

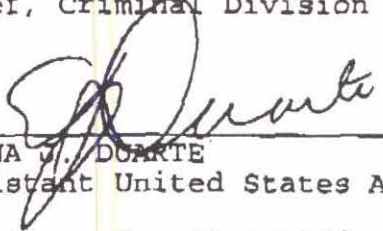
1 This motion in limine is based on the attached Memorandum of
2 Points and Authorities, all files and records of this case, and
3 any further evidence and argument that may be presented at the
4 hearing of this motion.

5 DATED: October 30, 2002

Respectfully submitted,

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION AND STATEMENT OF FACTS

3 By this motion in limine, the government seeks to admit
4 "other acts" evidence pursuant to FRE 404(b) of the defendant's
5 operation in approximately 1998 through 2001 of the website
6 killercop.com. The evidence that the government seeks to admit
7 is composed of testimony regarding the contents of the
8 killercop.com website, as well various printouts of the website.
9 The government also seeks to admit proof of the defendant's
10 control and operation of the website, including testimony and
11 documentary evidence regarding evidence found on the defendant's
12 computer and in his residence during the search of his residence
13 at the time of his arrest on the instant offense.

14 Evidence of the defendant's control and operation of
15 killercop.com is highly probative of defendant's responsibility
16 for the actions charged in the indictment as it shows his
17 knowledge, intent, identity, and preparation to establish and
18 operate the website located at evilgx.com.

19 A. The Indictment

20 The defendant is charged in the indictment with five counts
21 of transmitting threats, in violation of 18 U.S.C. Section
22 875(c), and four counts of transferring social security numbers
23 with the intent to aid and abet identity fraud, in violation of
24 18 U.S.C. Section 1028(a)(7). The charges stem from the
25 defendant's construction of and operation of the website
26 identified as evilgx.com between approximately late September,
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1 2001, and late March, 2002. The web pages created and displayed
2 during the course of the defendant's operation of the website
3 include explicit and implicit threats to injure as well as maps
4 to the residences of at least three victims.

5 **B. The Evidence**

6 The evidence against the defendant in the instant case
7 consists of witnesses who saw the evilgx.com website as well as
8 circumstantial evidence that the defendant created the website,
9 but no witnesses who actually saw the defendant create the
10 website. Two of the defendant's associates, Richard Weatherman
11 and Leslie McAfee, are also associated with the website, in that
12 their names figure prominently in the registration, payment, and
13 contact information given for the website's operator at various
14 times to various sources.¹

15 The fact that the defendant previously constructed and
16 operated another website, killercop.com, which also contained
17 similar syntax, threats, and showed strong interest in publishing
18 home addresses of victims, helps to prove the identity of the
19 website's creator as Sutcliffe, rather than Weatherman or McAfee,
20 and shows that defendant had the requisite knowledge, intent, and
21 ability to prepare the site because he has previous experience
22 with exactly this sort of "self-expression."
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25 ¹For example, the government is informed that while the
26 website evilgx.com was registered with DirectNIC under
27 Weatherman's name, the publicly available information included
28 both defendant's name as administrative contact and McAfee's
address, phone number, and related contact information.

1 **II. ARGUMENT**

2 The Ninth Circuit has interpreted Rule 404(b) as a rule of
3 inclusion. United States v. Blitz, 151 F.3d 1002, 1007-1008 (9th
4 Cir. 1998); United States v. De Salvo, 41 F.3d 505, 509 (9th Cir.
5 1994). It permits the admission of any evidence of other crimes
6 or acts relevant to an issue in the trial, except where the
7 evidence proves only a defendant's criminal disposition. See
8 United States v. Hadley, 918 F.2d 848, 850 (9th Cir. 1990)
9 (evidence inadmissible "only when it proves nothing but the
10 defendant's criminal propensities"), cert. dismissed, 506 U.S. 19
11 (1992).

12 Under Rule 404(b), evidence of crimes, wrongs or acts is
13 admissible to prove "motive, opportunity, intent, preparation,
14 plan, knowledge, identity, absence of mistake or accident." FRE
15 404(b). Here, the defendant's prior operation of a similar
16 website is highly probative of knowledge, intent, identity, and
17 preparation.

18 The Ninth Circuit applies a four-part test to determine
19 admissibility of prior bad acts evidence. Evidence of prior
20 criminal conduct may be admitted if (1) the evidence tends to
21 prove a material point; (2) the prior act is not too remote in
22 time; (3) the evidence is sufficient to support a finding that
23 defendant committed the other act; and (4) ... the act is similar
24 to the offense charged. Blitz, 151 F.3d at 1008; United States
25 v. Mayans, 17 F.3d 1174, 1181 (9th Cir. 1994).

1 1. The Evidence Tends to Prove a Material Point

2 Knowledge and specific intent are elements of the crime of
3 transmitting threats in interstate commerce, as well as identity
4 fraud as charged in the indictment. The elements of transmitting
5 threats to injure in interstate commerce are as follows: First,
6 the defendant transmitted a communication in interstate commerce;
7 Second, that communication threatened to injure a person; Third,
8 the defendant had the specific intent to threaten. The
9 government is not required to prove that the defendant intended
10 to carry out the threat, only that the defendant intended the
11 communication to threaten. 18 U.S.C. Section 875(c); United
12 States v. Twine, 853 F.2d 676, 679-81 (9th Cir. 1988)

13 The elements of unlawfully transferring the social security
14 number of another are as follows: First, the defendant acted
15 knowingly; Second, the defendant transferred the social security
16 number of another; Third, defendant's transfer was in or in a
17 manner affecting interstate commerce; Fourth, defendant's
18 transfer was without lawful authority; Fifth, defendant acted
19 with the intent to aid and abet the crime of false representation
20 of a social security number. 18 U.S.C. §§ 1028(a)(7),
21 1028(c)(3)(A); United States v. Jackson, 155 F.3d 942, 947 (8th
22 Cir. 1998).

23 Thus, Sutcliffe's knowledge and intent are material issues
24 in this case, as is, of course, Sutcliffe's identity. As
25 described above, the government's evidence on intent and
26 knowledge is primarily circumstantial. This is the precise
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1 prior act was one which would tend to make the existence of the
2 defendant's knowledge more probable than it would be without the
3 evidence." Id.

4 In the instant case, however, there are striking
5 similarities between Sutcliffe's prior conduct and the charged
6 conduct which weigh in favor of admission. Killercop.com, like
7 evilgx.com, contained diatribes aimed at those who had displeased
8 defendant. It also contained thinly veiled threats and
9 solicitations for the personal information, including home
10 addresses, of those who had displeased him. But more important
11 than the similarities in specific content is the similarity in
12 technical expertise that is shown by defendant's construction,
13 control, and operation of killercop.com.

14 These similarities between the websites and their operation
15 justify admission of Sutcliffe's operation of evilgx.com under
16 Rule 404(b). See United States v. Spillone, 879 F.2d 514, 518-19
17 (9th Cir. 1989) (Ninth Circuit "has upheld the admission of prior
18 crimes, not only when the offenses charged were identical . . .
19 but also when" they are similar); see also United States v.
20 Sarault, 840 F.2d 1479, 1486 (9th Cir. 1988) (upholding admission
21 of 404(b) evidence of similar though not identical transaction).

22 Sutcliffe's Prior Operation of Killercop.com Is Not Unduly
23 Prejudicial Such As To Warrant Exclusion Under Federal Rule of
Evidence 403

24 Nor should the evidence be excluded under Rule 403. The
25 test under that rule is not whether the evidence would simply be
26 prejudicial - "[t]he best evidence often is." United States v.
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1 Parker, 549 F.2d 1217, 1222 (9th Cir. 1977). Rather, the
2 evidence must be unfairly prejudicial. See United States v.
3 Skillman, 922 F.2d 1370, 1374 (9th Cir. 1991) (evidence that "has
4 an undue tendency to suggest decision on an improper basis,
5 commonly, though not necessarily, an emotional one" is considered
6 "unfairly" prejudicial) (quoting Advisory Committee Notes to Rule
7 403); United States v. Bailleaux, 685 F.2d 1105, 1111 n.2 (9th
8 Cir. 1982) ("As used in Rule 403, 'unfair prejudice' means that
9 the evidence not only has a significant impact on the defendant's
10 case but that its admission results in some unfairness to the
11 defendant from its non-probative aspect"), modified on other
12 grounds, Huddleston, 485 U.S. at 681.

13 . Moreover, any potential unfair prejudice to defendant can be
14 eliminated or mitigated through limiting instructions to the
15 jury. See, e.g., United States v. Houser, 929 F.2d 1369, 1373
16 (9th Cir. 1991). When coupled with proper limiting instructions,
17 evidence of defendant's prior operation and control of
18 killercop.com will produce no unfair prejudice because that
19 evidence is simply not of the type that so "appeals to the jury's
20 sympathies, arouses its sense of horror, [or] provokes its
21 instinct to punish" that it could cause the jury to disregard the
22 court's limiting instruction and base its decision on an improper
23 ground. The Ninth Circuit has consistently held that the use of
24 such a limiting instruction negates any potential prejudice to
25 defendant. United States v. Arambula-Ruiz, 987 F.2d 599, 604
26 (9th Cir. 1993).

CERTIFICATE OF SERVICE

I, YOLANDA AGUAYO, declare:

That I am a citizen of the United States and resident or employed in Los Angeles County, California; that my business address is the Office of the United States Attorney, United States Courthouse, 312 North Spring Street, Los Angeles, California 90012; that I am over the age of eighteen years, and I am not a party to the above-entitled action;

That I am employed by the United States Attorney for the Central District of California who is a member of the Bar of United States District Court for the Central District of California, at whose discretion I served a copy of: **GOVERNMENT'S MOTION IN LIMINE TO ADMIT 404(b) EVIDENCE OF DEFENDANT'S OPERATION OF THE WEBSITE KILLERCOP.COM** service was:

Placed in a closed envelope, for collection and interoffice delivery addressed as follows:

Placed in a seal envelope for collection and mailing via United States Mail, addressed as follows:

By hand delivery addressed as follows:

By facsimile as follows:

By messenger as follows:

By federal express as follows:

WILLIAM HARRIS, ESQ.
1499 Huntington Drive
Suite 403
South Pasadena, CA 91030

This Certificate is executed on October 30, 2002, Los Angeles, California.

I certify under penalty of perjury that the foregoing is true and correct.


YOLANDA AGUAYO