

1 ANTHONY P. CAPOZZI, CSBN: 068525
2 NICHOLAS A. CAPOZZI, CSBN: 275568
3 LAW OFFICES OF ANTHONY P. CAPOZZI
4 1233 W. Shaw Avenue, Suite 102
5 Fresno, California 93711
6 Telephone: (559) 221-0200
7 Facsimile: (559) 221-7997
8 E-mail: capozzilaw@aol.com

9 Attorney for Defendant,
10 MICHAEL S. IOANE

11 IN THE UNITED STATES DISTRICT COURT
12 EASTERN DISTRICT OF CALIFORNIA, FRESNO

13 UNITED STATES OF AMERICA,) Case No.: 1:09-CR-00142-LJO
14 Plaintiff,)
15 vs.) MOTION FOR JUDGMENT OF
16 MICHAEL S. IOANE,) ACQUITTAL PURSUANT TO RULE
17 Defendant.) 29; IN THE ALTERNATIVE,
18) MOTION FOR NEW TRIAL
19) PURSUANT TO RULE 33;
20) MEMORANDUM OF POINTS AND
21) AUTHORITIES IN SUPPORT
22) THEREOF
23)
24)
25) DATE: December 5, 2011
26) TIME: 1:00 p.m.
27) Hon. Lawrence J. O'Neill
28)

29 **TO THIS HONORABLE COURT AND TO THE UNITED STATES ATTORNEY**
30 **FOR THE EASTERN DISTRICT OF CALIFORNIA:**

31 Defendant, MICHAEL S. IOANE, by and through his attorney
32 of record, Anthony P. Capozzi, hereby moves this honorable
33 Court by Motion for Judgment of Acquittal Pursuant to Rule 29
34 of the Federal Rules of Criminal Procedure or, in the
35 alternative, for New Trial Pursuant to Rule 33 of the Federal
36 Rules of Criminal Procedure.

37 This Motion is based upon the attached Memorandum of
38 Points and Authorities filed and served herewith, and such

1 other oral and documentary evidence that has and may be
2 introduced in this matter.

3
4 **MEMORANDUM OF POINTS AND AUTHORITIES**

5
6 **I. MOTION FOR JUDGMENT OF ACQUITTAL**

7
8 Rule 29 of the Federal Rules of Criminal Procedure
9 provides that the Court "shall order the entry of judgment of
10 acquittal of one or more offenses charged in the indictment
11 or information after the evidence on either side is closed if
12 the evidence is insufficient to sustain a conviction." A
13 motion for acquittal may be made and granted after the
14 conclusion of the evidence on either side, at the conclusion
15 of trial and before the case is submitted to jury, or after
16 the jury has returned a verdict. In assessing the motion,
17 the court views the evidence in the light most favorable to
18 the prosecution and determines if any trier of fact could
19 have found the essential elements of the crime beyond a
20 reasonable doubt. See generally Jackson v. Virginia, 443
21 U.S. 307, 319 (1979);

22
23 **1) Count 1 - Conspiracy**

24
25 Defendant Michael Ioane (hereafter "Ioane"), was charged
26 in Count 1 with a Conspiracy to Defraud the United States by
27 willfully attempting to evade or defeat any income tax, or
28

1 payment thereof, due and payable to the Internal Revenue
2 Service.

3 In United States v. Caldwell, 989 F.2d 1056 (9th Cir.
4 1993), the defendant was a bookkeeper for a "warehouse bank",
5 utilized to keep clients' financial transactions secret. The
6 goal of the operation was to maintain clients' privacy and
7 too help them avoid paying income tax.

8 The Caldwell court stated that "**when you mess with the**
9 **IRS, the IRS messes back.**" 989 F.2d at 1058 (emphasis
10 added). The government shut down the bank and indicted
11 defendant Caldwell for conspiracy to defraud the United
12 States.

13 The "defraud clause" of 18 U.S.C. 371 prohibits all
14 conspiracies "to defraud the United States, or any agency
15 thereof in any manner and for any purpose. However, there
16 must be an allegation of deceitful or dishonest conduct.
17 Here, the Indictment did not make this allegation.

18 In Caldwell, the government contended that any conspiracy
19 to obstruct a government function is illegal even if not done
20 deceitfully or dishonestly. 989 F.2d at 1059. The same
21 charge was alleged here against Ioane. That is, the
22 government here, and in Caldwell, did not specifically allege
23 deceitful or dishonest conduct on the part of the defendant.
24 What was alleged in the Indictment is different and at
25 variance as to what was proven at trial and instructed to the
26 jury.

27 The Ioane Indictment charged a conspiracy to defraud in
28 the attempt to evade or defeat a tax, or payment thereof, due

1 to the IRS. The jury instruction read in this case to the
2 jury related to an obstruction of the lawful functions of the
3 IRS by deceitful or dishonest means as charged in the
4 Indictment. (Instruction No. 26.) This is not what was
5 alleged in the Indictment.

6 Ioane had requested in a Motion for a Bill of
7 Particulars, clarification as to certain allegations in the
8 Indictment. (Docket No. 113.) The request was denied. The
9 clarification requested would have notified Ioane of the
10 government's theory of prosecution and what was specifically
11 alleged in the Indictment; that is, whether deceit and
12 dishonesty were a part of the allegation in the Indictment or
13 whether obstruction of the lawful functions of the IRS by
14 deceit or dishonest means was charged.

15 What was read to the jury (Instruction No. 26) was not
16 what was alleged in the Indictment. As a result, Ioane was
17 clearly prejudiced.

18 Additionally, in Count 1, Ioane is alleged to have
19 conspired to attempt to evade or defeat the payment of an
20 income tax to the IRS. However, the government never
21 established an income tax due and owing by Dr. Booth.
22 Without this element of proof, Ioane could not have conspired
23 to evade or defeat the payment of an income tax. It strains
24 the fabric of law beyond reason to find Ioane guilty of
25 conspiring to evade or defeat a **payment** of income tax when no
26 such payment owed was ever proved. One cannot defeat
27 something that does not actually exist.
28

1 Accordingly, for these reasons, Ioane should be acquitted
2 of Count 1.

3
4 **2) Bill of Exchange Counts**

5
6 Iaone was charged in Counts 5 through 8 of the Indictment
7 with Presenting a False or Fictitious Instrument or Document
8 Purporting to be an Actual Security or Financial Instrument
9 of the United States, in violation of 18 U.S.C. 514(a)(2).
10 For Ioane to be guilty, the government must prove each of the
11 following elements beyond a reasonable doubt:

12 **First**, that a false or fictitious instrument, document or
13 other item was passed, presented, or offered within the
14 United States;

15 **Second**, that the instrument, document or other item
16 purported or contrived through scheme or artifice to be an
17 actual financial instrument issued under the authority of the
18 United States; and

19 **Third**, that the defendant did so with the intent to
20 defraud.

21 Although the statute is broader in that it includes financial
22 instruments issued under the authority of "an organization,"
23 the Indictment specifically charged that the instruments were
24 issued "under the authority of the United States,
25 specifically the United States Treasury." The Indictment may
26 not be "broadened except by the grand jury itself; therefore,
27 in the instant case, the government must prove that the
28 instruments purport to have been issued under the authority

1 of the United States Treasury. See United States v. Howick,
2 263 F.3d 1056, 1063 (9th Cir. 2001), cert. denied, 535 U.S.
3 946 (2002).

4 The evidence presented by the government in the instant
5 case is insufficient to prove an essential element of the
6 charged offense: That the instruments purported or contrived
7 through scheme or artifice to be an actual financial
8 instrument under the authority of the United States,
9 specifically the Treasury Department.

10 Neither the statute nor the case law specifically defines
11 what "issued under the authority of the United States" means.
12 In Howick, the Court set forth a standard to aid in the
13 analysis:

14
15 An unlawful fictitious obligation, we conclude, is
16 one that appears to be "actual" in the sense that
17 it bears a family resemblance to genuine financial
18 instruments. The offending document must, in other
19 words, include enough of the various hallmarks and
20 indicia of financial obligations so as to appear
21 to be within that class. The test, then, is not
22 whether the document is similar to any financial
23 obligation in particular, but whether taken as a
24 whole it is apparently a member of the family of
25 "actual ... financial instrument[s]" in general.
26 264 F.3d at 1068.

27 Here, the "Bill of Exchange" does not purport to have
28 been actually issued by the United States. (Exhibit 1)
29 Additionally, there are no hallmarks purporting the
30 instruments to have been issued under the authority of the
31 United States: there are no official, or purportedly
32 official, seals, signatures, watermarks or other governmental
33 insignia on the documents. Furthermore, the documents are

1 signed by, and issued by various private citizens. The
2 document does not indicate that the United States Treasury
3 would pay the amount. Rather, that the amount would be
4 submitted to, and come from, the drawer's U.C.C. Contract
5 Trust Account.

6 Finally, there was no evidence presented that Ioane, nor
7 his codefendant, Dr. Booth, acted with the intent to defraud.
8 Both Booth and Ioane testified that they acted in good faith.
9 Similarly, the government failed to prove that Ioane knew the
10 "Bill of Exchange" was false or fictitious.

11 Since the government did not prove intent, Ioane should
12 be acquitted of Counts 5 through 8.

13
14 **II. MOTION FOR NEW TRIAL**

15
16 If a Judgment for Acquittal is not granted, the above
17 mentioned reasons for said Motion should apply to Ioane's
18 alternative Motion for New Trial. Rule 33 of the Federal
19 Rules of Criminal Procedure states in pertinent part:

20
21 The court on motion of a defendant may grant a new
22 trial to that defendant if required in the
interest of justice.

23 This provision has been interpreted to mean that trial
24 court may grant a new trial where the court reaches the
25 conclusion that the verdict is contrary to the weight of the
26 evidence or that a miscarriage of justice may have resulted.
27 United States v. Ahern, 761 F.Supp. 1382, 1383 (S.D. Indiana
28

1 1991); see also 3 Wright, Federal Practice and Procedure,
2 section 553, 245-246 (1982).

3 On such a motion for new trial, the Court's power is much
4 broader than that on a motion for acquittal pursuant to Rule
5 29. Ahern, 761 F.Supp. at 1383.

6
7 **1) Count 1- Conspiracy**

8
9 Here, the variance of Count 1 as it was charged in the
10 Indictment and the charge as instructed to the jury has
11 created a great miscarriage of justice. As mentioned, supra,
12 The Ioane Indictment charged a conspiracy to defraud in the
13 attempt to evade or defeat a tax, or payment thereof, due to
14 the IRS. The instruction read to the jury related to an
15 obstruction of the lawful functions of the IRS by deceitful
16 or dishonest means as charged in the Indictment. Surely
17 there is injustice when a defendant enters a trial expecting
18 to defend himself against a particular theory of prosecution,
19 and even does so throughout trial, only to find at the time
20 of the jury's charging, that a completely different
21 instruction was to be given. A bait and switch of legal
22 theory surely implicates the policy behind Rule 33 and the
23 intent of Congress to ensure fair trials and even-handed
24 justice.

25 ///

26 ///

27 ///

1 **2) Violation of Speedy Trial Act**

2
3 Ioane fully incorporates herein all arguments presented
4 in his Motion to Dismiss Pursuant to 18 U.S.C. 3161, 3162.
5 Without reiterating all the arguments of that Motion, Ioane
6 essentially argued that a Speedy Trial Act violation occurred
7 due to the nonexistent analysis of the "ends of justice"
8 elements of 18 U.S.C. 3161(h)(7)(A) and (B). The violation
9 certainly falls within the sphere of Rule 33's concern for
10 justice. The absence of analysis concerning the "ends of
11 justice" exception to the Speedy Trial Act has, in essence,
12 caused the exact miscarriage of justice at issue with Rule
13 33. As the Ninth Circuit has phrased the issue, "The Speedy
14 Trial Act thus requires an ends of justice continuance be
15 specifically limited in time and that there be findings
16 supported by the record to justify each ends of justice
17 continuance. Otherwise one early ends of justice continuance
18 could exempt the entire case from the requirements of the
19 Speedy Trial Act altogether, and open the door for wholly
20 unnecessary delays in contravention of the Act's purpose."
21 United States v. Jordan, 915 F.2d 563, 565-566 (9th Cir.
22 1990).

23 The violation of Ioane's speedy trial rights have been
24 violated. The result has been a miscarriage of justice.

25 ///

26 ///

27 ///

28

CONCLUSION

1
2
3 For the foregoing reasons, a judgment of acquittal should
4 be entered in this case. Alternatively, a new trial should
5 be granted.
6

7 Respectfully submitted,

8 DATED: November 7, 2011

9 /s/Anthony P. Capozzi

10 Anthony P. Capozzi
11 Attorney for,
12 MICHAEL S. IOANE
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Acceptance # 7004 1160 0001 1102 1461 U.S. Department of Treasury Foreign Assets Control Division

\$842,896.80

\$842,896.80

BILL OF EXCHANGE

Bill of Acceptance/ Bond - Time Draft

Date: April 8, 2005

Vincent S. Booth, Principal/Drawer
C/o 5717 Roundup Way
Bakersfield, CA 93306

To: Secretary of the Treasury, Department of the Treasury Bank - Ledger #000030078
On or By June 11, 2005 Credit the account of UNITED STATES TREASURY, Invoice/Notice number. F
Fsc_ids (REQUEST FOR PAYMENT) dated April 4, 2005 addressed to VINCENT STEVEN BOOTH, SS#
██████████7668. Tax Period: December 31, 1997.

Credit Account of UNITED STATES TREASURY and Invoice/Reply No. Fsc_ids in the amount of:
\$842,896.80 Eight Hundred Forty Two Thousand Eight Hundred Ninety Six 80 /100.

Personal Direct Treasury/Resource (UCC Contract) account 7004 1160 0001 1102 1461; additional references
261257668, which are the accounts for access to the resources account, i.e. treasury exempt account of
VINCENT STEVEN BOOTH.

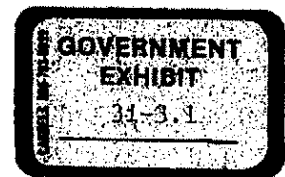
The obligation of the Drawee (acceptor), Secretary of the Treasury, through the bailee (authorized agent) of
Claimant's financial institution, hereof arises out of consideration for the pledge and by the redemption of the
pledge under Public Resolution HJR-192, now Public Law 73-10 and 59 S. Ct. 847 (FN3), represented by the
attached claim Accepted for Value (All Communication) and bearing the account/resource number 261257668
and registrations numbers 7004 1160 0001 1102 1461.

This claim document is hereby surrendered as said pledge is redeemed (discharged) by drawer through the
attached document of acceptance for value and exempt from levy. The Claimant's institution (U. S.
TREASURY) is to accept this bill, sign and present directly via Certified or Registered mail, Return Receipt to
the Secretary of Treasury - Department of the Treasury. Unless the original Negotiable Instrument is
dishonored in writing within 15 days of receipt by the Secretary of the Treasury, Claimant's institution (U. S.
TREASURY) is to release the credit to the payee within the time stipulated by Regulation "Z", Truth in
Lending Act or on the date designated, whichever is later. The amount of this accepted draft is to be credited by
Claimant's institution (U. S. TREASURY) to the designated account and the discharge of this claim fifteen (15)
days after receipt by the Federal Window (Regulation Z).

Notice : The law relating to principal and agent applies.

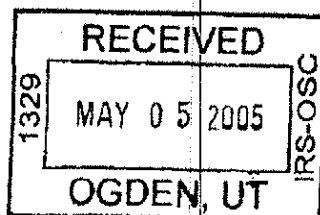
By: _____
Bailee's signature (U.S. Treasury)

Accepted at (_____) on _____



By: *Vincent S. Booth*
Drawer, Secured Party
Without Recourse

\$842,896.80



\$842,896.80

Page: 1 Document Name: Fsc_idrs

JNTST 261-25-7668

199712 04042005 BOOT

.00	ASSESSED FTP
.00	ASSESSED INT
842,896.80	TAX & PENALTY
842,896.80	ASSESSED TOTAL
.00	ACCRUED FTP
.00	ACCRUED INT
.00	TOTAL ACCRUALS
.00	TOTAL INT
.00	BALANCE DUE

Steven Bath

1997

I received your offer of attached April 4, 2005 from station name: FSC Idrs, in the amount of 842,896.80 charged to STEVEN BOOTH, SS# [REDACTED]-7668. I am accepting your offer for value and I am returning your offer for value, in the amount of 842,896.80 for the purpose of closure and discharge of this matter; pursuant to, but not limited to "HJR 192."

COMPUTATION HOLD ON INTEREST/FTP
 Employee #1722918191 Page 001 of 003 PAGE 002

By: Steven Bath, Date: 4-8-05
 Authorized Agent, underlying
 funding source and P.O.A.