

**SUBJECT:** Sealing child pornography evidence

**COMMITTEE:** Criminal Jurisprudence — favorable, without amendment

**VOTE:** 5 ayes — Peña, Riddle, Escobar, Mallory Caraway, Talton  
0 nays  
2 present not voting — Hodge, Pierson  
2 absent — Vaught, Moreno

**SENATE VOTE:** On final passage, April 26 — 31-0, on Local and Uncontested Calendar

**WITNESSES:** For — (*Registered, but did not testify:* Amy Mills, Tarrant County District Attorney's Office; Kevin Petroff, Harris County District Attorney's Office)  
Against — Samuel England, ACLU of Texas  
On — Eric Nichols, Office of the Attorney General

**DIGEST:** SB 634 would amend Code of Criminal Procedure, ch. 38 to require the sealing from the public of material that constituted child pornography and to limit a defendant's ability to photocopy or reproduce such material.

During the course of a criminal hearing or proceeding, a court would be forbidden from allowing the public to copy or disseminate this material. A court would be required to seal the child pornography on conclusion of the criminal hearing or proceeding.

Prosecutors would be allowed full access to child pornography placed into evidence. The defendant, the defendant's attorney, and any expert retained by the defendant also would have access to the material, but it could not leave the control of the court or the state. Further, a court could not allow a defendant to copy, photograph, duplicate, or otherwise reproduce the material, as long as the state made it reasonably available to the defendant — i.e., provided ample opportunity for the inspection, viewing, and

examination of the property or material by the defendant, the defendant's attorney, and the defendant's expert witnesses.

A court that placed material under seal would be allowed to issue an order lifting the seal on a finding that lifting the seal was in the best interest of the public.

The bill would take effect September 1, 2007.

**SUPPORTERS  
SAY:**

SB 634 would prevent the reproduction of child pornography in the state's possession, thus helping to stop the sexual exploitation of children. The bill would bring Texas law in line with federal law with regard to sealing and preventing these materials from being copied. By preventing child pornography from being reproduced, SB 634 would seek to prevent further criminal activity that exploited children. It would not create a new offense, nor would it enhance penalties. The bill represents a common sense approach to fighting a particularly reprehensible crime.

Defendants would be able to adequately defend themselves in court because they, their attorneys, and their expert witnesses all would be able to examine these materials. By placing the materials under the control of the state, SB 634 would ensure that they would not be distributed back into the community. The materials could be unsealed if the need arose. Further the appellate attorneys would have access to all the notes of the trial attorneys and reports by any experts.

Federal law contains similar limits on access to child pornography placed into evidence, and it has not proven to be a problem for defense attorneys working on similar federal cases. Society's interest in suppressing child pornography outweighs any potential inconvenience to the defendant.

**OPPONENTS  
SAY:**

While the exploitation of children is one of the worst possible crimes, all suspects are innocent until proven guilty. As such, defendants should be allowed full access to the evidence that the state plans to use against them. SB 634 would unreasonably hamper a defendant by limiting access to key evidence, creating delays and expenses that would slow the wheels of justice.

A common defense to charges of child pornography is that the defendant was not the one who created, manipulated, or accessed the material. These claims often require complex computer forensics. Expert witnesses

perform computer based analyses of data files. Limiting physical access to these files can interfere with the work of these experts, particularly those who live out of town and normally would receive a copy of the materials by overnight delivery. In addition to the cost of bringing an expert to the material, the act of doing so can disclose the identity of the expert to the prosecutor early on in the case. SB 634 thus would give aid to prosecutors not required by the rules of criminal procedure.

By requiring courts to seal evidence, this bill would hamper a defendant's access to evidence for the purpose of putting together an appeal. While the seal could be removed, that order would have to come from the court that initially sealed the evidence. Access to evidence on appeal is critical because many defendants hire entirely new defense teams to address the different issues that come up on appeal as opposed to during trial.