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9  
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11 UNITED STATES DISTRICT COURT

12 DISTRICT OF ARIZONA

13 UNITED STATES OF AMERICA, )  
 ) Case Nos. CR-07-00576-TUC-HCE (CVB);  
 Plaintiff, ) CR-07-00575-TUC-HCE (CVB)  
 )  
 vs. )  
 )  
 LOUIS VITALE; )  
 STEPHEN M. KELLY, ) GOVERNMENT’S REPLY TO DEFENSE  
 ) RESPONSE TO GOVERNMENT MOTION  
 Defendants. ) IN LIMINE TO ADMIT RES GESTAE  
 ) EVIDENCE OF OTHER ACTS OF FR.  
 ) LOUIS VITALE  
 )  
 ) July 2, 2007  
 )  
 )

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15 **RELIEF SOUGHT:**

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17 Plaintiff, United States of America, by its attorneys, Daniel G. Knauss, United States  
18 Attorney, and Evan R. Seamone, Special Assistant United States Attorney, respectfully  
19 replies to the Defense Response to Government Motion in Limine to Admit Res Gestae  
20 Evidence of Other Acts of Fr. Louis Vitale and requests that the evidence be admitted on the  
21 bases articulated below and in the Government’s initial motion.  
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1 **STATEMENT OF LAW AND ARGUMENT:**

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3 **1. THE OTHER ACTS OFFERED BY THE GOVERNMENT ARE INTRINSIC TO**  
4 **THE CHARGED OFFENSES.**

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6 The Defense has argued that Rule 404(b) prohibits introduction of the prior and  
7 subsequent acts offered by the Government in the initial motion in limine. Importantly, Rule  
8 404(b) does not apply to res gestae evidence that is intrinsic to the charged offenses. United  
9 States v. Lillard, 354 F.3d 850, 854 (2003) (“This rule is inapplicable, however, where the  
10 evidence the government seeks to introduce is directly related to, or inextricably intertwined  
11 with, the crime charged in the indictment.”) The Government requests that this Court  
12 consider the arguments initially offered in support of the admission of the evidence as res  
13 gestae evidence. Because the acts are probative of essential elements of the charged offenses,  
14 and consideration of these acts would not be unduly prejudicial—addressed in the  
15 Government’s initial motion and below—the evidence should be admitted.

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17 **2. THE ACTS SOUGHT FOR INTRODUCTION BY THE GOVERNMENT ARE**  
18 **MATERIAL TO THE CHARGES AND APPROPRIATE FOR CONSIDERATION**  
19 **AS 404(b) EVIDENCE DURING THE GOVERNMENT’S CASE IN CHIEF.**  
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21 As articulated in the Government’s initial motion, the prior acts are offered to show that  
22 Fr. Vitale had knowledge that his entry on Fort Huachuca was prohibited. Knowledge is  
23 clearly an essential element of 18 U.S.C. § 1382 as it applies to Fr. Vitale. United States v.  
24 Cottier, 759 F.2d 760, 762 (9th Cir. 1985) (“Where entry alone is the basis of the violation,  
25 knowledge that the entry is unauthorized is an essential element of a section 1382 offense.”).  
26 The information states, specifically, that Fr. Vitale went upon Fort Huachuca “for a purpose  
27 prohibited by law or lawful regulation, to wit: willful failure to stop and comply with access  
28 control identification and security check requirements .... with knowledge that his entry was  
29 unauthorized.” In accordance with Cottier, the Government has the burden of proving that Fr.  
30 Vitale was not merely an “innocent trespasser[ ]” on Fort Huachuca. Id.

31 Fr. Vitale’s prior acts of trespass on federal property, and the convictions related to those  
32 prior acts, are indicative of his knowledge of the status of federal installations, the standards  
33 that apply to entry on such installations, and the validity of any orders issued to him by  
34 military police or security personnel on such property. Because knowledge is determined by

1 consideration of the surrounding circumstances of the entry, the Government can offer the  
2 prior acts to demonstrate various aspects of Fr. Vitale's knowledge on the date in question.  
3 *See, e.g., United States v. Parrilla-Bonilla*, 648 F.2d 1373, 1378-83 (1st Cir. 1981) (describing  
4 numerous factors considered to determine whether the defendant had requisite knowledge).  
5 As the Ninth Circuit observed, when addressing the knowledge of a defendant who  
6 participated in prior fraudulent schemes similar to the charged offense: "He was engaged in  
7 fraud then, he would know fraud when he sees it now." *United States v. Blitz*, 151 F.3d 1002,  
8 1008 (9th Cir.), cert. denied, 525 U.S. 1029 (1998) (citing a litany of cases addressing the  
9 admissibility of prior acts and convictions used to prove knowledge). Fr. Vitale's convictions  
10 in federal district courts, where he had opportunities to consult with counsel about the nature  
11 of the offenses and where he was exposed to the elements of trespass offenses under very  
12 similar circumstances, are particularly probative of Fr. Vitale's knowledge that his conduct  
13 was prohibited on November 19, 2006.

14 Fr. Vitale's subsequent arrest at the Nevada Test Site on April 1, 2007, is also indicative of  
15 his knowledge of applicable standards. *E.g., United States v. Sioux*, 362 F.3d 1241, 1246 (9th  
16 Cir. 2004) ("[T]he existing exceptions to Rule 404(b)'s general bar against propensity  
17 evidence allow for the introduction of both prior and subsequent bad acts evidence."); *United*  
18 *States v. Bibo-Rodriguez*, 922 F.2d 1398, 1400 (9th Cir.), cert. denied, 501 U.S. 1234 (1991)  
19 (permitting subsequent acts specifically to show knowledge). At the upcoming hearing in  
20 August, the Government will produce Nye County Sheriff Deputy Christopher Jordan, who  
21 will testify that, before he arrested Fr. Vitale, Deputy Jordan personally witnessed Fr. Vitale  
22 cross over the Nevada Test Site property line after being warned that he would be arrested for  
23 trespass if he did so. Such evidence indicates Fr. Vitale's knowledge of prohibited actions  
24 and his conscious decision to commit prohibited acts with full awareness of the risks  
25 involved. *Bibo-Rodriguez* highlights the "identical inference of knowledge" that exists when  
26 an individual commits an offense in a "similar manner" shortly after the charged offense. *Id.*

27 Regarding each of these incidents, the Government need not prove offenses that are  
28 identical in every way to the charged misconduct. *Blitz*, 151 F.3d at 1008 ("[W]hen the  
29 evidence of other acts is offered to prove knowledge, the other acts need not be similar to the  
30 charged acts as long as they 'tend to make the existence of the defendant's knowledge more  
31 probable than it would be without the evidence.'") (citation omitted). Here, each of the acts

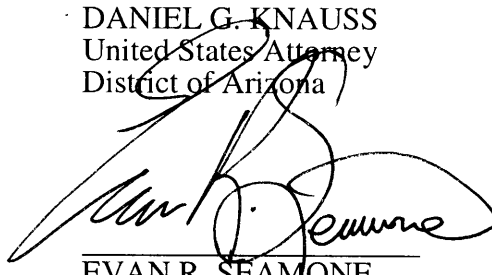
1 offered by the Government make Fr. Vitale's knowledge of the unlawfulness of his defiance  
2 of orders to stop and the unlawfulness of continued ingress on Fort Huachuca property more  
3 probable than it would be without the evidence.

4  
5 **3. THE ACTS SOUGHT FOR INTRODUCTION BY THE GOVERNMENT ARE NOT**  
6 **UNDULY PREJUDICIAL UNDER RULE 403.**  
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8 Ultimately, Rule 404(b) "is one of inclusion, and evidence of a prior act is admissible  
9 unless it tends to prove only criminal propensity." United States v. Iverson, 162 F.3d 1015,  
10 1026 (9th Cir. 1998). For the reasons articulated in the Government's initial motion, all  
11 evidence of uncharged acts are material to the essential element of knowledge that Fr. Vitale's  
12 ingress at Fort Huachuca was prohibited. Rule 403 may also be considered a rule that favors  
13 inclusion. *E.g.*, United States v. Mende, 43 F.3d 1298, 1302 (9th Cir. 1995) ("Rule 403 ... is  
14 an extraordinary remedy to be used sparingly because it permits the trial court to exclude  
15 otherwise relevant evidence.") (citations omitted). When determining whether 404(b)  
16 evidence should be excluded on the basis of Rule 403, the question is not whether there would  
17 be prejudice from consideration of similar acts, but rather whether such prejudice would be  
18 "unfair." United States v. Layton, 855 F.2d 1388, 1402 (9th Cir. 1988), cert. denied, 489 U.S.  
19 1046 (1989). For the reasons articulated in the Government's initial motion, the acts offered  
20 by the Government would not evoke the sort of prohibited response contemplated by Rule  
21 403, especially given the Court's use of a limiting instruction as directed by Fed. R. Evid.  
22 105.

23 Respectfully submitted this 2nd day of July, 2007.

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2 Copy of the foregoing e-mailed to the attorney listed below, and electronically filed with the

3 Court Clerk this 2nd day of July, 2007:

4 William P. Quigley, Esq.

5 Attorney for Defendants