

Case o' the Week

A little memo on a big case.

From: Steven Kalar, Federal Public Defender, N.D. Cal. FPD Date: Monday, Sept. 19, 2016
Re: *United States v. Soto-Zuniga*, 2016 WL 4932319 (9th Cir. Sept. 18, 2016): **Fourth Amendment / Discovery**: Important decision reverses on two discovery issues

Players: Decision by Judge Gould, joined by Judges Kozinski and W. Fletcher. Big win for AFD Paul Barr, Federal Defenders of San Diego, Inc.

Facts: Soto-Zuniga was charged with possession with intent to distribute meth, after a border car search. *Slip Op.* at 4. [Ed. Note: Westlaw pin cites (annoyingly) missing]. Soto-Zuniga moved to suppress, alleging the search was unconstitutional and requesting discovery of the checkpoint's arrest and search statistics. *Id.* He argued that the checkpoint was being used as a pretext to search for controlled substances, not to control immigration. *Id.* at 8. The discovery and suppression motions were denied: he was convicted. *Id.* at 1.



"Wait - which is evidence and which is lunch?"
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Issue(s): "We first address Soto-Zuniga's argument that the district court abused its discretion in denying his motion for discovery of the San Clemente checkpoint search and arrest statistics. He contends that this evidence is necessary to determine whether the checkpoint itself is constitutional." *Id.* at 12.

Held: "We agree that the district court abused its discretion in denying discovery that could have revealed an unconstitutional seizure and led to the suppression of the evidence that illicit drugs were found in Soto-Zuniga's car." *Id.* "If the checkpoint's primary purpose is to detect evidence of drug trafficking, then the initial seizure of Soto-Zuniga's car and person offended the Fourth Amendment and the drug evidence recovered from his car must be excluded as fruit of the poisonous tree . . . It is on this issue that the requested discovery is pertinent." *Id.* at 14. "Because the primary purpose of the San Clemente checkpoint was placed squarely at issue by Soto-Zuniga's motion to suppress, defense counsel should have been allowed reasonable discovery relating to this primary purpose. After that discovery, and with all material evidence on the table, the district court would have been in a superior position to assess and decide the motion to suppress." *Id.* at 18. "We conclude that the district court abused its discretion by denying this discovery." *Id.*

Of Note: The key holding of *Soto-Zuniga* is that the Supreme Court's selective prosecution decision, *Armstrong*, does not preclude Rule 16(a)(1)(E) discovery related to the constitutionality of a search or seizure. *Id.* at 16. As Judge Gould explains, "In our view, the holding of *Armstrong* applies to the narrow issue of discovery in selective-prosecution cases." *Id.* This holding rebuffs the government's attempt to cabin suppression discovery into *Armstrong*'s narrow confines: a very important win. *Id.* at 17.

How to Use: Overshadowed by the big checkpoint discovery issue is an equally valuable discussion on discovery of information related to the defense theory. Soto-Zuniga's trial theory was that teenagers who had been given a lift left the meth in the car. *Id.* at 19. The defense had unsuccessfully moved for discovery of the government's investigation of the teens and a smuggler associated with them. *Id.* at 19. In a thoughtful discussion, Judge Gould emphasizes that the defense is entitled to information "material to preparing the defense." He explains not limited to information that is *admissible* – it is information that have "helped to prepare a defense." *Id.* at 20. The Ninth reverses the denial of the discovery motion. *Id.* at 21. While Judge Gould hears the government's beef that the investigative docs were of "sensitive nature," the Ninth stands firm: the defense "interest in government materials that are pertinent to his defense takes precedence." *Id.* at 21. *Soto-Zuniga*'s discussion the defense right to discovery merits a close read and heavy citation in motions to compel.

For Further Reading: Remember ND Cal District Judge Koh's terrific and historic cell-tracking decision? <http://circuit9.blogspot.com/2015/08/case-o-week-our-privacy-protections-are.html> Apparently, so does Senator Coryn, R-Texas. <https://www2.kqed.org/news/2016/09/15/judge-lucy-koh-nomination-9th-us-circuit-court-of-appeals/> Judge Koh's Ninth confirmation heads to a Senate vote next Thursday – NorCal is knocking wood on her behalf.