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Case Name: ***Troy Levi Burwell v. The State of Texas***

- **OFFENSE**: Possession of Child Pornography
- **COUNTY**: Harris
- **C/A CASE No**. 01-18-00300-CR, 01-18-00301-CR, & 01-18-00302-CR
- **DATE OF OPINION**: May 21, 2019 **OPINION**: Justice Keyes
- **DISPOSITION**: Conviction Affirmed
- **TRIAL COURT**: 248th D/C
- **LAWYERS**: Nicole DeBorde (Defense); Travis Dunlap & Dan McCrory (State)

32.01 Search & Seizure / Reasonable Expectation of Privacy (On-Line Services -- Search Warrants): Appellant was charged with four counts of possession of child pornography after images containing child pornography were recovered from his Adobe Photoshop photo-storage account. An employee of Adobe Systems Inc. had reported the images to the National Center for Missing and Exploited Children (NCMEC), which in turn sent the tip to the Houston Police Department (HPD). HPD obtained a search warrant and conducted a further investigation, leading to Appellant's arrest and prosecution. In his motion to suppress, Appellant argued that Adobe acted as an agent of NCMEC, which he asserted was a governmental entity. Adobe's "Terms of Use" provided, in relevant part, that users grant Adobe "a nonexclusive, worldwide, royalty-free, sub-licensable, and transferrable license to use, reproduce, publicly display, distribute, [or] modify" content uploaded to Adobe's systems "for the purpose of operating or improving the Services." The Terms of Use further prohibited users from using Adobe's services to "upload or share any content that is unlawful, harmful, threatening, abusive, tortious, defamatory, libelous, vulgar, lewd, profane, invasive of another's privacy, or hateful" or to otherwise "violate applicable law." The Terms of Use also contained a section regarding "Investigations" that provided: "*We may access or disclose information about you, or your use of the Services, (a) when it is required by law (such as when we receive a valid subpoena or search warrant); (b) to respond to your requests for customer service support; or (c) when we, in our discretion, think it is necessary to protect the rights, property, or personal safety of us, our users, or the public*." The trial court denied Appellant's motion to suppress, and, on appeal, Appellant argues that the trial court erred in denying his motion to suppress because Adobe's search of his account violated his rights under

the Fourth Amendment. Appellant argues that Adobe acted as an agent of NCMEC in conducting the search and inspection of the files stored with Adobe's service, and he asserts that NCMEC is a governmental entity, citing ***United States v. Ackerman***, 831 F.3d 1292, 1296 (10th Cir. 2016).

Holding: "Whether a private party should be deemed an agent or instrument of the Government for Fourth Amendment purposes necessarily turns on the degree of the Government's participation in the private party's activities. . . ." ***Skinner v. Railway Labor Executives' Ass'n,*** 489 U.S. 602, 614 (1989). *** Thus, to determine whether a person is acting as an "instrument" or agent of the government, we ask (1) whether the government knew of, and acquiesced in, the intrusive conduct, and (2) whether the party performing the search intended to assist law enforcement efforts or, instead, to further his own ends. ***Dawson v. State***, 106 S.W.3d 388 (Tex.App. - Houston [1st] 2003)(see §§, Vol. 11, No. 20; 05/26/2003), citing ***Stoker v. State***, 788 S.W.2d 1 (Tex.Cr.App. 1989). *** The search of Appellant's computer was provided for by Adobe's Terms of Use, which indicated that Adobe would perform routine searches of user content. The Terms of Use stated that Adobe would use the content generally for its own purposes, that it would access or use content to enforce the Terms of Use themselves, and that it would "use available technologies or processes to screen for certain types of illegal content (for example, child pornography)" and would disclose information as required by law. Officer Wilson also testified that, to the best of his knowledge, Adobe acted in accordance with its own interests and not at the direction of or in cooperation with a government entity. *** Thus, considering both elements necessary to determining whether Adobe acted as an "instrument" or agent of the government, we conclude that nothing in the record indicates that a governmental entity knew of and acquiesced in Adobe's search of the user content that turned up the images of child pornography in Appellant's account. Nor does anything in the record indicate that Adobe acted out of anything other than its own business interests in complying with the law and maintaining the integrity of its services as set out in its Terms of Use. *** Appellant failed to carry his burden of establishing that Adobe acted as an agent of the government. *** Appellant's case here is based on significantly different facts and legal arguments from those in ***Ackerman***. Here, the only warrantless search of the contents of Appellant's account was done by Adobe, which actually viewed the contents of Appellant's files and forwarded a report containing those files to NCMEC though the CyberTipline, as compared to NCMEC's warrantless search in ***Ackerman***. There is no evidence in this case that NCMEC did anything more than forward the Cyber Tips to the HPD. And Officer Wilson's uncontradicted testimony indicated that he viewed only the files that had already been viewed and flagged by Adobe prior to obtaining a search warrant, and Appellant does not argue that HPD's search exceeded the scope of the private search conducted by Adobe. *** [Also] unlike ***Ackerman***, Appellant used Adobe's services pursuant to its Terms of Use, and these put him on notice that Adobe reviews files stored on its website for indicia of crimes, specifically including child pornography. Thus, Adobe had lawful access to Appellant's stored content at the time it conducted its search. *** There is no evidence that the search was done with the government's knowledge or to assist with law enforcement efforts. *** There is no evidence that it violated the Fourth Amendment. Rather, considered in light of this Fourth Amendment jurisprudence, the

record demonstrates that Adobe acted as a private entity in conducting its search of Appellant's account and that its search did not implicate Appellant's Fourth Amendment rights.

(**David A. Schulman**) The message here is what one of my gurus told me many years ago. If you share information with anyone that you don't want the whole world to know, you have to recognize that this person you're trusting may "drop a dime" on you.

(**John G. Jasuta**) Succinctly put, David. This guy violated the dumbass rule.