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Eli Ewing†

INTRODUCTION

The Securities and Exchange Commission (the SEC or the Commission) and the Department of Justice (DOJ) have increasingly come to rely on parallel civil and criminal proceedings, which involve concurrent investigations of the same conduct by different government agencies, as an efficient means of law enforcement.¹ The Securities Act of 1933 and the Securities Exchange Act of 1934, which explicitly permit the Commission to share any information it obtains through investigation and civil discovery with DOJ, make it possible for DOJ and the SEC to coordinate their efforts when they investigate the same conduct.² Because the SEC may avail itself of civil discovery tools,³ parallel proceedings enable federal prosecutors to acquire evidence they might not be able to obtain through criminal investigation and discovery under the Federal Rules of Criminal Procedure.⁴ The SEC’s civil enforcement also benefits from

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². Securities Act of 1933 § 20(b), 15 U.S.C. § 77t(b) (2000) (providing that whenever it appears to the Commission that a violation of that Act has occurred, the Commission may “transmit such evidence as may be available concerning such acts or practices to the Attorney General who may, in his discretion, institute the necessary criminal proceedings under this subchapter” (emphasis added)); Securities Exchange Act of 1934 § 21(e), 15 U.S.C. § 78u(d) (2000) (same). See generally 15 U.S.C. §§ 77g-77bbb, 78a-78mm.

³. E.g., 15 U.S.C. § 77t(b); see also Consol. Mines v. SEC, 97 F.2d 704 (9th Cir. 1938) (holding that SEC investigations under 15 U.S.C. § 77t(a) are analogous to those of a grand jury, meaning that the scope of inquiry need not be limited by questions of propriety, forecasts of the probable result of an investigation, or by doubts about whether a particular individual will ultimately be subjected to formal criminal accusation).

⁴. See FED. R. CRIM. P. 16; Georgia A. Stanton & Renee Scatena, Parallel Proceedings—A Discovery Minefield, 34 ARIZ. ATT’Y 17, 17-20 (1998); see also O’SULLIVAN, supra note 1, at 1008-10; Mark D. Hunter, SEC/DOJ Parallel Proceedings: Contemplating the Propriety of Recent Judicial Trends, 68 MO. L. REV. 149, 164-65 (2003).
parallel proceedings. Business organizations and individuals often cooperate with the SEC in order to avoid harsh civil penalties and/or referral to DOJ for criminal prosecution.

However, parallel proceedings are in tension with an individual’s Fifth Amendment right against self-incrimination. Should the recipient of an SEC subpoena invoke his Fifth Amendment privilege against self-incrimination, the SEC may view the invocation as evidence of guilt. The SEC may dole out civil penalties such as career-ending license revocation or crippling fines. Because federal law permits the Commission to transmit any information it obtains in the course of a civil investigation to the Attorney General, the civil defendant must also be aware that a failure to assert his Fifth Amendment privilege may provide DOJ with critical evidence for a criminal prosecution. Nevertheless, courts have generally approved of parallel proceedings except in cases in which the defendant could show that the government engaged in civil discovery in bad faith.

Two recent federal district court decisions, United States v. Stringer and United States v. Scrushy, concluded that in some cases agencies have an obligation to inform civil enforcement targets that DOJ will likely prosecute them. In each case, the courts suppressed SEC civil depositions that the Commission turned over to DOJ for use in a criminal prosecution. The courts found that DOJ had worked too closely with the SEC without informing witnesses in the civil proceedings that DOJ intended to pursue criminal prosecution. In each case, the court concluded that SEC/DOJ cooperation amounted to a single investigation designed, in bad faith, to avail DOJ of civil discovery and to prevent defendants from invoking their Fifth Amendment rights against self-incrimination. The government did not appeal the decision in Scrushy, but has appealed the Stringer decision to the Ninth Circuit Court of Appeals.

This Comment recommends that courts decline to adopt the holdings in

7. See, e.g., 3-56 CRIMINAL DEFENSE TECHNIQUES § 56.06 (2006).
9. See, e.g., O'SULLIVAN, supra note 1, at 1008-10; Abbe David Lowell & Kathryn C. Arnold, Corporate Crime after 2000: A New Law Enforcement Challenge or Déjà Vu?, 40 AM. CRIM. L. REV. 219, 238 (2003) (“By now the law is fairly settled that any agency may proceed with its portion of the parallel proceeding as long as it has the authority to act and has not overreached in its specific action.”).
10. 408 F. Supp. 2d 1083 (D. Or. 2006).
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_**Stringer** and **Scrushy.** It argues that those decisions articulated a standard for identifying bad faith in SEC discovery that too closely scrutinized interagency communication and was not in accord with established case law. This Comment concludes that extensive interagency communication did not, based on the facts presented in both cases, require the SEC or DOJ to inform a witness in a civil investigation that DOJ will likely prosecute him. Finally, this Comment asserts that the SEC’s standard procedures, which were followed in **Stringer** and **Scrushy,** adequately protect witnesses’ Fifth Amendment rights against self-incrimination and further the public’s interest in effective law enforcement. When the SEC has informed an individual of his constitutional rights, a warning that the Commission routinely passes information along to DOJ should be sufficient notice of the possibility of criminal prosecution.  

I. C**OURTS HAVE GENERALLY APPROVED OF SEC/DOJ PARALLEL PROCEEDINGS**

As a general rule, whenever the SEC is considering civil enforcement in a particular matter, it may seek discovery and share evidence with DOJ—even if DOJ is contemplating criminal prosecution.  

Courts agree that DOJ may “use evidence acquired in a civil action in a subsequent criminal proceeding unless the defendant demonstrates that such use would violate his constitutional rights or depart from the proper administration of criminal justice.” However, the agencies may not proceed with civil discovery in bad faith. Specifically, courts have held that SEC and DOJ agents may not make false statements or affirmatively deceive witnesses in a civil investigation, fail to inform a witness of his constitutional rights, or conduct civil discovery for the purpose of furthering a criminal proceeding. Otherwise, courts have generally declined to prevent DOJ from using evidence obtained from the SEC through the civil discovery process.

In _United States v. Kordel_, the Supreme Court’s seminal treatment of

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16. See, e.g., _In re Sealed Case_, 676 F.2d 793, 824 n.127 (D.C. Cir. 1982).


18. See _United States v. Rand_, 308 F. Supp. 1231, 1236 (N.D. Ohio 1970) (finding a Fifth Amendment violation when SEC officials led a witness to believe that he had been granted immunity from criminal prosecution); see also _United States v. Tweel_, 550 F.2d 297 (5th Cir. 1977); _United States v. Lipshitz_, 132 F. Supp. 519 (E.D.N.Y. 1955).

19. See, e.g., _United States v. Parrott (Parrott I)_ , 248 F. Supp. 196, 200 (D.D.C. 1965) (“The defendants in the instant case... produced records and gave testimony in proceedings at which they were often without counsel and often not warned of their constitutional rights.”).

20. See Afro-Lecon, Inc. v. United States, 820 F.2d 1198, 1202 (Fed. Cir. 1982) (holding that a civil enforcement proceeding may not serve as a “mere conduit” for a criminal prosecution).

parallel proceedings, the Court held that a criminal defendant's responses to FDA interrogatories (in which he divulged incriminating information) amounted to a waiver of his Fifth Amendment privilege against self-incrimination. A unanimous Court rejected the argument that courts should force the government to decide whether to pursue or forego criminal prosecution before beginning a civil proceeding: "It would stultify enforcement of federal law to require a governmental agency . . . invariably to choose either to forgo recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a trial."

The Kordel Court also affirmed that due process does not require DOJ or a government agency to inform a witness in a civil investigation that DOJ will likely prosecute him. While the court acknowledged in dicta that it did not address a situation in which the government failed to inform a defendant in a civil enforcement proceeding that his case would be referred to DOJ for criminal prosecution, the Court recognized that the individual defendant must make his own choice as to when to assert his constitutional rights: "Without question [the defendant] could have invoked his Fifth Amendment privilege against compulsory self-incrimination. Surely [the defendant] was not barred from asserting his privilege simply because . . . the proceeding in which the Government sought information was civil rather than criminal in nature."

The D.C. Circuit followed Kordel's lead in SEC v. Dresser Industries, Inc., when it concluded that it would not block SEC/DOJ parallel investigations unless agency cooperation "demonstrably prejudice[d] substantial rights of the investigated party." In Dresser Industries, a defendant in an SEC enforcement proceeding had argued that enforcement of an SEC subpoena against him would unfairly expand DOJ's discovery in the event that the Department chose to prosecute. The court replied with the observation that "effective enforcement of the securities laws requires that the SEC and DOJ be able to investigate possible violations simultaneously."

In dicta, the Kordel Court left open the possibility that under "special circumstances," such as a civil action undertaken "solely" to obtain evidence for criminal prosecution, courts might either stay civil proceedings pending the completion of criminal trial or disallow the use of evidence obtained in civil proceedings. However, the Court did not define bad faith discovery in the

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23. Justice Black took no part in the opinion. Id. at 1.
24. Id. at 11.
25. Id. at 7-8.
26. 628 F.2d 1368, 1377 (D.C. Cir. 1980).
27. Id. The defendant had not been indicted or informed that the government would seek indictment at the time he made his motion to quash the SEC subpoena. Id.
28. Id. (citations omitted).
29. Kordel, 397 U.S. at 12 ("We do not deal here with a case where the Government has brought a
context of parallel proceedings, and it did not establish a doctrinal test or describe a specific set of circumstances under which a parallel criminal proceeding could not gather evidence from an agency civil proceeding. Moreover, the Court's holding did not indicate that any particular amount of interagency communication and/or cooperation would require that the agencies inform witnesses of likely prosecution. The final paragraph of its opinion merely observed that the facts presented did not suggest that the agencies' cooperation in that case was unconstitutional or improper.30

Nevertheless, Kordel's suggestion that the government could not exploit civil discovery "solely" for the purpose of gathering evidence for a criminal prosecution ran contrary to the holding in United States v. Parrott (Parrott I), an opinion from a federal district court in the District of Columbia.31 Noting that witnesses subpoenaed in civil proceedings often must choose between "harmful disclosure, contempt, [and] perjury," the Parrott I court had endorsed the proposition that "parallel civil and criminal inquiries should not be commingled."32 The court's broad conclusion that the government could not "bring a parallel civil proceeding and avail itself of civil discovery devices to obtain evidence for subsequent criminal prosecution"33 had been embraced by some courts, including the court that Kordel reversed, to support the argument that the government's failure to apprise a defendant of a contemplated criminal proceeding could be impermissible—even when the government was also pursuing civil enforcement.34

One year before Kordel, a federal district court in the Southern District of New York considered essentially the same facts as those in Parrott I and concluded, in direct contradiction of Parrott I, that the government had no obligation to inform potential criminal defendants of possible indictment.35 In that case, which was also styled United States v. Parrott (Parrott II), defendants who had been convicted of criminal securities violations sought reversal on the grounds that the government's civil proceeding had aided the

civil action solely to obtain evidence for its criminal prosecution or has failed to advise the defendant in its civil proceeding that it contemplates his criminal prosecution; nor with a case where the defendant is without counsel or reasonably fears prejudice from adverse pretrial publicity or other unfair injury; nor with any other circumstances that might suggest the unconstitutionality or even the impropriety of this criminal prosecution." (citations omitted)).

30. Id.
32. Id. at 201-02.
33. Id. at 202.
parallel criminal proceeding in violation of their constitutional rights. The court held that the SEC’s civil action was itself “ample notice” that the defendants’ conduct could be subject to criminal prosecution, a possibility that the SEC had emphasized by warning them against self-incrimination throughout the civil proceedings. The court further held that once the government had warned defendants of their rights against self-incrimination it had “no duty... to warn” the defendants at any point during the SEC proceeding that they might be indicted.

II. STRINGER & SCRUSHY ARTICULATED A NEW STANDARD

Courts have yet to develop a clear standard that describes bad faith civil discovery in parallel proceedings. Nevertheless, SEC policy mandates that targets of civil enforcement proceedings be made aware of the possibility of criminal prosecution based on information obtained by the SEC from their testimony. SEC Form 1662 informs each witness that he has a right to counsel and that he may at any time invoke his Fifth Amendment privilege against self-incrimination. The form also reminds each witness that the Commission routinely makes files available to other government agencies, in particular DOJ.

The Stringer court concluded that, in light of extensive cooperation between the U.S. Attorney’s Office (USAO) and the SEC, the SEC’s standard warning to deponents that statements may be referred to DOJ was insufficient to protect the defendants’ due process rights. In that case, prosecutors asked SEC officials not to reveal DOJ’s interest in the case to defendants in an SEC enforcement proceeding. At the defendants’ depositions, SEC officials informed them, per Form 1662, of their right against self-incrimination. However, officials declined to confirm for the defendants that the USAO would...

36. Id.
37. Id.
38. Id.
42. See United States v. Stringer, 408 F. Supp. 2d 1083, 1086-87 (D. Or. 2006).
43. Id. at 1090. The court noted that Form 1662 reminds defendants of their Fifth Amendment privilege against self-incrimination. Id. at 1086-87. Nevertheless, it concluded that “[i]n light of the active role of the USAO in the SEC investigation, this warning was insufficient.” Id. at 1088.
44. See id. at 1086-88.
likely prosecute.45 The court concluded that the two agencies were not conducting "parallel" investigations but rather a single investigation designed to prevent the defendants from invoking their constitutional rights.46 The court held that it would have been "unrealistic to suppose that [the defendants would] be on guard against incriminating [themselves]."47

Similarly, though the Scrushy court admitted that it could find no "controlling authority" to distinguish "a legitimate parallel investigation from an improper one," it concluded that the SEC’s standard form of notice had, in light of extensive interagency cooperation, departed from the proper administration of justice.48 Noting that the USAO admitted that it had engaged in extensive cooperation with SEC officials without informing defendant Richard Scrushy of its intention to prosecute,49 the court concluded that the government had, in bad faith, conducted "a de facto criminal investigation using nominally civil means."50 The government officials had made no false or misleading statements to Scrushy or to his attorney. However, the court announced that it could not "take such a limited view of bad faith."51

The Stringer and Scrushy courts concluded that extensive DOJ/SEC cooperation triggered a government obligation to inform witnesses that they would likely be prosecuted. The Stringer court, which faulted the SEC for failing to inform civil deponents that a criminal prosecution "would most likely occur," established a rule that, under those circumstances, the SEC was responsible for conveying the likelihood of prosecution to the potential criminal defendants.52 The Scrushy court relied on a similar principle in holding that the government had acted in bad faith. It noted that "[w]hen a defendant knows . . . that a criminal investigation has targeted him, he can take actions to prevent the providing of information in an administrative or civil proceeding that could

45. As a matter of policy, SEC officials decline to answer questions about the status of parallel criminal investigations, but instead refer witnesses to the relevant USAO. Id. at 1086.
46. Id. at 1088.
47. Id. at 1089. In the eyes of the court the government’s conduct constituted a due process violation that infringed upon the Fifth Amendment’s right against self-incrimination. The court concluded that the USAO’s behavior was “so grossly shocking and so outrageous as to violate the universal sense of justice.” Id. at 1089 (quoting United States v. Smith, 924 F.2d 889, 897 (9th Cir. 1991)).
49. Unbeknownst to Scrushy and his counsel, the U.S. Attorney for the Northern District of Alabama had convinced SEC officials to depose the defendant in Birmingham, a request that coincided with the expressed preference of the Scrushy defense team that he be deposed in Alabama, his home state. The U.S. Attorney also communicated with SEC officials to ensure that certain topics would not be addressed in the deposition. Scrushy, 366 F. Supp. 2d at 1136.
50. Id. at 1140.
51. Id.
52. Stringer, 408 F. Supp. 2d at 1092.
Because the USAO and the SEC knew that criminal prosecution was likely, the court concluded, one of the agencies should have informed witnesses accordingly.

III. COURTS SHOULD DECLINE TO ADOPT THE RULES IN STRINGER AND SCRUSHY

*Stringer* and *Scrushy* addressed a tension between federal law enforcement policy and the Fifth Amendment right of a witness to avoid self-incrimination at a time when the government increasingly relies on interagency cooperation. In July of 2002, responding to corporate scandals and decreased investor confidence, President Bush ordered the formation of a Corporate Fraud Task Force within DOJ. The Executive Order directed the Attorney General to coordinate DOJ's criminal prosecutions with the actions of other government agencies with civil enforcement powers. Also, at a time when many USAOs and SEC offices faced hiring freezes and budget cuts, parallel proceedings have become a way for both agencies to conserve limited resources while conducting complicated, labor-intensive investigations.

However, *Stringer* and *Scrushy* need not represent the final word on the subject. Under the pre-Stringer/Scrushy case law there were three sets of circumstances in which courts deemed DOJ/SEC parallel proceedings improper. In the first, courts suppressed evidence obtained from a criminal defendant who was not informed of certain constitutional rights, such as the right against compulsory self-incrimination and the right to counsel. Second, courts did not permit either agency to obtain evidence by making false statements to a witness. Finally, courts have held that the SEC acted in bad faith when it conducted civil discovery solely as a tool to expand DOJ's access to incriminating evidence against a particular defendant. However, when the SEC could show that it might pursue civil enforcement, the Commission's discovery process had never been halted merely because DOJ would likely prosecute. In neither *Stringer* nor *Scrushy* did any of these three previously suppressed.

53. Id. at 1139.
54. Savage & Durbin, supra note 1, at 3.
59. See Afro-Lecon, Inc. v. United States, 820 F.2d 1198, 1202 (Fed. Cir. 1982); see also Rand, 308 F. Supp. at 1234 (noting that much of the evidence the SEC gathered was relevant to the criminal proceeding but not the civil proceeding).
identified circumstances obtain.

There is nothing in existing case law that would require the Ninth Circuit or courts in other circuits to suppress evidence obtained in a DOJ/SEC parallel proceeding solely on the basis of extensive interagency cooperation that was not revealed to the civil defendant. In fact, the author’s research uncovered no decision since Kordel in which a court invalidated SEC/DOJ parallel proceedings without citation to at least one of the three above-mentioned sets of circumstances. Because widespread judicial application of the holdings in Stringer and Scrushy would frustrate interagency cooperation, invade prosecutorial discretion, and might, as the Kordel Court feared, “stultify enforcement of federal laws,” the Ninth Circuit should either reverse Stringer or limit the holding to its facts. An approach consistent with the holdings in Kordel and Parrott II is supported by statute and furthers the public’s interest in enforcing federal law.

Stringer’s and Scrushy’s reliance on Parrott I created a standard for bad faith in civil discovery that was less deferential to the government than the standard that the Supreme Court articulated in Kordel. Stringer and Scrushy each quoted Parrott I for the proposition that “the Government may not bring a parallel civil proceeding and avail itself of civil discovery devices to obtain evidence for subsequent criminal prosecution.” The Kordel dicta, handed down five years after Parrott I, suggested that a government agency could not bring a civil proceeding “solely to obtain” evidence for a criminal proceeding.

Neither Stringer nor Scrushy concluded that the SEC had no intention of pursuing civil enforcement. Instead, each understood the Parrott I citation to mean that when DOJ intends to prosecute, it cannot cooperate too closely with the SEC—even when it is undisputed that the SEC intends to pursue civil enforcement.

The holdings in Stringer and Scrushy also blurred an important distinction in the case law between the government’s false statements to defendants and the government’s failure to inform a civil defendant of probable prosecution. Though Scrushy and Stringer held that the government had deceived civil defendants merely by failing to inform them of possible criminal prosecution, neither court cited a case in which the government’s failure to inform (as opposed to making a false statement) was the sole basis for deeming a parallel proceeding improper. In the decisions that formed the bases for the holdings in

60. United States v. Kordel, 397 U.S. 1, 12 (1970) (“It would stultify enforcement of federal law to require a governmental agency . . . invariably to choose either to forgo recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a trial.”).


Stringer and Scrushy, the courts dismissed criminal indictments after finding that the government had affirmatively misled defendants during civil proceedings. Even in Parrott I, the court noted that an SEC official had falsely informed defendants that DOJ had not initiated criminal proceedings.

A judicial approach to parallel proceedings that scrutinized the timing of DOJ's decision to prosecute would complicate interagency coordination and invade prosecutorial discretion. If consistently applied by district courts, the holdings in Stringer and Scrushy would in some cases place a burden on DOJ to communicate its intentions with respect to prosecution to the SEC so that the SEC could inform witnesses in civil investigations accordingly. Thus, in some investigations, prosecutors would be forced to make hurried determinations about criminal prosecution. Alternatively, DOJ might have to choose early in an SEC investigation to forgo criminal prosecution so as to avoid the appearance of having availed itself of civil discovery.

Current SEC policy sufficiently protects the constitutional rights of those involved in civil enforcement proceedings. The Commission routinely informs witnesses submitting evidence in civil proceedings of their Fifth Amendment right against compulsory self-incrimination and of their right to counsel. The SEC also reminds witnesses that any evidence the SEC obtains from them may be submitted to DOJ. Consistent with the rule in Kordel and the holding in Parrott II, the SEC's regulations inform defendants of their rights and require defendants to decide for themselves how to proceed. Moreover, as at least one court has pointed out, parallel proceedings dovetail with a defendant's Sixth Amendment right to a speedy trial.

Departing from recent precedent, the holdings in Scrushy and Stringer encroached upon the authority of duly enacted federal laws and the policy choices of elected officials by limiting the circumstances under which the SEC

63. In Rand, the court concluded that an SEC official had promised the defendant immunity from criminal prosecution in exchange for testimony at a civil enforcement hearing. 308 F. Supp. at 1236. In Parrott I, which constituted a foundation of the Scrushy court's reasoning, SEC officials told a defendant who was about to provide testimony in an administrative hearing that DOJ had not initiated criminal proceedings. 248 F. Supp. at 199 ("The SEC attorney denied that criminal proceedings had been instituted against any of the persons involved."). SEC officials in Parrott I also failed to inform witnesses of their Fifth Amendment privilege against self-incrimination. Id.

64. Parrott I, 248 F. Supp. at 201.

65. See United States v. Sclafani, 265 F.2d 408, 415 (2d Cir. 1959) ("[I]t is unrealistic to suggest that the government could or should keep a taxpayer advised as to the direction in which its necessarily fluctuating investigations lead. The burden on the government would be impossible to discharge in fact, and would serve no useful purpose.").


68. See Stringer, 408 F. Supp. 2d at 1086-88.

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may share information with DOJ. At a time when resources are scarce for both agencies, parallel proceedings ensure that more violations of securities laws will be given the attention they merit. Some courts have recognized parallel proceedings as an important and democratically chosen means of law enforcement. For example, in United States v. Fields, the Second Circuit took note of Congress's approval of DOJ/SEC parallel proceedings. The court cited a House committee report that stated: "Traditionally, there has been a close working relationship between the Justice Department and the SEC. The Committee [on Interstate and Foreign Commerce] fully expects that this cooperation between the two agencies will continue." The Fields court concluded that the SEC and DOJ's parallel proceedings were a "commendable example of inter-agency cooperation.

The principle established in Stringer and Scrushy would be difficult for courts to apply because it hinges on a fact-based and ultimately subjective determination as to whether DOJ and the SEC have cooperated too closely with one another. The holdings also relied on fact-based inquiries to reach the conclusion that DOJ had determined that it would prosecute before it informed defendants of its intentions. If government agents and attorneys are not required to record all communications with one another, then it would be extremely difficult for a court to discern whether, on the whole, the two agencies had coordinated too much or whether they were justified in failing to inform a prospective defendant of likely prosecution.

CONCLUSION

As long as SEC officials remind witnesses of their right against compulsory self-incrimination, courts should stand by the pre-Stringer/Scrushy case law. The previously established standards for invalidating parallel proceedings—failure to inform a witness of constitutional rights, false statement to a witness, and civil discovery solely to benefit a criminal prosecution—sufficiently protect defendants while promoting the public's interest in law enforcement.

71. 592 F.2d at 646 n.19 (alteration in original) (quoting H.R. REP. NO. 95-640, at 10 (1977)).
72. Id. at 646.