IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH
SALT LAKE DEPARTMENT

STATE OF UTAH, Plaintiff, v. JOHN EDWARD SWALLOW, Defendant.	**RULING AND ORDER** Case No. 141907718 Judge Elizabeth A. Hruby-Mills

Before the Court is Defendant's Motion to Dismiss ("Motion") filed April 11, 2016. Plaintiff filed an opposition on May 13, 2016 and Defendant filed a reply on June 16, 2016. The Court heard argument of the parties on July 13, 2016. The court does not believe an evidentiary hearing on the issues would assist the court. Having considered the papers, oral argument, relevant law, and for good cause, the Court now rules as follows.

BACKGROUND

During the investigation underlying this case authorities seized evidence, which included email communications between Defendant and his former counsel Rodney G. Snow. Mr. Snow informed investigators and prosecutors that the evidence contained attorney-client privileged communications. On February 3, 2015, the Salt Lake County District Attorney ("SLCDA") received a Blu-ray disc that contained a folder and bookmark indicating "potential attorney-client" materials.[1] Following its protocol, SLCDA sent the Blu-ray disc to Salt Lake Legal for conversion to PDF format and Bates numbering.[2] As a result of this processing, those items in the potential attorney-client folder were scattered throughout the final processed PDF ("PDF Product") and no longer contained any special markings identifying the potential attorney-client material.[3] This PDF Product was produced to Defendant who discovered the email communications with counsel and filed the instant Motion.[4]

[1] Ex. 1 to State's Memorandum in Opposition to Defendant's Motion to Dismiss ("Opposition"), ¶ 17; Ex. 2 to Opposition, ¶ 14; Ex. 5 to Opposition, ¶ 7, ¶ 12. The Court notes that the Defendant has submitted the potentially privileged material to the Court for review. Review of the material, however, is not necessary because the Court determines that the Motion may be resolved even assuming the material is privileged. The Court did very briefly view Disc labelled BB for the sole purpose of determining what is initially visible upon opening a file.
[2] Ex. 5 to Opposition, ¶ 4, ¶ 6, ¶ 12; Ex. 2 to Opposition, ¶ 14.
[3] Ex. 7 to Opposition, ¶ 5.
[4] Ex. 5 to Opposition, ¶ 11.

SLCDA was not aware that the PDF Product contained potentially privileged communications until Defendant filed the instant Motion.[5] Following the discovery, SLCDA immediately eliminated internal access to the PDF Product and discovery material.[6] SLCDA also requested that the FBI prepare a 'clean set' of discovery to SLCDA and sent letters to the prosecutor and defense attorneys in the Shurtleff case[7] as well as the defense attorneys in the Lawson case[8] advising them of the problem and instructing them not to view the produced discovery.[9] Despite having temporary access to the PDF Product, SLCDA maintains that it has not viewed or attempted to view any potentially privileged materials.[10]

DISCUSSION

The Sixth Amendment to the United States Constitution guarantees the right to effective assistance of counsel. U.S. Const. amend. VI.[11] A State's intrusion into the attorney-client relationship may violate that right. *Weatherford v. Bursey*, 429 U.S. 545 (1977). In *Weatherford*, Bursey was arrested and charged for a state criminal offense. *Id.* at 547. To maintain his undercover status, Weatherford was also arrested and charged. *Id.* On two occasions, Weatherford (still undercover) met with Bursey and Bursey's retained defense attorney and discussed the approaching trial. *Id.* at 547-48. Weatherford was called at Bursey's trial and testified about his undercover activities as well as the criminal episode underlying the prosecution. *Id.* at 548-49. The Fourth Circuit Court of Appeals found that the United States Supreme Court precedence established a "per se rule," that "whenever the prosecution knowingly arranges or permits intrusion into the attorney-client relationship the right to counsel is sufficiently endangered to require reversal and a new trial." *Bursey v. Weatherford*, 528 F.2d 483, 486 (4th Cir. 1975), *rev'd,* 429 U.S. 545 (1977). However, addressing their holdings in *Black v. United States*, 385 U.S. 26 (1966) and *O'Brien v. United States*, 386 U.S. 345 (1967) on which the Fourth Circuit relied, the United States Supreme Court stated:

> If anything is to be inferred from these two cases with respect to the right to counsel, it is that when conversations with counsel have been overheard, the constitutionality of the conviction depends on whether the overheard conversations have produced, directly or indirectly, any of the evidence offered at trial.

Weatherford, 429 U.S. at 552. The court ultimately found that Bursey's Sixth Amendment right to counsel was not violated based upon findings that: Weatherford did not seek the meetings with

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[5] Ex. 5 to Opposition, ¶ 11, ¶ 12.
[6] Ex. 5 to Opposition, ¶ 17.
[7] *State v. Shurtleff*, case no. 141907720, Third Judicial District Court, State of Utah.
[8] *State v. Lawson*, case no. 131911737, Third Judicial District Court, State of Utah.
[9] Ex. 5 to Opposition, ¶ 17.
[10] Ex. 5 to Opposition, ¶ 18; Ex. 11 to Opposition, ¶ 6.
[11] The Sixth Amendment applies to the States through the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963), *citing Grosjean v. Am. Press Co.*, 297 U.S. 233, 243-44 (1936).

Bursey and counsel; did not intentionally request the trial strategy information; and did not communicate the information to prosecutors or his superiors. *Id.* at 558.

In *State v. Lenarz*, 22 A.3d 536 (Conn. 2011), a state prosecutor received voluminous written materials regarding the defendant's trial strategy. *Id.* at 539. The court provided:

> The state admitted that the prosecutor had read all of the materials and did not dispute that the documents contained trial strategy, but claimed that, because the prosecutor had not conducted any additional investigation and had not interviewed any additional witnesses as a result of reading the materials, the defendant had suffered no prejudice.

Id. at 539-40. On these facts, the Supreme Court of Connecticut held that an attorney-client privilege intrusion is presumptively prejudicial when a prosecutor reads privileged material containing trial strategy. *Id.* at 542.

Similarly, in *Shillinger v. Haworth*, 70 F.3d 1132 (10th Cir. 1995), the Tenth Circuit Court of Appeals held "when the state becomes privy to confidential communications because of its purposeful intrusion into the attorney-client relationship and lacks a legitimate justification for doing so, a prejudicial effect on the reliability of the trial process must be presumed." *Id.* at 1142. Prior to trial, defense counsel for Haworth arranged several preparatory sessions with defendant Haworth in the trial courtroom. *Id.* at 1134. Because Haworth remained in custody, the sessions were attended by a deputy sheriff. *Id.* The prosecutor initiated a conversation with the deputy in which the prosecutor learned about the sessions and about the substance of the attorney-client conversations that took place. *Id.* at 1134-36. The *Shillinger* court, stated:

> [T]his is a case in which the prosecutor, by his own admission, proceeded for the purpose of determining the substance of Haworth's conversations with his attorney, and attorney-client communications were actually disclosed. This sort of purposeful intrusion on the attorney-client relationship strikes at the center of the protections afforded by the Sixth Amendment...

Id. at 1141.

In the instant case, prosecutors were in possession of potentially attorney-client privileged emails. Prosecutors disclosed the PDF Product to Defendant without reading or reviewing the contents. Defendant discovered that the PDF Product contained the potentially privileged emails, which were not separated from the other materials or otherwise identified as potentially privileged. Prosecutors immediately took steps to ameliorate the situation. Unlike the facts underlying *Lenarz* and *Shillinger*, the prosecutors in this case did not read, review, or attempt to determine the substance of the potentially privileged material. The potential access by prosecutors was not intentional and because prosecutors did not read or review the potentially privileged materials, there is no purposeful intrusion. Consequently, the Sixth Amendment

prejudice standard has not been met. The Court certainly does not condone the SLCDA's apparent lack of stringent practices to safeguard against access to identified potentially privileged communications. The court admonishes the prosecution team to be cognizant of the deep responsibility that surrounds its handling of potentially privileged communications such as that at issue here. However, the circumstances at hand do not rise to the level of a Sixth Amendment violation.

ORDER

Based on the foregoing, it is HEREBY ORDERED that Defendant's Motion to Dismiss is DENIED. The court reminds the parties that a telephone conference call is set for August 12, 2016 at 10:00 a.m. Counsel is advised that the court anticipates setting hearing and trial dates at that time. This Ruling and Order is the order of the court and no further order is necessary on this issue.

DATED this 5th day of August, 2016.

BY THE COURT

Judge Elizabeth A. Hruby-Mills
DISTRICT COURT JUDGE

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 141907718 by the method and on the date specified.

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Date: 08/05/2016

/s/ KATIE JOHNSON

Deputy Court Clerk