A recent decision by the United States Court of Appeals for the Ninth Circuit, United States v. Stringer, 521 F.3d 499 (9th Cir. 2008), gives government lawyers, and prosecutors in particular, significant latitude to conceal the existence of a criminal investigation from individuals and companies, and their attorneys, who are actively defending against a civil investigation initiated by a government agency. In the wake of Stringer, there exists a blurry distinction between what government lawyers are allowed to do and say in conducting parallel civil and criminal government investigations, and what may constitute bad faith and deceit that infringes on defendants’ constitutional rights. Although government attorneys are nominally forbidden from using a civil investigation for the purposes of collecting evidence for a criminal case, the line at which the government’s conduct becomes improper is far from clear. Indeed, the Stringer decision shows that government attorneys involved in civil investigations may work in concert with, take direction from, and make strategic and tactical decisions with prosecutors pursuing a criminal case without being found to have acted in bad faith. In light of the freedom government lawyers have in concealing the existence of a parallel criminal investigation from a civil defendant, where necessary, competent defense counsel must prepare a defense that takes into account the possibility that a criminal investigation exists, and that prosecutors have access to evidence gathered in a civil investigation or may be working in conjunction with civil investigators.

I. The Stringer Decision

A. Factual Background

The Stringer case began with a Securities and Exchange Commission (SEC) investigation of alleged violations of the federal securities laws by three individuals, J. Kenneth Stringer, J. Mark Samper, and William N. Martin, and their company, FLIR Systems Inc. Id. at 1085. Shortly after the SEC opened its investigation, a staff attorney assigned to the case met with an Assistant United States Attorney (AUSA), who was involved in an ongoing investigation by the FBI and the United States Attorney’s Office (USAO) of the same defendants, to discuss various aspects of the SEC’s probe. Id.

Approximately two months later, the SEC met with another AUSA to again discuss the investigation of the defendants. During this meeting, the SEC provided the
USAO and FBI with evidence it collected during its investigation, as well as memoranda composed by SEC attorneys detailing their factual and legal analyses. At the meeting, the SEC, USAO, and FBI agreed “that the criminal investigation would abate in order to continue receiving statements from defendants and other witnesses through the civil investigation.” Id. An FBI agent who attended the meeting noted that it was agreed that the criminal investigation would ease because the SEC was able to collect evidence and statements from the defendants that could not be obtained during the course of a criminal investigation:

It was determined that since Stringer has agreed to be interviewed by the SEC, the FBI will make no effort to interview Stringer or other corporate officers at this time so as not to jeopardize the opportunity to obtain statements from these individuals. Id. Although the agencies agreed that the criminal investigation should “abate” to enhance the government’s ability to collect evidence from the defendants, the lead AUSA observed that the case “warranted prosecution” and “the probability of prosecution was very high.” Id. The same AUSA also observed that criminal investigators would “benefit greatly” from the SEC’s investigation. Id.

Several months later, the FBI and USAO met and decided that they would allow SEC personnel to continue to conduct the investigation after it successfully collected evidence from the FLIR facilities. In a memorandum composed after the meeting, an FBI agent noted that “based on the level of cooperation that the new FLIR management team has extended to the SEC, no overt investigation will be conducted by the FBI at this time.” Id. (emphasis added).

The SEC, FBI, and USAO continued to communicate frequently throughout the course of the SEC’s investigation, exchanging information and discussing strategy. The collaboration was so close that an AUSA advised SEC investigators that he wanted to build a false testimony case and instructed SEC personnel on how to create a record during civil depositions to support such an approach. Id. at 1086. In addition, SEC staff attorneys and the USAO continued to discuss tactical and strategic considerations, and jointly considered when the optimal time to commence a parallel criminal investigation would be, so as to maximize the quality of the evidence collected by the SEC during the civil investigation. Id.

The SEC and USAO also closely collaborated to conceal the involvement of the USAO and FBI in the investigation. In particular, a SEC attorney took steps to ensure that court reporters who were present at civil depositions did not disclose the USAO’s involvement. The SEC also requested that the AUSAs not attend any of the SEC’s interviews so as not to encourage any of the defendants to invoke their Fifth Amendment rights. Id.

As part of the SEC’s investigation, the defendants, including Stringer, were subpoenaed to testify and were advised that their testimony was mandatory, subject only to the assertion of any legal right or privilege. Stringer and the other defendants were provided with a SEC Form 1662, which is provided to all witnesses testifying before the SEC. The notice informed the defendants of their right to counsel, their Fifth Amendment rights, and the “routine uses of information” gathered by the SEC. Among the “routine uses of information” is a notice that the SEC makes its files available to other governmental agencies, including the USAO, and that any information given to the SEC could be used in a federal criminal proceeding. Id. at 1087.

During Stringer’s testimony before the SEC, his attorney asked a series of questions aimed at determining whether the SEC was working in conjunction with any other federal agencies, such as the USAO or the Department of Justice (DOJ). In response, the SEC attorney merely directed defense counsel’s attention to the Form 1662 and the “routine use” of information section, and stated that “it is the agency’s policy not to respond to questions like that.” Id. Moreover, when defense counsel inquired about which U.S. Attorney’s Office he should contact to inquire about whether a criminal investigation was pending, the SEC attorney responded that that was up to the defense attorney’s “discretion.” Id. The SEC
attorney made these representations knowing full well that his agency had been working closely with the USAO and FBI in conducting the civil investigation and that a criminal case was being developed.

**B. The District Court Dismisses the Indictment**

One year after Stringer and Martin entered into consent decrees with the SEC, a grand jury indicted Stringer, Samper, and Martin on fifty counts of conspiracy and securities fraud charges. The defendants moved to dismiss the indictment on the grounds that their due process rights were violated because they were not advised that the USAO and the FBI were using the SEC to gather evidence for a criminal prosecution. They further argued that had they been aware of the criminal investigation, they would have asserted their Fifth Amendment rights and would have sought a stay of the civil investigation.

The district court dismissed the indictments against the three defendants after it found that the SEC and USAO improperly conspired to gather evidence and acted in bad faith during a civil investigation initiated by the SEC. See United States v. Stringer, 408 F. Supp. 1083 (D. Or. 2006). In dismissing the indictment and rejecting the government’s argument that the USAO and the SEC were appropriately conducting parallel proceedings, the district court stated:

The court concludes that these were not parallel investigations. The USAO identified potential criminal liability and a few targets in the beginning of the investigation, and elected to gather information through the SEC instead of conducting its own investigation. The government was concerned that the presence of a criminal investigation would halt the successful discovery by the SEC, witnesses would be less cooperative and more likely to invoke their constitutional rights, and that the rules of criminal discovery would be invoked.

Id.

The district court noted that the USAO had determined from the outset of the civil investigation that the case warranted prosecution and nonetheless refused to make the targets aware of that possibility. Id. at 1088. The district court also found of significance that the USAO was actively involved in the civil investigation by meeting regularly with SEC investigators and reviewing documents, advising what information was needed for the criminal investigation, instructing how best to conduct interviews to gather evidence to successfully prosecute false statement cases, intentionally hiding its presence from the company’s counsel, and coordinating with the SEC on when it would be most advantageous to “surface” and conduct an “overt” criminal investigation. Id.

The district court concluded that this strategy to conceal the criminal investigation from the targets was an abuse of the investigative process and constituted a “violation of due process or a departure from proper standards in the administration of justice.” Id.

The district court further found that the SEC attorney’s response to the direct inquiry by Stringer’s attorney as to the existence of a criminal investigation was “evasive and misleading, particularly in light of the close association between the USAO and the SEC throughout the investigation and the early identification of Stringer as a criminal target.” Id. at 1089. Finally, the district court noted that dismissal of the indictments was required because the government’s conduct was “so grossly shocking and so outrageous as to violate the universal sense of justice.” Id.

**C. The Ninth Circuit Reverses**

The government appealed the dismissal of the indictment and the Ninth Circuit reversed, holding that the government did not violate the defendants’ Fifth Amendment rights against self-incrimination by failing to disclose the involvement of the USAO by virtue of the warnings contained on the SEC Form 1662. See United States v. Stringer, 521 F.3d 1189, 1197 (9th Cir. 2008). The court further determined that the government did not violate the defendants’ due process or Fourth Amendment rights because it did not act in bad faith or employ trickery or deceit in concealing the existence of the criminal investigation. Id. at 1197-1198.

In reversing the district court, the Ninth Circuit anchored its decision in the Supreme Court’s holding in United States v. Kordel,
397 U.S. 1 (1970), that the government can conduct parallel civil and criminal investigations without violating the due process clause so long as it does not act in bad faith. See Stringer, 521 F.3d at 1195-1200. The court relied on the rationale developed in Kordel to support a number of actions undertaken by SEC and USAO attorneys that, on their face, appear to have been undertaken to intentionally mislead defendants and their counsel, and to induce them to reveal evidence and information that they would not have otherwise disclosed if they knew of the existence of the criminal probe.

Specifically, the Ninth Circuit determined that the defendants had knowingly waived their Fifth Amendment rights because the SEC Form 1662 that they were issued prior to testifying alerted them to the fact that information gathered by the SEC could be used in a criminal proceeding. The court found that the government did not have a legal duty to make further disclosures to the defendants, even in light of the SEC’s awareness of, and collaboration with, the FBI and USAO investigations. Indeed, at the time the defendants received the SEC Forms 1662s, the SEC had long been sharing the evidence it collected with the FBI and USAO. In addition, the court explicitly noted the role played by the defense attorneys in allowing their clients to testify before the SEC, stating that through the Form 1662 “defendants were on sufficient notice, and so were their attorneys,” that their testimony could be used against them in a criminal case. Id. at 1197. In reaching these conclusions the Ninth Circuit found that none of the actions of the SEC constituted bad faith, deceit, or trickery, despite the fact that it closely collaborated and shared its investigative files, findings, and analyses with the FBI and USAO, and refused to disclose the existence of the investigation when directly questioned by defense counsel.

The court also rejected the notion that the government acted in bad faith by failing to disclose the existence of an investigation being conducted by the USAO and FBI, because the civil SEC investigation was not commenced “solely to obtain evidence for its criminal prosecution.” Id. The court relied on its impression that the SEC commenced its investigation first, leading to the imposition of civil sanctions, and that Congress expressly authorized the SEC to share information with the Department of Justice to facilitate criminal prosecutions. Id. at 1198. Importantly, in reaching this conclusion, the Ninth Circuit completely ignored the facts that so troubled the district court, namely that the USAO closely collaborated with the SEC, coached SEC attorneys on how to lay the groundwork for the imposition of certain charges, and decided in concert with the FBI to forestall the initiation of a formal criminal investigation because the SEC was cultivating strong evidence that could not have been obtained during a criminal inquiry.

II. The Ramifications of the Stringer Decision

The impact of the Stringer decision on how counsel should approach the defense of a civil investigation cannot be understated. Defense attorneys must be aware that their clients can potentially, and unknowingly, waive their Fifth Amendment rights after they are given minimal notice by civil investigators. Thus, even if a government investigation appears to be merely civil in nature, an astute defense attorney must anticipate the possibility that the civil attorneys are working with, or taking direction from, prosecutors seeking to build a criminal case. Counsel also must realize that, simply because the existence of criminal investigation is not readily apparent, does not mean that one is not underway, especially if their clients are cooperating with civil investigators. Indeed, Stringer allows criminal and civil investigators to conceal a significant amount of collaboration and joint strategic planning without triggering concerns that the government is acting in bad faith.

In addition, the Ninth Circuit’s holding that the government did not engage in deceit or trickery in Stringer raises serious concerns about whether a defense attorney can, or should, rely on a government attorney’s representations when asked whether a criminal investigation exists. As evidenced by the SEC’s conduct in Stringer, a government attorney is apparently under no obligation to notify counsel of a concurrent criminal probe or collaboration between another government
agency and the DOJ. Counsel should therefore presume in this context that a parallel criminal investigation is underway, notwithstanding contrary indications from the government, and advise their clients accordingly.

III. Conclusion

The apparent freedom government lawyers have in coordinating parallel civil and criminal investigations as in Stringer should raise serious concern for defense counsel. The Stringer decision shows that defense counsel should handle the defense of a client subject to a civil investigation as though it were criminal, and strongly consider the extent to which their clients should be cooperating with government lawyers, particularly where the lawyer knows that the client may have criminal exposure. Because the result of Stringer affords government lawyers so much leeway in using evidence collected in a civil investigation to build a criminal case, counsel must be careful not to allow their clients to supply the government with the proverbial rope with which they will ultimately be hung. ■