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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.

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26 ///

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

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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.

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CONCLUSION

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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  
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Acceptance # 7004 1160 0001 1102 1461 Department of Treasury Foreign Letters of Credit 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.

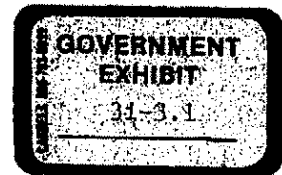
The obligation of the Drawee (acceptor), Secretary of the Treasury, through the bailee (authorized agent) of  
Claimant's financial institution, hereof arises out of consideration for the pledge and by the redemption of the  
pledge under Public Resolution HJR-192, now Public Law 73-10 and 59 S. Ct. 847 (FN3), represented by the  
attached claim Accepted for Valuc (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.

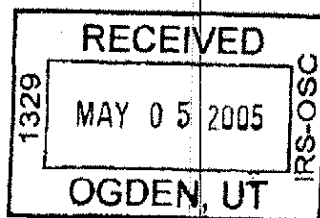
By: \_\_\_\_\_  
Bailee's signature (U.S. Treasury)

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.