

No. \_\_\_\_\_

SUPREME COURT OF THE UNITED STATES

DAN PIZARRO, Petitioner,  
vs.

UNITED STATES OF AMERICA, Respondent.

APPENDIX  
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MARCH 7<sup>th</sup>, 2019

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

United States Court of Appeals  
Fifth Circuit

**FILED**

March 7, 2019

Lyle W. Cayce  
Clerk

No. 18-30201  
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

DAN PIZARRO, also known as Danny Pizarro,

Defendant-Appellant

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Appeal from the United States District Court  
for the Eastern District of Louisiana  
USDC No. 2:16-CR-63-1

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Before JOLLY, COSTA, and HO, Circuit Judges.

PER CURIAM:\*

Dan Pizarro was convicted by a jury of conspiracy to distribute and possess with intent to distribute 500 grams or more of methamphetamine and a quantity of heroin. Because Pizarro had two prior felony drug convictions, the district court sentenced him to life imprisonment and ten years of supervised release.

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\* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

APPENDIX  
EXHIBIT A p. 1

According to Pizarro, the district court erred in admitting evidence of his arrest at a train station in possession of ten pounds of marijuana and his subsequent conviction for possession with intent to distribute marijuana pursuant to Federal Rule of Evidence 404(b). Pizarro objected to the admission of this evidence in the district court. Although this court generally reviews evidentiary rulings for abuse of discretion, a heightened standard applies where, as here, the evidence is admitted under Federal Rule of Evidence 404(b). *See United States v. Wallace*, 759 F.3d 486, 493 (5th Cir. 2014).

Federal Rule of Evidence 404(b) provides that evidence of a “crime, wrong, or other act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.” FED. R. EVID. 404(b). Such evidence may be admissible, however, to prove “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” *Id.* To determine whether such evidence was properly admitted, this court first determines whether the extrinsic offense evidence is relevant to an issue other than the defendant’s character; second, the court determines whether the probative value is substantially outweighed by undue prejudice. *United States v. Gurrola*, 898 F.3d 524, 537 (5th Cir. 2018) (citing *United States v. Beechum*, 582 F.2d 898, 911 (5th Cir. 1978) (en banc)). Because Pizarro pleaded not guilty to the instant offense, the district court correctly determined that the first prong of the test was satisfied. *See, e.g., United States v. Cockrell*, 587 F.3d 674, 679 (5th Cir. 2009).

Further, the district court did not abuse its discretion by determining that the probative value of the evidence of Pizarro’s prior arrest and offense was not substantially outweighed by the danger of unfair prejudice. *See Beechum*, 582 F.2d at 914. This court has often “held that proof of prior drug activities is more probative than prejudicial” in proving Rule 404(b) exceptions

such as knowledge or intent. *See United States v. Kinchen*, 729 F.3d 466, 474 (5th Cir. 2013) (internal quotation marks and citation omitted). The prior offense was similar to the instant offense as both involved the distribution of controlled substances that Pizarro obtained from California sources. Although the similarity of the offenses increased the prejudicial effect of the evidence, it also made the evidence highly probative. *See United States v. Juarez*, 866 F.3d 622, 628 (5th Cir. 2017). The probative value is not diminished necessarily because the prior offense involved a different controlled substance. *See, e.g.*, *Cockrell*, 587 F.3d at 680; *see also United States v. Booker*, 334 F.3d 406, 412 (5th Cir. 2013) (finding no unfair prejudice from the admission of evidence of seizure of 178 kilograms of marijuana to show intent in a crack cocaine conspiracy). Further, the prior offense occurred only a few months before the charged offense. *See United States v. Garcia Mendoza*, 587 F.3d 682, 689 (5th Cir. 2009). In addition, the evidence corroborated the testimony of Pizarro's coconspirators, especially given the temporal proximity of the offenses and the fact that both offenses involved a California source. *See, e.g.*, *Juarez*, 866 F.3d at 627. Moreover, the prior conviction was not of such a "heinous nature" that it would "incite the jury to irrational decision by its force on human emotion," and therefore it was not likely that the jury felt a desire to punish Pizarro for his prior conviction. *See Beechum*, 582 F.2d at 917. Finally, the district court gave a limiting instruction, which greatly minimizes the danger of prejudice. *See Garcia Mendoza*, 587 F.3d at 689. Therefore, the district court did not abuse its discretion in admitting the evidence.

After completion of briefing, Pizarro filed pro se motions for appointment of counsel, leave to file a supplemental brief, and for extraordinary relief. Because he is represented by counsel and is not entitled to hybrid representation, his motions are denied. *See United States v. Long*, 597 F.3d

720, 724 (5th Cir. 2010); *United States v. Villafranca*, 844 F.3d 199, 199 (5th Cir. 2016).

AFFIRMED; MOTIONS DENIED.

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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No. 18-30201

---

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

DAN PIZARRO, also known as Danny Pizarro,

Defendant - Appellant

---

Appeal from the United States District Court  
for the Eastern District of Louisiana

---

**ON PETITION FOR REHEARING**

Before JOLLY, COSTA, and HO, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/s/ James C. Ho

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JAMES C. HO  
UNITED STATES CIRCUIT JUDGE

## UNITED STATES DISTRICT COURT

## EASTERN District of LOUISIANA

UNITED STATES OF AMERICA

v.

DAN PIZARRO

Social Security No.: xxx-xx-5101

## JUDGMENT IN A CRIMINAL CASE

Case Number: 053L 2:16CR00063-001 "F"

USM Number: 91279-022

Jason Rogers Williams and Nicole E. Burdett

Defendant's Attorney

## THE DEFENDANT:

- pleaded guilty to count(s) \_\_\_\_\_
- pleaded nolo contendere to count(s) \_\_\_\_\_ which was accepted by the court.
- was found guilty on count(s) 1 OF THE SUPERSEDING INDICTMENT ON AUGUST 17, 2017 AND 1 & 2 OF THE BILL OF INFORMATION TO ESTABLISH PRIOR CONVICTION ON NOVEMBER 27, 2017 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title &amp; Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
21U.S.C. §§ 841(a)(1), 841(b)(1)(A), 841(b)(1)(C), 846	Conspiracy to Distribute and Possess With the Intent to Distribute 500 grams or more of Methamphetamine and a Quantity of Heroin	07/15/2014	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- The defendant has been found not guilty on count(s) \_\_\_\_\_
- Count(s) \_\_\_\_\_  is  are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Court Reporter: Toni Tusa

Asst. U.S. Attorneys: Shirin Hakimzadeh and Matthew Payne

U. S. Probation Officer: Catherine Hollinrake

February 7, 2018

Date of Imposition of Judgment

Signature of Judge

Signature of Judge

MARTIN L. C. FELDMAN, UNITED STATES DISTRICT JUDGE  
Name and Title of Judge

February 7, 2018

Date

APPENDIX  
EXHIBIT C-1

18-30201.527

DEFENDANT: DAN PIZARRO  
CASE NUMBER: 053L 2:16CR00063-001 "F"

### IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

LIFE AS TO COUNT 1 OF THE SUPERSEDING INDICTMENT. THIS SENTENCE IS TO BE SERVED CONCURRENTLY TO ANY SENTENCE IMPOSED IN DKT. #2:14CR218, BEFORE THE U.S. DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, SHOULD THE DEFENDANT'S TERM OF SUPERVISED RELEASE BE REVOKED IN THAT CASE.

- The court makes the following recommendations to the Bureau of Prisons:
- The defendant is remanded to the custody of the United States Marshal.
- The defendant shall surrender to the United States Marshal for this district:
- at \_\_\_\_\_  a.m.  p.m. on \_\_\_\_\_
- as notified by the United States Marshal.
- The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
- before 2 p.m. on \_\_\_\_\_
- as notified by the United States Marshal.
- as notified by the Probation or Pretrial Services Office.

### RETURN

I have executed this judgment as follows:

Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_  
at \_\_\_\_\_, with a certified copy of this judgment.

\_\_\_\_\_  
UNITED STATES MARSHAL

By \_\_\_\_\_  
DEPUTY UNITED STATES MARSHAL

18-30201.528

C-2

DEFENDANT: DAN PIZARRO  
CASE NUMBER: 053L 2:16CR00063-001 "F"

### **SUPERVISED RELEASE**

In the event you are released from imprisonment, you will be on supervised release for a term of :

10 YEARS AS TO COUNT 1 OF THE SUPERSEDING INDICTMENT

### **MANDATORY CONDITIONS**

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.  
 The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4.  You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5.  You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6.  You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7.  You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

C-3

18-30201.529

**IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

UNITED STATES OF AMERICA, )  
Plaintiff-Appellee, )  
vs. )  
DAN PIZARRO, also known as )  
Danny Pizarro )  
Defendant-Appellant. )  
No. 18-30201

## **Motion to Withdraw from Further Representation**

The undersigned CJA-appointed counsel of record, Christopher A. Aberle, moves, pursuant to *Austin v. United States*, 513 U.S. 5, 8 (1994) and this Circuit's *Plan Under the Criminal Justice Act for Representation on Appeal*, § 6, ¶ 4, to withdraw from further representation of the Appellant Dan Pizarro. On appeal, Mr. Pizarro argued that the district court erred in admitting a prior conviction under Rule 404(b). This Court held that the district court did not abuse its discretion in admitting the evidence and that, in any case, the evidence was not unfairly prejudicial.

This Court’s ruling is strictly a case-dependent, fact-based assessment that implicates none of the Considerations Governing Review on Certiorari, as set forth in Rule 10 of the Rules of the Supreme Court of the United States. As such, there is no realistic chance that the Supreme Court would review this case through certiorari.

## APPENDIX EXHIBIT D-1

Accordingly, the undersigned cannot, in good faith, prepare and file a petition for certiorari on the Appellant's behalf. The undersigned therefore requests that he be allowed to withdraw from further representation of Appellant and that he not be required to apply on his behalf to the Supreme Court for a writ of certiorari, which would otherwise be due for filing in that Court on July 8, 2019.

The undersigned has already filed a petition for rehearing on Mr. Pizarro's behalf, which was denied on this date, and the time for filing for rehearing en banc has expired. The undersigned has advised Mr. Pizarro of remaining potential avenues for relief, including a petition for certiorari and a motion pursuant to 28 U.S.C. § 2255, and he has advised Mr. Pizarro of the time limits associated with these proceedings.

Respectfully submitted,

*/s/ Christopher A. Aberle*  
Christopher A. Aberle  
Attorney at Law  
P.O. Box 8583  
Mandeville, LA 70470-8583  
(985) 871-4084  
*Attorney for Appellant*

## Certificate of Service

I certify that on this April 9, 2019, a copy of this motion was electronically filed with the Clerk of Court using the CM/ECF system, which will send notice of electronic filing to the Government, and a copy of this motion was likewise mailed to the Appellant,

Danny Ernesto Pizarro, Reg. No. 91279-022  
USP Victorville  
P.O. Box 3900  
Adelanto, CA 92301-3900

I further certify that (1) required privacy redactions have been made, 5TH CIR. R. 25.2.13; (2) the electronic submission is an exact copy of the paper Document, 5TH CIR. R. 25.2.1; and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

/s/ Christopher A. Aberle  
Christopher A. Aberle



U.S. Department of Justice  
Federal Bureau of Prisons

Office of Emergency Preparedness

Federal Correctional Complex  
Victorville, California 92394

June 21, 2019

MEMORANDUM FOR INMATE POPULATION  
USP VICTORVILLE

FROM: T. Lillard, *6/25 J ALBANY 1* Deputy Captain  
FCC Victorville

SUBJECT: Personal Property;  
Issuance of Property Bags

Cell searches will be occurring throughout the institution in every unit and every cell. In order to streamline the process and return the institution to normal operations, the following will take place:

You will be given a list of items you are authorized to retain. All other items will be confiscated and shipped home at the inmate's expense, donated or destroyed.

Each inmate will also be given two trash bags. Excess Gov't items will placed in one trash bag and trash will be placed in the other trash bag.

All items you wish to mail home at your expense will be placed on your assigned bed.

Government issued clothing should be accounted for according to the A&O Handbook, i.e. 3 Khaki Pants, 3 Khaki Shirts, 5 T-shirts, 5 Boxers, 5-Pair Socks, and 1 Pair Boots.

Your cooperation in this matter will expedite the shakedown process and assist in returning the institution to normal operations.

APPENDIX EXHIBIT E p.1 INSTITUTION lockdown

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

**BILL OF INFORMATION TO ESTABLISH PRIOR CONVICTIONS**

UNITED STATES OF AMERICA

\* CRIMINAL NO: 16-63

v.

\* SECTION: "F"

DAN PIZARRO  
a/k/a "Danny"

\* VIOLATION: 21 U.S.C. § 851(a)

\* \* \*

The United States Attorney charges that:

**COUNT 1**

On or about September 6, 2005, in the United States District Court, District of Hawaii, the defendant, DAN PIZARRO, a/k/a "Danny," was convicted under Case Number 04-CR-00146, of two counts of conspiracy to distribute and possession with the intent to distribute 50 grams or more of methamphetamine, a Schedule II controlled substance, felony violations of Title 21 United States Code Section 846, and punishable by a term of imprisonment of more than one year. Thereafter, the defendant was sentenced to a term of imprisonment of 90 months as to each count, served concurrently. This conviction is final.

APPENDIX EXHIBIT E-1

**COUNT 2**

On or about March 27, 2014, in the Criminal District Court for Orleans Parish, State of Louisiana, the defendant, **DAN PIZARRO**, a/k/a "Danny," was convicted under Case Number 519029 "K," of possession with the intent to distribute marijuana, a felony violation of La. R.S. § 40:966(A)(2). This offense is punishable by a term of imprisonment of more than one year. Thereafter, the defendant was sentenced to a term of imprisonment of five years, suspended, with five years of probation. This conviction is final.

This Count is filed pursuant to the requirements of Title 21, United States Code, Section 851(a).

DUANE A. EVANS  
ACTING UNITED STATES ATTORNEY

s/ Shirin Hakimzadeh  
SHIRIN HAKIMZADEH  
MATTHEW R. PAYNE  
La. Bar Roll No. 32631  
Assistant United States Attorneys  
650 Poydras Street, Suite 1600  
New Orleans, LA 70130  
Telephone: (504) 680-3144  
Shirin.Hakimzadeh@usdoj.gov

New Orleans, Louisiana  
June 23, 2017

**CERTIFICATE OF SERVICE**

I hereby certify that on June 23, 2017, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

s/ Shirin Hakimzadeh  
SHIRIN HAKIMZADEH  
Assistant United States Attorney

APPENDIX EXHIBIT E-2

CERTIFICATE OF SERVICE

I declare I placed the APPENDIX in the envelope addressed to:

Clerk - U.S. Supreme Court

WASHINGTON, D.C. 20543

Solicitor General of the United States  
Room 5614 Dept. of Justice  
950 Pennsylvania Ave. N.W.  
WASHINGTON, D.C. 20530-0001

on June 27<sup>th</sup>, 2019 under penalty of  
perjury via U.S. Postal Service.

Respectfully submitted,



DAN PIZARRO

Reg #91279-022

USP Victorville

P.O. Box 3900

Adelanto, Ca. 92301

Petitioner is pro se