517, 523-524 (1985).

21 However, the definition of “unavailable” does not include any witness “if the *exemption*,
22 *preclusion*, disqualification, death, inability, or absence of the declarant was brought about by the
23 procurement or wrongdoing of the *proponent* of his or her statement for the purpose of preventing
24 the declarant from attending or testifying.” Evid. Code § 240(b) (Italics added.). This statute codifies
25 the equitable doctrine of forfeiture by wrongdoing. The forfeiture by wrongdoing doctrine holds that
26 “‘one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to
27 confrontation.’” *People v. Osorio*, 165 Cal.App.4th 603, 611 (2008) quoting *Davis v. Washington*,
28 547 U.S. 813, 833, 165 S.Ct. 2266, 165 L.Ed. 2d 224 (2006); *see also Giles v. California*, 554 U.S.

1 353, 128 S.Ct. 2678, 171 L.Ed.2d 488 (2008). “The forfeiture by wrongdoing exception,” the United
2 States Supreme Court clarified, “applies only where the defendant acted with the intent or purpose of
3 making the witness unavailable to testify at trial.” *Osorio*, 165 Cal.App.4th at 611 citing *Giles*, 554
4 U.S. at 359. “The common-law forfeiture rule,” opined the United States Supreme Court, “was
5 aimed at removing the otherwise powerful incentive for defendants to intimidate, bribe, and kill the
6 witnesses against them— in other words, it is grounded in the ability of courts to protect the integrity
7 of their proceedings.” *Giles*, 554 U.S. at 374. The typical case in which the forfeiture of
8 wrongdoing exception applies is, indeed, a case in which the defendant killed or threatened the
9 witness; however, this need not be the case always. It is possible, as in the instant case, that the
10 prosecution might intimidate or bribe a witness to make him or her unavailable for purposes of trial.

11 Indeed, in the case *In re Williams*, 7 Cal.4th 572, 603 (1994), the California Supreme defined
12 “prosecutorial misconduct” as “conduct that was ‘entirely unnecessary to the proper performance of
13 the prosecutor’s duties and was of such a nature as to transform a defense witness willing to testify
14 into one unwilling to testify.’” (quoting *People v. Mincey*, 2 Cal.4th 408, 460 (1992) and citing *In re*
15 *Martin*, 44 Cal.3d 1 (1987)) “The misconduct in question,” the Court continued, “may be deemed a
16 substantial cause [of the witness not testifying] when, for example, it carries significant coercive
17 force and is soon followed by the witness’s refusal to testify.” *Id.* Finally, the testimony must be
18 favorable to the defendant and material. *Id.*

19 The law is well established that a “grant of immunity to an accomplice [conditioned on the
20 accomplice’s testimony being in conformity with an earlier statement] is a denial of a defendant’s
21 right to a fair trial if the prosecution’s case relies substantially on the accomplice’s testimony.”
22 *People v. Kennedy*, 36 Cal.4th 595, 612 (2005) citing *People v. Reil*, 22 Cal.4th 1153 (2000); *People*
23 *v. Allen*, 42 Cal.3d 1222 (1986).

24 In the instant case, the alleged victim, __[Redacted]__, sometimes referred to in the
25 reporter’s transcript as [Redacted], testified at the preliminary hearing. He was the only witness to
26 the actual interaction between himself and the defendant. His testimony is obviously material;
27 without it there is simply no case. Sometime after the preliminary hearing, but before trial, Mr.
28 [Redacted] recanted his testimony. However, in a devious twist on the practice of offering an

1 accomplice immunity to testify as condemned in *Kennedy*, the persecution, through its agent
2 Detective __[Redacted]__, threatened Mr. [Redacted] with prosecution on a charge of perjury if he
3 did not testify at trial and if his trial testimony did not materially match his testimony at the
4 preliminary hearing. R.T. _____. Mr. Peoples retained counsel—or more likely
5 counsel was retained on his behalf—and signed a statement recanting his testimony at the
6 preliminary hearing. R.T. _____. Under threat of persecution and possible prison, Mr.
7 [Redacted] asserted his privilege against self-incrimination pursuant to the Fifth Amendment to the
8 United States Constitution, R.T. _____, and was therefore “unavailable” pursuant to
9 Evidence Code section 240(a)(1). His preliminary hearing testimony, complete with cross-
10 examination, was read into the trial by Deputy District Attorney ____[Redacted]__ with his
11 colleague, Deputy District Attorney __[Redacted]__ reading for Mr. [Redacted]. R.T., pp. _____.
12 Mr. [Redacted]’s testimony is the only direct evidence against Mr. [Redacted].

13 Mr. [Redacted] is entitled to a new trial on the ground that he was denied his right to confront
14 the witness against him for two reasons: first, Mr. [Redacted] was not legally unavailable; second, by
15 reading Mr. [Redacted]’s preliminary hearing testimony at trial, the jury was denied to opportunity to
16 evaluate Mr. [Redacted]’s demeanor, etc. A person is not legally unavailable within the meaning of
17 Evidence Code section 240 when that unavailability is procured or caused by the party offering the
18 testimony, nor is a person legally unavailable until all reasonable efforts have been expended to
19 remove the cause of their unavailability. The prosecution was embarrassed by Mr. [Redacted].
20 When faced with the prospect that their only witness might recant and offer testimony favorable to
21 the defense, the prosecution undertook a program of intimidation and coercion. By threatening to
22 prosecute Mr. [Redacted] for perjury if he changed his trial testimony from that offered at the
23 preliminary hearing, the prosecution—in a way uniquely within its power—intimidated and coerced
24 Mr. [Redacted] until he took refuge in the Constitution, the only place he could. This activity on the
25 part of the prosecution was unethical, immoral, unjust and wrong. The prosecution could have easily
26 made Mr. [Redacted] available by merely granting him immunity, but did not do so for fear that its
27 scheme to convict Mr. [Redacted] on a frivolous charge would be frustrated. Indeed, the prosecution
28 had a win-win situation. Either Mr. [Redacted] would testify as they wished, or, because he was

1 “unavailable,” the prosecution could introduce his prior testimony. While the Courts have usually
2 phrased the forfeiture by wrongdoing exception in terms of the defendant’s wrongdoing—that is after
3 all the usual fact pattern— fundamental fairness, justice, and equity dictate that the prosecution has
4 forfeited the opportunity to use Mr. [Redacted]’s testimony at trial. Further, the jury was not
5 permitted to see and evaluate Mr. [Redacted] as a witness—this was as the prosecution wished it, of
6 course. Had the jury been able to see Mr. [Redacted] testify, it is likely that they either would have
7 found his testimony incredible, or Mr. [Redacted] would have testified that no crime occurred. For
8 these reasons, Mr. [Redacted] should be granted a new trial.

9 B. The admission of testimony by Detective __[Redacted]__ as an expert on criminal
10 street gangs, including and especially testimony about and the criminal records of
11 [Redacted] and _____[Redacted_____, Exhibits 50 and 51, respectively, was
12 improper because it was unduly prejudicial.

13 A new trial may be granted when the court “has erred in the decision of any question of law
14 arising during the course of the trial, and when the district attorney or other counsel prosecuting the
15 case has been guilty of prejudicial misconduct during the trial thereof before a jury,” Pen. Code §
16 1181(5). In addition, the court may, and ought to, grant a new trial when the defendant has been
17 denied constitutional due process.

18 It is “commonly recognized that evidence of identifying a defendant as a member of a gang
19 may be prejudicial, since juries may associate such groups with criminal activity and improperly
20 convict on the basis of inferences as to the defendant’s character.” John E. Thomas, Annotation,
21 *Admissibility of Evidence of Accused's Membership in Gang*, 39 ALR 4th 775, 776 (1985), *see also*
22 21 Cal. Jur. 3d *Criminal Law: Trial* § 527. Evidence Code section 352 states, in relevant part, “The
23 court in its discretion may exclude evidence if its probative value is substantially outweighed by the
24 probability that its admission will . . . create substantial danger of undue prejudice, or confusing the
25 issues, or of misleading the jury.” In the context of Evidence Code section 352, the word “prejudice”
26 retains “its etymological sense of prejudging a person or cause on the basis of extraneous factors.”
27 *People v. Doolin*, 45 Cal.4th 390, 438-439 (2009); *see also Vorse v. Sarasy*, 53 Cal App 4th 998,
28 1008-1009 (1997). “In other words,” the California Supreme Court admonished, “evidence should

1 be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury,
2 motivating them to use the information, not to logically evaluate the point upon which it is relevant,
3 but to reward or punish one side because of the jurors' emotional reaction.” *Id.* Evidence of a
4 defendant’s gang membership is of this sort; it “may be highly inflammatory and may cause the jury
5 to ‘jump to the conclusion’ that the defendant [committed the alleged crime],” *People v. Lewis*, 43
6 Cal.4th 415, 499 (2008); therefore, the admission of evidence that a defendant is a member of a
7 criminal street gang is committed to the trial court’s sound discretion, *People v. Garcia*, 168
8 Cal.App.4th 261, 275 (2008).

9 “California courts,” one Court of Appeal observed, “have long recognized the potentially
10 prejudicial effect of gang membership. ... The word gang connotes opprobrious implications. The
11 word gang takes on a sinister meaning when it is associated with activities.” *People v. Albarran* 149
12 Cal.App.4th 214, 223 (2007) citing *People v. Perez*, 114 Cal.App.3d 470, 479 (1981) (Internal
13 punctuation omitted.). “Thus, as general rule,” the Court of Appeal continued, “evidence of gang
14 membership and activity is admissible if it is logically relevant to some material issue in the case,
15 other than character evidence, is not more prejudicial than probative and is not cumulative.” *People*
16 *v. Albarran* 149 Cal.App.4th 214, 223 (2007), *see also* *People v. Avitia*, 127 Cal.App.4th 185, 192
17 (2005). “Gang evidence should not be admitted at trial when its sole relevance is to show a
18 defendant’s criminal disposition or bad character as a means of creating an inference the defendant
19 committed the charged offense.” *People v. Sanchez*, 58 Cal.App.4th 1435, 1449 (1997), *see also*
20 *People v. Albarran* 149 Cal.App.4th at 223. In *Kennedy v. Lockyer*, 379 F.3d 1041, 1055 (9th Cir.
21 2004), the United States Court of Appeals observed that “[o]ur cases make it clear that evidence
22 relating to gang involvement will almost always be prejudicial and will constitute reversible error.
23 Evidence of gang membership may not be introduced ... to prove intent or culpability.” (Citations
24 omitted.) The *Kennedy* court cited, among other cases, *United States v. Garcia*, 151 F.3d 1243, 1246
25 (9th Cir. 1998), “This is contrary to fundamental principals of our justice system. There can be no
26 conviction for guilt by association.” (quoting *United States v. Melchor-Lopez*, 627 F.2d 886, 891 (9th
27 Cir. 1980) (Internal quotation marks and brackets omitted.). Even in the highly relevant
28 circumstance of proving gang affiliation for purposes of sentencing enhancement under the

1 California Street Terrorism Enforcement and Prevention Act, ch. 1242, 1988 CAL. STAT. 4127-4130
2 codified as amended at Pen. Code §§ 186.20-186.28, the trial court must wisely use the discretion
3 granted by Evidence Code section 352 to guarantee fundamental fairness to the defendant. *People v.*
4 *Williams*, 16 Cal.4th 153, 193 (1997) citing *People v. Champion*, 9 Cal. 4th 879, 922 (1995).

5 The *California Appellate Reports* have many examples of the Court of Appeal chastising the
6 trial court for improperly admitting evidence of the defendant's alleged gang membership and/or
7 gang activities. In the case *People v. Memory*, 182 Cal.App.4th 835 (2010), the Court of Appeal
8 reversed the convictions of two defendants when evidence of their membership in the Jus Brothers
9 motorcycle club was introduced after the defense lost a motion in limine to exclude such evidence.
10 According the Court of Appeal, "the People offered the Jus Brothers evidence to prove that, because
11 defendants were Jus Brothers, they were required to fight when challenged, to not back down, and to
12 carry knives." *Id.* at 859. The Court of Appeal went on to hold, "'Gang evidence should not be
13 admitted at trial where its sole relevance is to show a defendant's criminal disposition or bad
14 character as a means of creating an inference the defendant committed the charged offense.'" *Id.*
15 quoting *People v. Sanchez*, 58 Cal.App.4th 1435 (1997). The Court further opined, "'Membership
16 in an organization does not lead reasonably to any inference as to the conduct of a member on a
17 given occasion. Hence, the evidence was not relevant. It allowed, on the contrary, *unreasonable*
18 inferences to be made by the trier of fact that the [defendant] was guilty of the offense on the theory
19 of 'guilt by association.'"' *Id.*, (quoting *In re Wing Y.* 67 Cal.App.3d 69, 79 (1977) (Italics as in
20 *Wang Y.*))

21 In the case *People v. Albarran*, the Court of Appeal concluded:

22 that evidence of Albarran's gang membership and some evidence concerning gang
23 behavior were relevant to the issue of motive and intent, other extremely
24 inflammatory gang evidence was admitted, which had no connection to these crimes.
25 The prosecution presented a panoply of incriminating gang evidence, which might
26 have been tangentially relevant to the gang allegations, but had no bearing on the
27 underlying charges. Deputy [Robert] Gillis [the People's gang expert] testified at
length about the identities of other 13 Kings [gang] members, the wide variety of
crimes they had committed and the numerous contacts between then various gang
members (other than Albarran) and the police. ... All this evidence was irrelevant to
the underlying charges and obviously prejudicial.

28 *People v. Albarran* 149 Cal.App.4th 214, 227-228 (2007) (At footnote 10 on page 227, the Court

1 notes, “Deputy Gillis’s testimony consumed the better part of an entire day (in a six-day trial) and
2 spans 70 pages in the reporter’s transcript.”) The Court of Appeals found that “the admission of
3 [this] evidence has violated federal due process and rendered the defendant’s trial fundamentally
4 unfair,” and reversed the conviction and remanded the case for a new trial in the superior court. *Id.*
5 at 232.

6 In *People v. Maestas*, 20 Cal.App.4th 1482 (1993), a case very much like the instant case, the
7 Court of Appeal reversed and remanded a conviction when gang evidence that the trial court had
8 ruled could be admitted only to prove the common gang membership of the defendants and certain
9 witnesses and then only to show bias on the part of the witnesses resulted in “testimony about gangs,
10 violence, fear, and retribution.” According to the Court’s opinion:

11 The only evidence of appellants' gang membership was the testimony of Los Angeles
12 Police Officer Steven Alva, a stipulated gang expert assigned to the Venice 13 Gang
13 for the past 18 months. In his opinion appellants were gang members because they
lived in Venice and appellant Young had a "V-13" tattoo and appellant Maestas had a
"Venice" tattoo.

14 But Officer Alva also testified there were a dwindling number of Venice 13
15 Gang members, now only about 200 to 250, he had interviewed hundreds of them, he
16 maintained lists of gang members, and lists of gang member monikers (nicknames),
and neither appellant Young nor appellant Maestas was on any list. Nor, in his
conversation with gang members and their associates, had either of their names ever
been mentioned.

17 Officer Alva further conceded he had no evidence appellant Maestas had ever
18 been involved in gang-related crime, it was "probable" he was not an active gang
member, and it was possible he was not a gang member at all.

19 *Id.* at 1494-1495. In all, Officer Alva’s testimony “fills 47 reporter’s transcript pages,” and “ranged
20 far from mere membership.” *Id.* at 1500. However, according to the Court of Appeal’s analysis,
21 Officer Alvar’s expert opinion “was based only on his [the defendant’s] ‘VENICE’ tattoo and place
22 of residence but on [not] ‘criminal activity.’” *Id.* In addition, the prosecutor asked various
23 percipient witnesses if they knew about the gang of which the defendants were alleged to be
24 members and whether or not they feared “retribution. *Id.* at 1499-1500. The Court of Appeal
25 concluded “that erroneously admitted gang membership evidence and its wake of gang-violence-
26 fear-retribution testimony resulted in a miscarriage of justice.” *Id.* at 1501.

27 In the instant case, the People called Detective __[Redacted]__ to testify as a gang expert.
28 Detective [Redacted]’s testimony consumed most of the morning and all of the afternoon of

1 [Redacted]_____, nearly all of the time the court devoted to taking testimony that day, and is
2 recorded on sixty-nine pages in the Reporter’s Transcript, specifically pages ____ to ____, inclusive.
3 Most of that testimony involved the description and interpretation of various tattoos worn by Mr.
4 [Redacted], for example the “Chief Wahoo” logo of the Cleveland Indians major league baseball
5 team which Detective [Redacted] interpreted to mean “insane,” R.T., _____
6 and the “B” logo of the Boston Red Sox major league baseball team, which Detective [Redacted]
7 interpreted to mean “Babies,” as in the Baby Insane Crips, Mr. Wilson’s alleged gang, R.T. _____
8 _____. The People then introduced exhibits 50 and 51, a “12-page certified rap sheet in the name of
9 [Redacted], . . . in case no. _____, [which] reflects a conviction for . . . offenses committed on or
10 about _____, in the County of Los Angeles” including murder and attempted murder, and “a
11 certified four-page minute order reflecting a defendant’s name _____[Redacted]_____ . . ., case
12 _____, with an offense . . . commission date of _____, and reflecting a conviction for
13 robbery,” R.T., _____, respectively. Neither Mr. [Redacted] nor Mr. [Redacted]
14 is a defendant in the instant case, and the crimes reflected in exhibits 50 and 51 occurred nineteen
15 months and twenty-nine months before in crime alleged in the instant case. No evidence was
16 introduced to tie Mr. [Redacted] to either of these earlier crimes. Further, Detective [Redacted] then
17 testified that Messrs. [Redacted] and [Redacted] were, and still are, “active members of the Insane
18 Crips or Baby Insane Crips.” R.T., _____. Detective [Redacted] opined, on the basis of
19 hearsay evidence, *see United States v. Mejia*, 545 F.3d 179, 197 (2d. Cr. 2008) (An expert witness
20 may not “simply transmit hearsay to the jury ... a practice that allows the Government to circumvent
21 the rules prohibiting hearsay,” (Internal quotation marks and citations omitted.)) that Mr. [Redacted]
22 was “a cold-blooded killer and . . . one of the most dangerous persons he’s ever investigated.” R.T.,
23 p._____. Whatever the prosecution’s intent in introducing this evidence, its effect can only be
24 to prejudice and inflame the jury by associating Mr. [Redacted] with Messrs. [Redacted] and
25 [Redacted], a classic case of guilt-by-association. For this reason, Mr. [Redacted] is entitled to a
26 new trial.

27 C. The evidence presented in the People’s case-in-chief does not support the verdict.
28 Subdivisions (6) and (7) of Penal Code section 1181 both provide that the court may grant a

1 new trial when “the verdict or finding is contrary to law or evidence.” In this context, “contrary to
2 law or evidence” means either an utter lack of evidence or that the evidence, such as it may be, is
3 lacking in enough probative force to establish the proposition of fact to which it is addressed. *In re*
4 *Estate of Bainbridge*, 169 Cal. 166 (1915).

5 Many cases have held that litigants, whether civil or criminal, whether the People or the
6 defendant, are entitled to a decision by the trial judge as to whether the evidence is sufficient to
7 support the jury’s verdict, giving due weight to conflicts and inconsistencies in the evidence and the
8 credibility of the testimony of witnesses; the court must use its own judgement and discretion in
9 reaching its conclusions as distinguished from the conclusions reached by the jury. *See e.g. People*
10 *v. Baker* 39 Cal 686 (1870); *People v. Merkle*, 89 Cal. 82 (1891); *People v. Ward*, 10 Cal.App. 524
11 (1909); *People v. Navarro*, 74 Cal.App.2d 544 (1946). Where the *preponderance of evidence*
12 against the verdict is so great as to produce a conviction that the jury must have been under the
13 influence of personal prejudice, a new trial will be granted. *People v. Hamilton*, 46 Cal. 540 (1873).
14 The judge must grant a new trial if he or she is not satisfied that the evidence as a whole was
15 sufficient to sustain the verdict, *see e.g. People v. Lum Yit*, 83 Cal 130 (1890); *People v. Nuno*, 89
16 Cal. App. 1 (1928); *People v. Westcott*, 93 Cal.App. 216 (1928), even when the evidence was wholly
17 that of the prosecution, not conflicting, and tended to prove all the material facts, *see e.g. People v.*
18 *Knutte*, 111 Cal 453 (1896); *People v. Sarazzawski* 27 Cal 2d 7 (1945); *People v. Cardenas*, 31
19 Cal.3d at 908 (1982).

20 In the instant case, the evidence against the defendant, ___[Redacted]___, was of two types
21 only: first, the testimony of ___[Redacted]___ offered at the preliminary hearing and read into the trial
22 record by the members of the prosecution’s staff, and, second, evidence of the defendant’s alleged
23 gang membership offered by a police officer-expert together with photographs of the defendant’s
24 tattoos. For the reasons stated above, none of this evidence is credible or legally sufficient to sustain
25 a conviction. Therefore, the defendant should be granted a new trial on the additional ground of
26 insufficient evidence.

27 D. ___[Redacted]___, the alleged victim, who was previously unavailable to testify at trial,
28 is now available. This constitutes “newly discovered evidence” within the meaning of Penal Code

1 section 1181(8).

2 Penal Code section 1181(8) states, in relevant part, that a new trial may be granted when
3 “new evidence is discovered material to the defendant, and which he could not, with reasonable
4 diligence, have discovered and produced at the trial.” To justify granting a new trial: (1) the
5 evidence and not merely its materiality must be newly discovered; (2) the evidence may not be
6 merely cumulative; (3) a different result must be probable on a retrial of the cause; (4) the party
7 could not with reasonable diligence have discovered and produced it at the trial; (5) these facts must
8 be shown by the best evidence which the case admits. *See e.g. People v. Beard*, 46 Cal.2d 278
9 (1956). Where newly discovered evidence contradicts the strongest evidence introduced against the
10 defendant and comes from unexpected source, it is proper that defendant should have an opportunity
11 of trying to present such evidence for consideration of the trier of facts. *People v. Williams*, 57
12 Cal.2d 263 (1962). As mentioned above, the Court of Appeal in the case *People v. Shoals*, 8
13 Cal.App.4th at 487, explicitly concluded that the testimony of a witness who had previously asserted
14 her Fifth Amendment rights was “‘newly discovered’ evidence.”

15 ____[Redacted____, the alleged victim and complaining witness, was unavailable to testify at
16 trial due to him, on the advice of counsel, asserting his rights against self-incrimination pursuant to
17 the Fifth Amendment to the United States Constitution and article 1, section 15 of the California
18 Constitution. Evid. Code § 240(a)(1). Mr. [Redacted] has since agreed to testify on behalf of the
19 defense. The nature of his testimony is set forth in the accompanying affidavit. For this additional
20 reason, Mr. [Redacted] should be granted a new trial.

21 E. Defendant received ineffective assistance from his counsel, ____[Redacted]__.

22 Every criminal defendant is entitled to reasonably competent and effective assistance of
23 counsel acting in a diligent and conscientious manner during all phases of the proceedings, including
24 pretrial, trial and post-trial. U.S. Const., amend. vi; Cal. Const., art. 1, § 15; *Strickland v.*
25 *Washington*, 466 U.S. 668 (1984); *People v. Alvarez*, 14 Cal.4th 155 (1996); 19A Cal.Jur.3d
26 *Criminal Law—Rights of the Accused*, § 152. Ineffective representation by counsel is grounds for a
27 new trial, notwithstanding it is not included within the specific grounds listed in Penal Code section
28 1181. 22B Cal.Jur.3d 50, *Criminal Law: Post-Trial Proceedings—Trial Court*, § 612 (And cases

1 cited there.).

2 “To prevail on a motion for a new trial on the ground of ineffective assistance of counsel, a
3 defendant must show both that counsel’s performance was deficient when measured against the
4 standard of a reasonably competent attorney and that counsel’s deficient performance resulted in
5 prejudice to the defendant in the adversarial process that the trial cannot be relied on as having
6 produced a just result.” 22B Cal.Jur.3d 51, *Criminal Law: Post-Trial Proceedings— Trial Court*, §
7 612. In *People v. Fosselman*, 33 Cal.3d at 583-584, the California Supreme Court approved a
8 “broader test of prejudice” and concluded that ineffective assistance of counsel existed when
9 “counsel failed to perform with reasonable competence and that it is reasonably probable a
10 determination more favorable to the defendant would have resulted in the absence of counsel’s
11 failings.” The California Supreme Court has found ineffective assistance of counsel where defense
12 counsel failed to move for a mistrial after an evidentiary error, *People v. Haskett*, 30 Cal.3d 841
13 (1982), or failed to object to other crimes evidence, *People v. Lanphear*, 26 Cal.3d 814 (1980), or
14 failed to object to critical identification evidence, *People v. Nation*, 26 Cal.3d 169 (1980). *See also*
15 *Fosselman*, 33 Cal.3d at 583. The quintessential grounds for a finding of ineffective assistance of
16 counsel are an utter failure to present a defense, *Turner v. Duncan*, 158 F.3d 449 (9th Cir. 1998), and
17 where the defense did not subject the prosecution’s case to a meaningful adversarial testing, *In re*
18 *Andrews*, 28 Cal.4th 1234 (2002); *see also* 19A Cal.Jur.3d, *Criminal Law: Rights of the Accused*, §
19 157. A defendant has no right to a specific defense—for example, insanity—but has a right to and
20 adequate and competent defense. *See e.g. People v. Roldan*, 35 Cal.4th 646 (2005); *People v. Cole*,
21 33 Cal.4th 1158 (2004); 19A Cal.Jur.3d, *Criminal Law: Rights of the Accused*, § 163.

22 In the instant case, trial counsel for the defense did virtually nothing to meaningfully test the
23 prosecution’s evidence. The defense case-in-chief consisted of only one witness, [Redacted], an
24 employee of the 7-Even Liquor Store in Long Beach. Mr. [Redacted]’s direct testimony consisted of
25 a mere one page of the transcript, and consisted of whether or not someone—presumably the victim,
26 but this is not clear—came into the store to use a phone to called 911 on November 9, 2009. Mr.
27 [Redacted] testified, “Actually, no.” R.T. _____. Defense trial counsel did not call any
28 other witnesses. A reasonably competent and diligent attorney would have called other witnesses to

1 testify, or example, a defense expert on gangs and gang culture to rebut the testimony of Detective
2 [Redacted], and an expert on the hip-hop/rap music industry to testify on the role of defendant and
3 the alleged victim in that industry. Defense trial counsel might have called members of the
4 defendant's family or friends to offer alternate explanations for the defendant's tattoos. All of these
5 obvious, reasonable measures ought to have been done by the defendant's trial counsel and would
6 have been done by a reasonably competent attorney. None of them were done in the instant case.
7 For this reason, the defendant must be granted a new trial.

8 CONCLUSIONS

9 For the reason stated above, the defendant, _____[Redacted]_____, should be granted a new
10 trial.

11 Respectfully submitted,

12
13 _____
14 [Redacted], Attorney for Defendant

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16 Date: _____
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