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IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 SAN JOSE DIVISION

ROBERT REEVES BLAKEWOOD,) Case No.: 5:11-CV-00142-LHK
)
Petitioner,) AMENDED REPLY TO ANSWER TO
) PETITION FOR WRIT OF HABEAS CORPUS
v.) AND AMENDED POINTS AND AUTHORITIES
) IN SUPPORT OF PETITIONER'S REPLY
JAMES D. HARTLEY, Warden,) TO ANSWER TO PETITION FOR WRIT OF
) HABEAS CORPUS
Respondent.)
)

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AMENDED REPLY TO ANSWER TO PETITION
FOR WRIT OF HABEAS CORPUS

Attorney for Petitioner Robert Reeves Blakewood does hereby respectfully file this Amended Reply to Answer to Petition for Writ of Habeas Corpus and alleges as follows:

1. Paragraph one, the "CUSTODY" paragraph of Respondent's Answer to Petition for Writ of Habeas Corpus is untrue because it alleges that the Petitioner's custody is lawful and proper;
2. Paragraph two, the "GENERAL AND SPECIFIC DENIALS" paragraph of Respondent's Answer to Petition for Writ of Habeas Corpus is untrue because it alleges that the State Court ruling was not based upon an unreasonable determination of fact or was not contrary to or not involved an unreasonable application of clearly established United States Supreme Court law. Furthermore, this paragraph is untrue as it alleges that Petitioner's conviction was not obtained as a result of an unlawful search and seizure in violation of the Fourth Amendment. Finally, this paragraph is untrue as it alleges that Petitioner was not denied a full and fair opportunity to litigate his Fourth Amendment claims in the underlying state proceedings.
3. Petitioner incorporates by reference and resubmits his Petition for Writ of Habeas Corpus as if fully set forth herein; and,
4. Petitioner also incorporates by reference the Memorandum of Points and Authorities to his Petition and this Reply.

1 AMENDED POINTS AND AUTHORITIES IN SUPPORT OF PETITIONER'S
2 REPLY TO ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS

3 Petitioner has reviewed the Attorney General's Points and
4 Authorities and notes that they are in accord with the Petitioner's
5 presentation of his case in at least two significant respects which
6 are noted as follows:

7 First, the Petitioner is in accord with the Attorney General's
8 summary of the Statement of Facts and secondly, the Petitioner is in
9 accord with the Attorney General's recognition of the standard for
10 determining, pursuant to established authority, whether the Petitioner
11 has had a full and fair opportunity to litigate his Fourth Amendment
12 claims within the State Courts. In this regard, the established
13 authority upon which the Attorney General and Petitioner agree will be
14 more fully developed later herein.

15 With respect to the Statement of Facts with which the Petitioner
16 and the Attorney General are in accord, those facts appear as follows:

17 That upon responding to a call and conversing with Doe at the
18 front of Petitioner's home, Officer Shoemaker knocked on the
19 Petitioner's front door three times and when the Petitioner answered,
20 Shoemaker asked the Petitioner to get Alford.

21 Petitioner turned away from the front door to get Alford from
22 upstairs and Shoemaker followed Petitioner inside to the entry/dining
23 room area.

24 Once inside, Shoemaker continued to question Petitioner whereupon
25 Petitioner ultimately admitted that he had engaged in sexual contact
26 with Doe.

1 Shoemaker then went outside to consult with her Sergeant who was
2 with Doe and then Shoemaker returned to the house and advised the
3 Petitioner of his Miranda rights.

4 Thereafter, Petitioner made further admissions when, thereafter,
5 Shoemaker again contacted her Sergeant outside, then returned and
6 arrested Petitioner.

7 In addition to the above, the Trial record reflects that at no
8 time did law enforcement possess either a search warrant or an arrest
9 warrant.

10 Since each of the above noted facts do appear in the Trial
11 record, in essence, they should be considered the Undisputed Facts of
12 Petitioner's case.

13 The Attorney General and the Petitioner are in additional accord
14 with respect to the legal criteria regarding whether the Petitioner
15 had, in fact, received a full and fair opportunity to advance his
16 Fourth Amendment claims within the State Courts.

17 In this regard, both the Attorney General and the Petitioner
18 agree that the case authority of Herrera v. Lemaster (10th Cir. 2000)
19 225 F.3d 1176 and Gamble v. State of Oklahoma 583 F.2d 1161, when
20 applied to a Habeas claim, constitutes well established authority for
21 guiding the reviewing Court's determination as to whether, under the
22 circumstances, the Petitioner when advancing his Fourth Amendment
23 claim, based on colorable U.S. Supreme Court precedent has, in fact,
24 been provided an opportunity to litigate those U.S. Supreme Court
25 precedents, on point, while presenting his Fourth Amendment arguments
26 within the State Courts.

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1 Furthermore, even though his Petition did not specifically cite
2 28 U.S.C. §2254 (d) (2) or Williams v. Taylor (2000) 529 U.S. 362, the
3 fact is, Petitioner cited case authority supporting Williams, supra
4 where, as argued in his Petition, the State Courts based their
5 decision on an unreasonable determination of the facts. These cases,
6 as cited in the Petition, are U.S. Ex Rel. Bostick v. Peters 3 F.3d
7 1023 (7th Cir. 1993), Dortch v. O'Leary 863 F.2d 1337 (7th Cir. 1988)
8 and Smallwood v. Gibson 191 F.3d 1257 (10th Cir. 1999).

9 Also, as to 28 U.S.C. Section 2254 (d) (1), which essentially
10 states that a Habeas Corpus Petition cannot be granted unless the
11 State Court's ruling was "contrary to or involved in unreasonable
12 application of clearly established U. S. Supreme Court law, that
13 recitation of authority on point, coincides with the criteria as noted
14 in both Herrera, supra and Gamble, supra, with which both parties
15 agree can be determinative as to whether Habeas relief should be
16 granted.

17 Furthermore, the Attorney General and the Petitioner herein,
18 would be in accord with Harrington v. Richter (2011) 131 S.Ct. 770,
19 which provides that Habeas relief can only be permitted where the
20 State Court's ruling on the claim being presented in Federal Court was
21 so lacking in justification that there was an error well understood
22 and comprehended in existing law beyond any possibility for fair
23 minded disagreement.

24 In this respect and as discussed further in this reply when
25 noting Petitioner's initial argument, the State Court's outright
26 failure to acknowledge the well-established precedent in Bumper v.

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1 North Carolina 391 U.S. 543, Silverman v. United States (1961) 365
2 U.S. 505 and Wong Sun v. United States (1963) 371 U.S. 471, clearly
3 demonstrates that the State Court's overall error in failing to apply
4 those U.S. Supreme Court precedents on point, as advanced in the State
5 Courts by the Petitioner was, in fact, beyond any possibility for fair
6 minded disagreement, in light of the clear cut application of Bumper,
7 supra, Silverman, supra and Wong Sun, supra to the Undisputed Facts of
8 Petitioner's case.

9 Consequently as emphasized herein, it is extremely noteworthy
10 that even though the Attorney General and the Petitioner are in
11 complete accord as to the operable Undisputed Facts of Petitioner's
12 case and the well-established exceptions to the Stone bar, the
13 Attorney General, nevertheless proceeds to oppose this Petition by
14 waging an argument, which, in actuality, defies and flies in the face
15 of the application of the Undisputed Facts and the Stone bar legal
16 authorities to which they initially agreed with Petitioner, in terms
17 of determining whether the Petitioner has, in fact, effectively argued
18 that he is entitled to an overall grant of his Habeas Corpus Petition.

19 Again, as argued above, despite agreeing with the Petitioner in
20 the two above noted significant respects, the Attorney General's
21 answer falls prey to a variety of the State Courts' glaring
22 misapplications of the Undisputed Facts of Petitioner's case, as well
23 as the State Court's failure to recognize and incorporate the
24 Petitioner's U.S. Supreme Court case authority (as well as United
25 States v. Shaibu (9th Cir. 1990) 920 F.2d 1423, as advanced by
26 Petitioner at the Appellate Court and the California Supreme Court.)

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1 Despite the Attorney General's concession that the standards set
2 by Herrera, supra and Gamble, supra are well established exceptions to
3 the Stone bar which is wholly consistent with the Petitioner's overall
4 argument on that point, as urged in his Petition, the Attorney General
5 nevertheless, proceeds to fruitlessly argue that the mere fact the
6 Petitioner was simply permitted to file and argue his Motion to
7 Suppress, based on his well-established Fourth Amendment claims,
8 throughout the State Court system, in and of itself, somehow
9 demonstrates that the Petitioner did, in fact, receive a full and fair
10 opportunity to litigate his Fourth Amendment claims.

11 Without undue elaboration, the Attorney General's baseless and
12 fallacious argument in this regard, simply ignores their initial
13 acknowledgement of the well-established authority as noted herein,
14 with respect to the standard which must be applied when determining,
15 whether or not, the Petitioner did, in fact, receive a full and fair
16 opportunity to litigate his Fourth Amendment claims as presented by
17 him at each level in the State Courts. (See for example, in this
18 regard, Herrera, supra, and Gamble, supra)

19 In fact, a close comparison of the Attorney General's answer to
20 the Petitioner's Writ, demonstrates that the only two areas where the
21 parties substantially disagree are the Attorney General's adoption of
22 the results of the State Court's willful failure to colorably apply
23 the Undisputed Facts of the Petitioner's case to the U.S. Supreme
24 Court precedent in Bumper, supra, Silverman, supra, and Wong Sun,
25 supra, as well as Shaibu, supra, where, by failing to carefully apply
26 the Undisputed Facts of Petitioner's case, the State Court's ignored

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1 the holding in Williams v. Taylor, supra (9th Circuit 1990) 920 F.2d
2 1423 and 28 U.S.C. §2254(d) (2) .

3 Furthermore, the only other area where the parties disagree
4 concerns the Attorney General's vain attempt to argue that, in fact,
5 the Petitioner received a full and fair opportunity to litigate his
6 claims, simply by virtue of the fact that he was allowed to argue his
7 Fourth Amendment claims, even where the Attorney General's argument in
8 that regard, wholly ignores the clear cut applicability of the
9 authority of Herrera, supra, Gamble, supra, Williams v. Taylor, supra,
10 28 U.S.C. §2254 (d) (1) and 28 U.S.C. §2254 (d) (2), which the Attorney
11 General themselves have acknowledged are determinative as to whether a
12 Petitioner has, in fact, received an opportunity to litigate his
13 Fourth Amendment claims in the State Courts, after referencing and
14 urging U.S. Supreme Court case precedent, on point, and applying that
15 authority to the established facts in his case at each level therein.

16 As to the first area of disagreement between the Attorney General
17 and the Petitioner, this Petitioner emphasizes the Attorney General's
18 overall misguided attempts to justify the State Court's failure to
19 carefully analyze the Undisputed Facts in Petitioner's case as well as
20 the State Courts willful failure to colorably apply U.S. Supreme Court
21 precedent, on point, as advanced by the Petitioner in connection with
22 the Undisputed Facts in his case.

23 As noted herein above, the Attorney General's adoption of and
24 attempt to justify the State Courts overall failure to carefully
25 analyze the Undisputed Facts in Petitioner's case, pursuant to the
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1 mandate of Williams, supra, and 28 U.S.C. §2254(d)(2) are, in fact,
2 glaring in their significance when outlined as follows:

3 For example, as vainly urged by the Attorney General, the
4 Trial Judge found that "Shoemaker contacted Defendant at the door of
5 his home, questioned him about Doe's allegations and decided that he
6 should be arrested and given his Miranda rights." This finding by the
7 Trial Court, wholly defies the Undisputed Statement of Facts where,
8 even the Attorney General concedes that the only exchange which
9 occurred at the Petitioner's front door was, in fact, Shoemaker's
10 demand that Petitioner seek out Alford. Furthermore, the Trial
11 Court's finding that the Petitioner was arrested at the front door,
12 wholly defies the Statement of Facts that Shoemaker followed the
13 Petitioner inside his house when the Petitioner, at Shoemaker's
14 request, went to retrieve Alford and where, once inside and without
15 requesting entry, Shoemaker proceeded to question Petitioner, prior to
16 providing Petitioner with his Miranda warnings, whereupon Petitioner
17 provided damaging admissions in advance of receiving his Miranda
18 warnings.

19 In the face of the Trial Court's above noted misplaced and
20 incorrect findings, that Court also, without factual support concluded
21 that there was consensual encounter at the entrance to Petitioner's
22 home and admittedly inside.

23 In light of the foregoing, the Trial Court wholly failed to
24 carefully analyze the Undisputed Facts of Petitioner's case as
25 initially conceded to by the Attorney General that Shoemaker entered
26 Petitioner's home by merely following Petitioner into his home when

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1 Petitioner turned his back to retrieve Alford at Shoemaker's request
2 and where, under the Undisputed Facts of Petitioner's case, Shoemaker
3 gained entry into Petitioner's home, without making a formal request
4 to enter and where, thereafter, extracting damaging admissions from
5 the Petitioner, prior to providing the Petitioner with his Miranda
6 warnings.

7 Consequently, despite well established Fourth Amendment law on
8 point, the Trial Judge 's findings (with which the Attorney General
9 erroneously adopts) that the Petitioner was cooperative when speaking
10 inside his house with Shoemaker and the Trial Judge 's finding that
11 the Petitioner said nothing to object to Shoemaker's presence in his
12 home, is of no overall legal consequences or impact as to whether
13 Petitioner, in fact, provided legal implied consent, given the clear
14 cut applicability of Bumper, supra, Silverman supra, Wong Sun, supra,
15 and the application of the true facts of U.S. v. Shaibu, supra, to the
16 Undisputed Facts of Petitioner's case to which the Attorney General
17 has initially conceded as applicable.

18 Thus, for the above stated reasons, it is clear that the Trial
19 Judge failed to carefully analyze the Undisputed Facts of
20 Petitioner's case and failed to colorably apply Fourth Amendment
21 Constitutional law, on point, which ultimately resulted in the Trial
22 Court's erroneous denial of Petitioner's Suppression Motion, since
23 from a Constitutional basis, the Petitioner did nothing, said nothing,
24 nor acted in any way, which was inconsistent with his Constitutionally
25 protected rights and thus, his acts or failure to act could never
26

1 justify a finding of implied consent pursuant to Bumper, supra,
2 Silverman supra, Wong Sun, supra.

3 Thus, the Trial Court's failure to colorably apply Fourth
4 Amendment Supreme Court precedent, on point, when based on the
5 Undisputed Facts as conceded to by the Attorney General, clearly shows
6 that the Trial Judge, by his failure to apply U.S. Supreme Court
7 authority, on point, and his failure to carefully analyze the
8 Undisputed Facts of Petitioner's case, wholly erred in denying
9 Petitioner's Suppression Motion, especially under the Undisputed
10 Facts, where Shoemaker never requested entry and where Shoemaker's
11 entry was without benefit of a warrant.

12 The Attorney General's attempt to adopt and justify the
13 Appellate Court's wholly erroneous finding of implied consent again
14 demonstrates that the Attorney General has fallen prey to the
15 Appellate Court's failure to carefully analyze the Undisputed Facts of
16 Petitioner's case as well as the Appellate Court's willful failure to
17 colorably apply U.S. Supreme Court case precedent, along with Shaibu,
18 supra, to the Undisputed Facts to Petitioner's case.

19 First, it is noteworthy that nowhere in their answer does the
20 Attorney General address the clear cut applicability of the U.S.
21 Supreme Court precedent, on point, as raised by the Petitioner, when
22 referring to Bumper, supra, Silverman, supra, and Wong Sun, supra,
23 especially where, as argued in his Petition, the Petitioner notes how
24 the Appellate Court's three findings of implied consent wholly defy
25 the essence of the holdings of Bumper, supra, Silverman, supra, and
26 Wong Sun, supra.

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1 In this regard, the Petitioner noted that the Appellate Court
2 found implied consent based, in fact, on three faulty factual
3 findings. These findings are as follows:

4 1. That the Petitioner left the door open when Shoemaker
5 asked Petitioner to get Alford.

6 2. That Petitioner, upon Shoemaker's request, went to get
7 Alford.

8 3. That when Petitioner went to get Alford, without seeking
9 Petitioner's request, Shoemaker gained entry into
10 Petitioner's home and before being Mirandized,
11 Petitioner cooperated in responding to Shoemaker's
12 questions.

13 As emphasized in his Petition, the Petitioner noted that by
14 basing their findings of implied consent on the above three factors,
15 the Appellate Court willfully failed to colorably apply U.S. Supreme
16 Court precedent, on point, to the Undisputed Facts of Petitioner's
17 case, as urged by him, where the Petitioner noted the following:

18 As to the Appellate Court's finding of implied consent based on
19 the fact that the Petitioner left the door open when Shoemaker asked
20 him to get Alford, the Appellate Court willfully failed to apply clear
21 cut U.S. Supreme Court precedent in the case of Silverman, supra,
22 which stands for a citizen's right to retreat into the sanctity of his
23 home and to be safe from warrantless intrusion, even if he is under
24 investigation.

25 As to the findings by the Appellate Court of implied consent,
26 based on the fact that the Petitioner went to get Alford at the

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1 specific request of Shoemaker, this finding wholly ignores Bumper
2 supra, which holds that actions in acquiescence to police authority
3 cannot be deemed consent.

4 As to the Appellate Court's third finding of implied consent,
5 based upon the fact that Petitioner cooperated by answering
6 Shoemaker's questions prior to receiving his Miranda warnings, the
7 Appellate Court wholly ignored Petitioner's argument that, pursuant to
8 Wong Sun, supra, statements or observations made after an unrequested
9 and unlawful entry cannot be used at all, against a citizen,
10 especially where, as applied in this case, to find implied consent.

11 In essence, the Appellate Court unjustifiably relied on the above
12 three facts, as words, acts, or conduct, to justify its finding of
13 implied consent, even where, as demonstrated above, everything the
14 Petitioner did or failed to do was wholly consistent with his
15 constitutionally protected rights and activities as enunciated and
16 clarified by Bumper, supra, Silverman, supra, and Wong Sun, supra.

17 Next, the Attorney General attempts to adopt and justify the
18 propriety of the Appellate Court's decision that U.S. v. Shaibu,
19 supra, is not controlling.

20 Yet, in doing so, the Attorney General fails to closely examine
21 how the true facts of Shaibu, supra, as found by that Court, are in
22 close alignment with the operable Undisputed Facts in Petitioner's
23 case.

24 The Attorney General's and the Appellate Court's recount of the
25 significant facts and legal conclusions in Shaibu, supra, are not
26 accurate by virtue of the Appellate Court's and Attorney General's

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1 omission of certain salient facts and the true holding of Shaibu,
2 supra.

3 The Court in Shaibu, supra, distinctly found that when Shaibu
4 turned around to retreat into his apartment, he, in fact, left his
5 door open, which both the Appellate Court and the Attorney General
6 failed to note.

7 The significance of the Appellate Court's and the Attorney
8 General's failure to acknowledge that the Shaibu Court found that
9 Shaibu retreated into his house, leaving the front door open, cannot
10 be overstated, since as noted herein above, the Appellate Court, in
11 rendering their three faulty findings of implied consent, noted that
12 one of those factors was the fact that the Petitioner had left the
13 front door of his residence open, when, at Officer Shoemaker's
14 request, the Petitioner retreated into his home to get Alford.
15 (Parenthetically, as noted herein, Petitioner's compliance with
16 Shoemaker's request to get Alford and his leaving the door open, when
17 he retreated into the sanctity of his home, are, as argued in his
18 Petition, Constitutionally protected activities pursuant to Bumper,
19 supra and Silverman, supra.)

20 Again, with reference to the Appellate Court's and the Attorney
21 General's recount of the Shaibu Court's findings of facts and ultimate
22 conclusions of law, concerning the fact that the Shaibu Court did find
23 that Shaibu had indeed, left the door to his apartment open, when he
24 retreated into his apartment, the Appellate Court and the Attorney
25 General further failed to relate the Shaibu Court's further findings
26 of fact and conclusions of law that Shaibu opened the door not to let

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1 the police enter, but only for himself to step out of the apartment to
2 meet visitors outside, rather than inside and that there was no
3 contention that the police expressly or impliedly asked consent to
4 enter, nor that Shaibu expressly granted or refused entry. The Shaibu
5 Court went on to conclude that it is one thing to infer consent from
6 actions responding to a police request. It is quite another to
7 sanction the police walking into a person's home without stopping at
8 the door to ask permission.

9 Under the circumstances of Shaibu, supra, the Court noted that
10 the defendant's failure to object to an entry, especially in the
11 absence of a specific request by the police for permission to enter,
12 is not sufficient to establish free and voluntary consent. The Court
13 concluded by observing, "we will not infer both the request and the
14 consent."

15 Yet, in the face of the Appellate Court's and the Attorney
16 General's failure to fully recount the salient features of Shaibu,
17 supra, as noted above, the Appellate Court and the Attorney General,
18 here, make reference to cases which are factually distinguishable from
19 Shaibu, supra, and the Undisputed Facts of Petitioner's case, to
20 support each of their assertions that Shaibu, supra, is not
21 controlling, as applied to the Undisputed Facts of Petitioner's case.

22 First, the Attorney General cites the Appellate Court's misplaced
23 reliance on United States v. Impink (9th Cir. 1984) 728 F.2d 1228,
24 which is factually distinct from Petitioner's case because that aspect
25 of Impink, supra, focuses on "assisting in the search of others,"
26 which is not factually germane to Petitioner's Undisputed Facts when,

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1 especially, the Petitioner relies on the holding of Shaibu, supra,
2 where the Shaibu opinion, in part, makes specific reference to Impink,
3 supra, which states that in implied consent cases "the suspect himself
4 takes some action" showing "unequivocal and specific" consent.

5 In this regard, as emphasized in the Undisputed Facts, the fact
6 that Petitioner remained silent and did not object to Shoemaker's
7 warrantless, unrequested entry into his home and his mere cooperation
8 thereafter, by answering Shoemaker's questions, prior to her providing
9 Petitioner with his Miranda warnings, in no way establishes implied
10 consent, pursuant to Petitioner's reliance on Bumper, supra,
11 Silverman, supra, and Wong Sun, supra, where in fact, under those
12 circumstances, Petitioner did nothing, said nothing, nor acted in any
13 way which was inconsistent with his Constitutional rights as provided
14 by Bumper, supra, Silverman, supra, and Wong Sun, supra.

15 Thus, the Appellate Court's and the Attorney General's reliance
16 on Impink, supra, for the above stated reasons, does not support their
17 argument that Petitioner somehow provided implied consent to
18 Shoemaker's otherwise warrantless and unlawful entry.

19 Furthermore, the Appellate Court's and the Attorney General's
20 reliance on People v. Harrington (1970) 2 Cal.3d 991, is factually
21 distinguishable when compared to the true facts of Shaibu, supra, and
22 the Undisputed Facts of Petitioner's case since, unlike Shaibu and
23 Petitioner, who did absolutely nothing to indicate that they had acted
24 in any way, by undertaking some act or uttering some words to imply
25 consent, in Harrington, supra, after the Officer asked if he could go
26 inside Harrington's residence (which is clearly not part of the

1 surrounding facts of Shaibu, supra, and Petitioner's case), Harrington
2 made a gesture by extending his left hand, whereupon the officer
3 entered Harrington's apartment.

4 Thus, the facts of Harrington, supra, are totally distinct from
5 the Undisputed Facts of Petitioner's case, since in Harrington, supra,
6 the officer not only requested entry into Harrington's apartment, but
7 Harrington responded thereto in making a gesture by extending his left
8 hand, in clear acquiescence to the officer's request to enter. Thus,
9 under the circumstances, the Harrington Court was clearly justified in
10 finding implied consent.

11 Furthermore, the Appellate Court's and the Attorney General's
12 reliance on United States v. Griffin 530 F.2d 739 (7th Cir.1976) is
13 misplaced since, as noted in the Shaibu opinion, unlike the facts of
14 Shaibu, supra, the police ultimately requested admission into
15 Griffin's and his codefendant Russell's apartment on two occasions.
16 Thus, the Seventh Circuit found consent, not only because the police
17 twice asked to enter the apartment, but also because, even though,
18 Russell slammed the front door after the first request by the police
19 to be admitted into the apartment, upon answering the door after the
20 police's second knock and their second request to enter, Russell
21 stepped back into the apartment, leaving the door partially open.

22 In Griffin, supra, neither officer later recalled any words
23 spoken by Russell during these moments. The officers entered the
24 apartment and followed Russell down a short hallway into the living
25 room.

1 The Shaibu opinion noted how Griffin, supra, was dissimilar from
2 Shaibu, supra, in two fundamentally significant respects. First, in
3 Griffin, supra, the police requested entry while in Shaibu's case,
4 they did not. Second, in Griffin, supra, the Seventh Circuit
5 interpreted the acts of opening the door and stepping back, as
6 responding affirmatively to a clear request by the police to enter the
7 home. The Shaibu Court noted that no affirmative acts took place.
8 Shaibu opened the door, not to let the police enter, but only for
9 himself to step out of his apartment to meet visitors outside rather
10 than inside. Shaibu, supra, goes on to state, that there is no
11 contention that the police expressly or impliedly asked consent to
12 enter, nor that Shaibu expressly granted or refused entry. In this
13 regard, the Shaibu Court noted that it is one thing to infer consent
14 from actions responding to a police. It is quite another to sanction
15 the police walking into a person's home without stopping at the door
16 to ask permission.

17 Thus, for the above stated reasons the facts of Shaibu, supra,
18 are clearly distinguishable from Griffin, supra, and thus, in light of
19 the foregoing argument where the facts and holding of Impink, supra,
20 the facts of Harrington, supra, and the facts of Griffin, supra, are
21 demonstrably distinct from the Undisputed Facts in Petitioner's case,
22 the Appellate Court and the Attorney General have wholly failed to
23 establish why, in fact, the decision in Shaibu, supra, should not have
24 been controlling in Petitioner's case.

25 In the face of the true facts in Shaibu, supra, and the fact that
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1 Harrington, supra, and Griffin, supra, and the applicable facts and
2 holding of Impink, supra, are distinguishable from the Undisputed
3 Facts of Petitioner's case, at the bottom of page 4 and the top of
4 page 5 of the Attorney General's Memorandum of Points and Authorities
5 in support of their answer to the Petition for Writ of Habeas Corpus,
6 the Attorney General again fails to recognize the true factual and
7 legal applicability of Shaibu, supra, as well as the clear
8 applicability of Bumper, supra, Silverman, supra, and Wong Sun,
9 supra.

10 In this regard, a close scrutiny of the Attorney General's
11 argument demonstrates that they again fail to note the true facts of
12 Shaibu, supra, and its underlying decision, based thereon, as well as
13 the Undisputed Facts of Petitioner's case, which are closely the same
14 as the true facts of Shaibu, supra, where that Court also found that
15 Shaibu, when retreating into his apartment, had left his door open,
16 just as the Petitioner did under the Undisputed Facts of his case.

17 Also, the Attorney General's argument that the Petitioner
18 cooperated in getting Alford wholly ignores the impact of the U. S.
19 Supreme Court case of Bumper, supra.

20 Further, by arguing that Petitioner cooperated by responding to
21 Officer Shoemaker's questions, the Attorney General ignores that under
22 the Undisputed Facts, as argued in his Petition, when coupled with the
23 clear fact that Shoemaker had already accomplished her unrequested and
24 thus, unlawful entry into Petitioner's residence, the mere fact that
25 the Petitioner assertedly, thereafter cooperated, cannot form a basis
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1 for finding implied consent pursuant to Wong Sun, supra, for the
2 reasons stated in the Petitioner's initial Petition for Habeas relief.

3 Also, pursuant to the authority of Wong Sun, supra, the Attorney
4 General's argument that after Shoemaker's entry into Petitioner's
5 home, which has clearly been shown to be unlawful, the mere fact that
6 the Petitioner did not, thereafter object to Shoemaker's presence does
7 not, in any way, absolve Shoemaker from her initial, unrequested,
8 warrantless entry into the sanctity of Petitioner's home, where, under
9 the overall circumstances of Petitioner's case, Shoemaker's initial
10 entry, her initial questioning and her continued presence was
11 unjustified under the clear cut authority of Bumper, supra,
12 Silverman, supra, and Wong Sun, supra.

13 Thus, the Trial Judge did err in finding a "consensual encounter"
14 at defendant's home and consequently, he erred when denying
15 Petitioner's Motion to Suppress evidence.

16 The Petitioner has already emphasized why, pursuant to the
17 established authority of Herrera, supra, Gamble, supra, and the
18 authority of Williams v. Taylor, supra, as well as the authority of 28
19 U.S.C. §2254(d)(1) and 28 U.S.C. §(d)(2), the Trial Judge, not only
20 willfully failed to colorably apply United States Supreme Court
21 precedent on point, as urged by the Petitioner, in connection with the
22 Undisputed Facts of Petitioner's case, but also emphasized that the
23 Trial Judge failed to carefully analyze the facts of Petitioner's case
24 and thus, based his decision on an unreasonable determination of those
25 facts and consequently, pursuant to the authority with which the
26 Attorney General agrees, as provided by Williams, supra, and 28 U.S.C.

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1 §2254(d)(2), and thus, based on the Trial Judge's failures as noted
2 immediately herein above, this Petitioner respectfully submits that he
3 was not provided a full and fair opportunity to argue his Fourth
4 Amendment claims as advanced by him at the Trial Court level.

5 Furthermore, with respect to this Petitioner's close review of
6 the Attorney General's attempts to adopt and justify the Appellate
7 Court's conclusion that Shaibu, supra is not controlling, based on a
8 close review and scrutiny of Shaibu, supra, it is clear, as urged
9 herein, that both the Appellate Court and the Attorney General, when
10 arguing that Shaibu, supra, should not be controlling, based their
11 opinion, in part, on an unreasonable determination of the true facts
12 of Shaibu, supra, in outright violation of Williams v. Taylor, supra,
13 and 28 U.S.C. §2254 (d)(2), to which the Attorney General has earlier
14 conceded can be a basis for a reviewing Court's issuance of a Writ of
15 Habeas Corpus.

16 Furthermore, both the Appellate Court and the Attorney General
17 fail to fully appreciate the principle holding of Schneckloth v.
18 Bustamonte (1973) 412 U.S. 218, which wholly concurs with the
19 underlying holding of Shaibu, supra, that a citizen must have been
20 found to express voluntary consent, whether express or implied before
21 a search or entry can be legally justified. In this regard, the
22 additional aspect of Schneckloth, supra, regarding the fact that the
23 government need not show the citizen's knowledge of his right to
24 refuse consent, in no way, was advanced by this Petitioner, at any
25 stage of the proceedings against him.

1 Consequently, for both the Appellate Court and the Attorney
2 General to raise this second aspect of Schneckloth, supra, which in no
3 way played a role in the Petitioner's argument of his Fourth Amendment
4 claims, the Appellate Court as well as the Attorney General have again
5 failed to carefully analyze the facts of Petitioner's case pursuant to
6 Williams v. Taylor, supra and 28 U.S.C. §2254(d)(2).

7 Thus, when this Court considers, as urged herein, the impact of
8 the Appellate Court's failure to comply with Williams, supra, and 28
9 U.S.C. §2254(d)(2), in addition to the Appellate Court's willful
10 failure and refusal to colorably apply U.S. Supreme Court precedent,
11 on point, as urged by the Petitioner when relying on Silverman, supra,
12 Bumper, supra and Wong Sun, supra, as those cases pertain to the
13 Undisputed Facts of Petitioner's case, it is respectfully submitted
14 that the Petitioner has established, at the Appellate Court level, he
15 did not receive a full and fair opportunity to argue his Fourth
16 Amendment claims which he advanced pursuant to the Stone bar authority
17 exceptions, to which the Attorney General has agreed can form a basis
18 for this Court's ultimate grant of Petitioner's Writ of Habeas Corpus.

19 Also, the California Supreme Court refused to consider the merits
20 of Petitioner's Fourth Amendment arguments which were, in large part,
21 similar to his overall arguments which he advanced in the Trial Court
22 and at the Appellate Court. Thus, without undue elaboration, the
23 California Supreme Court wholly failed to provide Petitioner with a
24 full and fair opportunity to advance his Fourth Amendment claims in
25 that Court, for the reasons stated herein with respect to the

1 arguments which the Petitioner attempted to raise in the Trial Court
2 and Appellate Court.

3 Thus, even though the Petitioner believes he has persuasively
4 argued that he is entitled to this Court's grant of his Writ of Habeas
5 Corpus, for the reasons stated in the Petition and the reasons stated
6 herein, this Petitioner feels compelled to address two additional
7 arguments raised in the Attorney General's answer.

8 First, apparently pursuant to Ortiz-Sandoval v. Gomez 81 F.3d at
9 899, the Attorney General urges that the Petitioner may not argue why
10 he believes the State Courts decisions were incorrectly decided and
11 where, in this regard, the Attorney General notes that this Petitioner
12 has merely listed all the ways he disagrees with the State Court
13 rulings.

14 The fact of the matter is, Petitioner is not seeking Habeas
15 relief based on why he disagrees with the State Courts rulings, but
16 instead, based on the well reasoned opinions of the U.S. Supreme Court
17 justices involved in the majority decisions of Silverman, supra,
18 Bumper, supra and Wong Sun, supra.

19 In this respect, Petitioner submits that the majority of the
20 justices involved in the above three noted Supreme Court decisions
21 would wholeheartedly disagree with the State Court's overall failure
22 to properly interpret and apply Fourth Amendment law, on point, as
23 enunciated in Silverman, supra, Bumper, supra and Wong Sun, supra.

24 Secondly, the Attorney General, in the face of their recognition
25 of the established exceptions to the Stone bar, nevertheless allude to
26 the curious standard of Mack v. Cupp 564 F.2d at 901, where the

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1 Attorney General seems to ignore the Stone bar exception authorities
2 as noted in Herrera, supra and Gamble, supra, by begging the Court to
3 adopt a novel standard that "as long as the State procedures were
4 fair," somehow this reviewing Court should find that the Petitioner
5 received a full and fair opportunity to argue his Fourth Amendment
6 claims in the State Courts.

7 With all due respect to the Attorney General, this Petitioner has
8 not found any established authority to substantiate the Attorney
9 General's claim that the decision in Mack, supra, in fact, in any way
10 supplants the well established authority, to which the Attorney
11 General has previously conceded as embodied in Herrera, supra, Gamble,
12 supra, and 28 U.S.C. §2254(d)(1) and 28 U.S.C. §2254(d)(2).

13 Thus, for each of the above stated reasons, this Petitioner
14 respectfully requests that his Petition for Habeas Corpus relief be
15 granted.

16 CONCLUSION

17 Again, for the above stated reasons, the Petitioner requests that
18 this Court grant his Petition for Habeas Corpus relief.

19
20 Respectfully submitted,

21 Date: May ___, 2012

22 _____
23 Robert Bratberg
24 Attorney for Petitioner
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