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Supreme Court Review Sought for Per Se Rule in Criminal Cases

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A petition for review is before the Supreme Court filed by three California real estate investors who were convicted after trial under Section 1 of the Sherman Act for bid rigging at real estate foreclosure auctions. The defendants preserved their objection that the application of the per se rule was unconstitutional because it took an element of the offense [was the agreement in restraint of trade?] away from the jury once the court decided the per se rule applied.

The cert petition was filed on behalf of defendants Javier Sanchez, Gregory Casoro and Michael Marr by the law firm of Keker, Van Nest & Peters, LLP. In the last week, two amicus briefs were filed in support of the Supreme Court taking the case; one by National Association of Criminal Defense Lawyers NACDLSanchezAmicus, and another by the Due Process Institute Sanchez v. US — DPI Amicus Brief. Law 360 published an article on October 25, 2019 discussing the cert petition and amicus briefs (here—but behind a paywall). I was quoted in the article for agreeing that the per se rule in criminal cases unconstitutionally deprives the defendant of his/her right to have the jury decide every element of the offense. Because the jury does not decide whether the agreement was a restraint of trade, the defense is barred from proffering procompetitive evidence. While much could be written (and has) the argument is simple:

There are three elements to a Section 1 Sherman Act offense: 1) an agreement; 2) in restraint of trade, 3) that affects interstate or foreign trade or commerce. In civil cases the jury decides all three elements, including whether the agreement was in restraint of trade (i.e. procompetitive or anticompetitive). In a criminal case, however, the jury is instructed by the court that the agreement [if proven] *is* a restraint of trade and their job is to find whether the defendant knowingly joined the charged agreement. The language of Section 1 of the Sherman Act, however, is the same for a civil or criminal violation; so it is odd, and unconstitutional, that in a criminal Sherman Act case, the jury does not decide whether the agreement was “in restraint of trade.”

Another way to look at this is that in the most recent Supreme Court case to deal with the Sherman Act, *Ohio v. American Express Co.,* 138 S. Ct. 2274 (2018) the Court

explained the basis for the per se rule : “A small group of restraints are unreasonable per se because they always or *almost always* tend to restrict competition and decrease output.” Id. at 2283-84 (emphasis added). But in a criminal case, the government doesn’t get to prove the defendants are *almost always* guilty; the prosecution needs to prove that this defendant’s agreement was in restraint of trade.

I am in no way advocating that price fixing and bid rigging should not be charged criminally. In fact I have advocated as loudly as I can for stronger cartel enforcement with the passage of a criminal cartel whistleblower statute (here and here). Holding culpable individuals accountable for corporate crime is the surest and most effective deterrence. When I started looking into the per se issue, I did not expect to reach the conclusion that I have. I can relate to something Justice Gorsuch wrote when he was on the Tenth Circuit Court of Appeals: “Indeed, a judge [researcher] who likes every result he reaches is very likely a bad judge [researcher], reaching for results he prefers rather than those the law compels.” *A.M. ex rel. FM v. Holmes*, 830 F.3d 1123, 1170 (10th Cir. 2016). If the Sherman Act needs fixing, again Justice Gorsuch has the solution. He wrote in his dissent in *Perry v. Merit Systems Protection Board*, 137 S. Ct 1975 (2017), “If a statute needs repair, there’s a constitutionally prescribed way to do it. It’s called legislation.” Id. at 1990.

Will the Supreme Court take Cert?

I don’t have any insight into this question except to note that the Supreme Court agrees to hear relatively few cases. Further, in this case there is no split among the circuits. The cert petition, however, does raise a constitutional question, and one that is of seeming importance to “progressive” Supreme Court Justice Sonia Sotomayor and “textualist” Justice Neil Gorsuch. To quote one commentator, in an article titled *Sotomayor and Gorsuch Resume Their Fight for the Future of the Sixth Amendment*, “they are on a mission to restore criminal defendants’ constitutional rights:” Mark Joseph Stern, Slate, January 7, 2019; see also Mark Joseph Stern, “*Neil Gorsuch and Sonia Sotomayor Team Up to Protect Criminal Defendants,*” Slate November 19, 2018.

For longer versions of what I have written on the constitutionality of the per se rule, see

The End is Near For the Per Se Rule in Criminal Sherman Act Cases, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3356731 and

How Per Se Rule Will Die In Criminal Antitrust Cases, Law 360, March 20, 2019, at https://www.law360.com/articles/1141024?copied=1.

Stay tuned. Thanks for reading.

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