

STATE OF NEW YORK

4952--B

2021-2022 Regular Sessions

IN ASSEMBLY

February 9, 2021

Introduced by M. of A. JOYNER -- read once and referred to the Committee on Children and Families -- recommitted to the Committee on Children and Families in accordance with Assembly Rule 3, sec. 2 -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- reported and referred to the Committee on Codes -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the family court act and the judiciary law, in relation to the discovery provisions applicable to juvenile delinquency proceedings in family court; and to repeal certain provisions of the family court act relating thereto

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Sections 331.1, 331.2, 331.3, 331.4, 331.5, 331.6 and 331.7 of the family court act are REPEALED.

§ 2. The family court act is amended by adding thirteen new sections 331.1, 331.2, 331.3, 331.4, 331.5, 331.6, 331.7, 331.8, 331.9, 331.10, 331.11, 331.12 and 331.13 to read as follows:

§ 331.1. Initial appearance. 1. Disclosure. At the respondent's initial appearance, as defined in section 320.1 of this article, if the court directs detention pursuant to subdivision three of section 320.5 of this article, the presentment agency shall forthwith disclose to the respondent, and permit the respondent to discover, inspect, copy, photograph and test, all items and information set forth in paragraphs (a) through (u) of subdivision one of section 331.3 of this part that are within the presentment agency's possession at the time of the initial appearance. If the court does not direct detention, the presentment agency shall disclose to the respondent:

(a) any police or other law enforcement agency reports and written witness statements relating to the juvenile delinquency proceeding

EXPLANATION--Matter in italics (underscored) is new; matter in brackets [-] is old law to be omitted.

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1 against the respondent that are within the presentment agency's
2 possession at that time;

3 (b) electronic recordings relating to the juvenile delinquency
4 proceeding against the respondent that are within the presentment agen-
5 cy's possession at that time, in accordance with paragraph (g) of subdi-
6 vision one of section 331.3 of this part; and

7 (c) exculpatory information known to the presentment agency at that
8 time.

9 (d) where the charges were removed from a youth part pursuant to arti-
10 cle seven hundred twenty-five of the criminal procedure law and the
11 attorney for the child did not represent the respondent in the youth
12 part, all discovery material previously provided pursuant to article two
13 hundred forty-five of the criminal procedure law.

14 2. Copy of records. If in the exercise of reasonable diligence and due
15 to the limited availability of resources for downloading or copying
16 recordings, a copy of an electronic recording discoverable under this
17 section is unavailable at the initial appearance, a copy shall be made
18 and disclosed to the respondent as soon as practicable but not later
19 than five calendar days after the initial appearance, provided, however,
20 that if the respondent is in detention, a copy shall be made not later
21 than three days after the initial appearance. Portions of materials
22 under this section claimed to be non-discoverable may be withheld pend-
23 ing a prompt request by the presentment agency for a determination and
24 ruling of the court under section 331.11 of this part; but the discover-
25 able portions of such materials shall be disclosed to the extent practi-
26 cable.

27 § 331.2. Timing of discovery after the initial appearance. 1.
28 Presentment agency's performance of obligations. (a) The presentment
29 agency shall perform its initial discovery obligations under subdivision
30 one of section 331.3 of this part as soon as practicable but not later
31 than fifteen calendar days after the respondent's initial appearance or,
32 if the respondent is in detention, not later than three days prior to
33 the first scheduled fact-finding hearing date, or seven days after the
34 initial appearance, whichever is earlier. Portions of materials claimed
35 to be non-discoverable may be withheld pending a determination and
36 ruling of the court under section 331.11 of this part; but the respond-
37 ent shall be notified in writing that information has not been disclosed
38 under a particular subdivision of this section, and the discoverable
39 portions of such materials shall be disclosed to the extent practicable.
40 When the discoverable materials are exceptionally voluminous, the time
41 periods in this paragraph may be stayed by up to an additional ten
42 calendar days or, if the respondent is in detention, up to an additional
43 period of three days without need for a motion pursuant to subdivision
44 two of section 331.11 of this part.

45 (b) The presentment agency shall perform its supplemental discovery
46 obligations under subdivision three of section 331.3 of this part as
47 soon as practicable but not later than fifteen calendar days prior to
48 the first scheduled fact-finding hearing date, unless the respondent is
49 in detention, in which case the presentment agency shall fulfill its
50 supplemental discovery obligations not later than three days prior to
51 the first scheduled fact-finding hearing date.

52 2. Respondent's performance of obligations. The respondent shall
53 perform his or her discovery obligations under subdivision four of
54 section 331.3 of this part not later than twenty-five calendar days
55 after being served with the presentment agency's certificate of compli-
56 ance pursuant to subdivision two of section 331.6 of this part or not

1 later than three days prior to the first scheduled fact-finding hearing
2 date, whichever is earlier. Portions of materials claimed to be non-dis-
3 coverable may be withheld pending a determination and ruling of the
4 court under section 331.11 of this part; but the presentment agency
5 shall be notified in writing that information has not been disclosed
6 under a particular section.

7 3. Timing adjustment. The time periods in this section may be adjusted
8 by the court upon a finding of good cause based upon the needs of the
9 case, the detention status of the respondent and the need for a fair and
10 expeditious resolution of the proceeding.

11 § 331.3. Automatic discovery. 1. Initial discovery for the respondent.
12 The presentment agency shall disclose to the respondent, and permit the
13 respondent to discover, inspect, copy, photograph and test, all items
14 and information that relate to the subject matter of the case and are in
15 the possession, custody or control of the presentment agency or persons
16 under the presentment agency's direction or control, including but not
17 limited to:

18 (a) All written or recorded statements, and the substance of all oral
19 statements, made by the respondent or a co-respondent to a public serv-
20 ant engaged in law enforcement activity or to a person then acting under
21 his or her direction or in cooperation with him or her.

22 (b) All transcripts of the testimony of a person who has testified
23 before a grand jury in a related criminal proceeding, including but not
24 limited to the respondent or a co-respondent. The presentment agency
25 shall request that the prosecutor of the matter before the grand jury
26 provide a transcript of the testimony and, upon receipt of the request,
27 the prosecutor shall promptly apply to the appropriate criminal court,
28 with written notice to the presentment agency and the respondent, for a
29 written order pursuant to section three hundred twenty-five of the judi-
30 ciary law releasing a transcript to the presentment agency; provided,
31 however, that the transcripts of the grand jury proceedings in a case
32 removed from the youth part pursuant to article seven hundred twenty-
33 five of the criminal procedure law shall be annexed to the petition or
34 transferred to the family court in accordance with subdivision seven of
35 section 311.1 of this article. If in the exercise of reasonable dili-
36 gence, and due to the limited availability of transcription resources, a
37 transcript is unavailable for disclosure within the time period speci-
38 fied in subdivision one of section 331.2 of this part, such time period
39 may be stayed by up to an additional fifteen calendar days or, if the
40 respondent is in detention, an additional period of three days, without
41 need for a motion pursuant to subdivision two of section 331.11 of this
42 part; provided, however, that such disclosure shall be made as soon as
43 practicable and not later than fifteen calendar days prior to the first
44 scheduled fact-finding hearing date, unless the respondent is in
45 detention, in which case such disclosure shall be made not later than
46 three days prior to the first scheduled fact-finding hearing date,
47 unless an order is obtained pursuant to section 331.11 of this part.
48 When the court is required to review grand jury transcripts, the
49 presentment agency shall disclose such transcripts to the court expe-
50 ditiously upon receipt by such agency, notwithstanding the otherwise
51 applicable time periods for disclosure in this part.

52 (c) The names of, and adequate alternative contact information for,
53 all persons other than law enforcement personnel whom the presentment
54 agency knows to have evidence or information relevant to any act of
55 juvenile delinquency charged or to any potential defense thereto,
56 including a designation by the presentment agency as to which of those

1 persons may be called as witnesses. Nothing in this paragraph shall
2 require the disclosure of physical addresses; provided, however, upon a
3 motion and good cause shown the court may direct the disclosure of a
4 physical residence. Information under this subdivision relating to a
5 confidential informant may be withheld, and redacted from discovery
6 materials, without need for a motion pursuant to section 331.11 of this
7 part; but the presentment agency shall notify the respondent in writing
8 that such information has not been disclosed, unless the court rules
9 otherwise for good cause shown.

10 (d) The name and work affiliation of all law enforcement personnel
11 whom the presentment agency knows to have evidence or information rele-
12 vant to any offense charged or to any potential defense thereto, includ-
13 ing a designation by the presentment agency as to which of those persons
14 may be called as witnesses. Information under this subdivision relating
15 to undercover personnel may be withheld, and redacted from discovery
16 materials, without need for a motion pursuant to section 331.11 of this
17 part; but the presentment agency shall notify the respondent in writing
18 that such information has not been disclosed, unless the court rules
19 otherwise for good cause shown.

20 (e) All statements, written or recorded or summarized in any writing
21 or recording, made by persons who have evidence or information relevant
22 to any offense charged or to any potential defense thereto, including
23 all police reports, notes of police and other investigators, and law
24 enforcement agency reports. This provision also includes statements,
25 written or recorded or summarized in any writing or recording, by
26 persons to be called as witnesses at pre-fact-finding hearings.

27 (f) Expert opinion evidence, including the name, business address,
28 current curriculum vitae, a list of publications, and all proficiency
29 tests and results administered or taken in the current employment or
30 within the past ten years, whichever is longer, of each expert witness
31 whom the presentment agency intends to call as a witness at the fact-
32 finding hearing or at a pre-trial motion hearing, and all reports
33 prepared by the expert that pertain to the case, or if no report is
34 prepared, a written statement of the facts and opinions to which the
35 expert is expected to testify and a summary of the grounds for each
36 opinion. If in the exercise of reasonable diligence this information is
37 unavailable for disclosure within the time period specified in subdivi-
38 sion one of section 331.2 of this part, that period shall be stayed
39 without need for a motion pursuant to subdivision two of section 331.11
40 of this part; except that the presentment agency shall notify the
41 respondent in writing that such information has not been disclosed, and
42 such disclosure shall be made as soon as practicable and not later than
43 fifteen calendar days prior to the first scheduled fact-finding hearing
44 date, or, if the respondent is in detention, not later than three days
45 prior to the first scheduled fact-finding hearing date, unless an order
46 is obtained pursuant to section 331.11 of this part. When the present-
47 ment agency's expert witness is being called in response to disclosure
48 of an expert witness by the respondent, the court shall alter a sched-
49 uled fact-finding hearing date, if necessary, to allow the presentment
50 agency fifteen calendar days to make the disclosure and the respondent
51 fifteen calendar days to prepare and respond to the new materials,
52 unless the respondent is in detention, in which case the court may alter
53 the scheduled fact-finding hearing date, if necessary, to allow the
54 presentment agency an additional three days to make the disclosure and
55 the respondent three days to prepare and respond to the new materials.

(g) All tapes or other electronic recordings, including all electronic recordings of 911 telephone calls made or received in connection with the alleged incident of juvenile delinquency, and a designation by the presentment agency as to which of the recordings under this paragraph the presentment agency intends to introduce at fact-finding hearing or a pre-trial motion hearing. If the discoverable materials under this paragraph exceed ten hours in total length, the presentment agency may disclose only the recordings that it intends to introduce at fact-finding hearing or a pre-fact-finding hearing, along with a list of the source and approximate quantity of other recordings and their general subject matter if known, and the respondent shall have the right upon request to obtain recordings not previously disclosed. The presentment agency shall disclose the requested materials as soon as practicable and not less than fifteen calendar days after the respondent's request, or, if the respondent is in detention, not less than three days after the respondent's request, unless an order is obtained pursuant to section 331.11 of this part.

(h) All photographs and drawings made or completed by a public servant engaged in law enforcement activity, or which were made by a person whom the presentment agency intends to call as a witness at fact-finding or a pre-trial motion hearing or which relate to the subject matter of the proceeding.

(i) All photographs, photocopies and reproductions made by or at the direction of law enforcement personnel of any property prior to its release.

(j) All reports, documents, records, data, calculations or writings, including but not limited to preliminary tests and screening results and bench notes and analyses performed or stored electronically, concerning physical or mental examinations, or scientific tests or experiments or comparisons, relating to the juvenile delinquency proceeding which were made by or at the request or direction of a public servant engaged in law enforcement activity, or which were made by a person whom the presentment agency intends to call as a witness at fact-finding or a pre-trial motion hearing, or which the presentment agency intends to introduce at fact-finding or a pre-trial motion hearing. Information under this paragraph also includes, but is not limited to, laboratory information management system records relating to such materials, any preliminary or final findings of non-conformance with accreditation, industry or governmental standards or laboratory protocols, and any conflicting analyses or results by laboratory personnel regardless of the laboratory's final analysis or results. If the presentment agency submitted one or more items for testing to, or received results from, a forensic science laboratory or similar entity not under the presentment agency's direction or control, the court on motion of a party shall issue subpoenas or orders to such laboratory or entity to cause materials under this paragraph to be made available for disclosure.

(k) All evidence and information, including that which is known to police or other law enforcement agencies acting on the government's behalf in the case, that tends to: (i) negate the respondent's guilt as to a charged act of juvenile delinquency; (ii) reduce the degree of or mitigate the respondent's culpability as to a charged act of juvenile delinquency; (iii) support a potential defense to a charged act of juvenile delinquency; (iv) impeach the credibility of a testifying presentment agency witness; (v) undermine evidence of the respondent's identity as a perpetrator of a charged act of juvenile delinquency; (vi) provide a basis for a motion to suppress evidence; or (vii) mitigate the

1 restrictiveness of the disposition. Information under this subdivision
2 shall be disclosed whether or not such information is recorded in tangi-
3 ble form and irrespective of whether the presentment agency credits the
4 information. The presentment agency shall disclose the information expe-
5 ditiously upon its receipt and shall not delay disclosure if it is
6 obtained earlier than the time period for disclosure in subdivision one
7 of section 331.2 of this part.

8 (l) A summary of all promises, rewards and inducements made to, or in
9 favor of, persons who may be called as witnesses, as well as requests
10 for consideration by persons who may be called as witnesses and copies
11 of all documents relevant to a promise, reward or inducement.

12 (m) A list of all tangible objects obtained from, or allegedly
13 possessed by, the respondent or a co-respondent. The list shall include
14 a designation by the presentment agency as to which objects were phys-
15 ically or constructively possessed by the respondent and were recovered
16 during a search or seizure by a public servant or an agent thereof, and
17 which tangible objects were recovered by a public servant or an agent
18 thereof after allegedly being abandoned by the respondent. If the
19 presentment agency intends to prove the respondent's possession of any
20 tangible objects by means of a statutory presumption of possession, it
21 shall designate such intention as to each such object. If reasonably
22 practicable, the presentment agency shall also designate the location
23 from which each tangible object was recovered. There is also a right to
24 inspect, copy, photograph and test the listed tangible objects.

25 (n) Whether a search warrant has been executed and all documents
26 relating thereto, including but not limited to the warrant, the warrant
27 application, supporting affidavits, a police inventory of all property
28 seized under the warrant, and a transcript of all testimony or other
29 oral communications offered in support of the warrant application.

30 (o) All tangible property that relates to the subject matter of the
31 case, along with a designation of which items the presentment agency
32 intends to introduce in its case-in-chief at fact-finding hearing or at
33 a pre-trial motion hearing. If in the exercise of reasonable diligence
34 the presentment agency has not formed an intention within the time peri-
35 od specified in subdivision one of section 331.2 of this part that an
36 item under this paragraph will be introduced at fact-finding hearing or
37 at a pre-trial motion hearing, the presentment agency shall notify the
38 respondent in writing, and the time period in which to designate items
39 as exhibits shall be stayed without need for a motion pursuant to subdi-
40 vision two of section 331.11 of this part; but the disclosure shall be
41 made as soon as practicable, but not later than fifteen calendar days
42 prior to the first scheduled fact-finding hearing date, unless the
43 respondent is in detention, in which case such disclosure shall be made
44 no later than three days prior to the first scheduled fact-finding hear-
45 ing date. All property under this paragraph is subject to the continuing
46 duty to disclose pursuant to section 331.9 of this part.

47 (p) The results of complete checks of juvenile delinquency fingerprint
48 records or criminal history records, as applicable, as well as any
49 history of juvenile delinquency adjudications known to the presentment
50 agency and not sealed, for all respondents and all persons designated as
51 potential presentment agency witnesses pursuant to paragraph (c) of this
52 subdivision, other than those witnesses who are experts.

53 (q) When it is known to the presentment agency, the existence of any
54 pending criminal action against all persons designated as potential
55 presentment agency witnesses pursuant to paragraph (c) of this subdivi-
56 sion.

1 (r) The approximate date, time and place of the offense or offenses
2 charged and of the respondent's seizure and arrest.

3 (s) In any juvenile delinquency proceeding alleging a violation of the
4 vehicle and traffic law, all records of calibration, certification,
5 inspection, repair or maintenance of machines and instruments utilized
6 to perform any scientific tests and experiments, including but not
7 limited to any test of a person's breath, blood, urine or saliva, for
8 the period of six months prior and six months after such test was
9 conducted, including the records of gas chromatography related to the
10 certification of all reference standards and the certification certifi-
11 cate, if any, held by the operator of the machine or instrument.

12 (t) Any presentment agency alleging a violation of section 156.05 or
13 156.10 of the penal law, the time, place and manner such violation
14 occurred.

15 (u) (i) A copy of all electronically created or stored information
16 seized or obtained by or on behalf of law enforcement from: (A) the
17 respondent as described in subparagraph (ii) of this paragraph; or (B) a
18 source other than the respondent which relates to the subject matter of
19 the proceeding.

20 (ii) If the electronically created or stored information originates
21 from a device, account, or other electronically stored source that the
22 presentment agency believes the respondent owned, maintained, or had
23 lawful access to and is within the possession, custody or control of the
24 presentment agency or persons under the presentment agency's direction
25 or control, the presentment agency shall provide a complete copy of the
26 electronically created or stored information from the device or account
27 or other source, and a designation by the presentment agency as to which
28 portions it intends to introduce.

29 (iii) If possession of such electronically created or stored informa-
30 tion would be a crime if committed by an adult under New York state or
31 federal law, the presentment agency shall make those portions of the
32 electronically created or stored information that are not criminal to
33 possess available as specified under this paragraph and shall afford
34 counsel for the respondent access to inspect contraband portions at a
35 supervised location that provides regular and reasonable hours for such
36 access, such as a presentment agency's office, police station, or court.

37 (iv) This paragraph shall not be construed to alter or in any way
38 affect the right to be free from unreasonable searches and seizures or
39 such other rights a suspect or respondent may derive from the state
40 constitution or the United States constitution. If in the exercise of
41 reasonable diligence the information under this paragraph is not avail-
42 able for disclosure within the time period required by subdivision one
43 of section 331.2 of this part, that period shall be stayed without need
44 for a motion pursuant to subdivision two of section 331.11 of this part,
45 except that the presentment agency shall notify the respondent in writ-
46 ing that such information has not been disclosed, and such disclosure
47 shall be made as soon as practicable and not later than fifteen calendar
48 days prior to the first scheduled fact-finding hearing date or, if the
49 respondent is in detention, such disclosure shall be made no later than
50 three days prior to the first scheduled fact-finding hearing date,
51 unless an order is obtained pursuant to section 331.11 of this part.

52 2. Duties of the presentment agency. The presentment agency shall make
53 a diligent, good faith effort to ascertain the existence of material or
54 information discoverable under subdivision one of this section and to
55 cause such material or information to be made available for discovery
56 where it exists but is not within the presentment agency's possession,

1 custody or control; provided that the presentment agency shall not be
2 required to obtain by subpoena duces tecum material or information which
3 the respondent may thereby obtain. For purposes of subdivision one of
4 this section, all items and information related to the presentment agen-
5 cy of a charge in the possession of any New York state or local police
6 or law enforcement agency, and any information in the possession of a
7 laboratory having contact with evidence related to the presentment agen-
8 cy of a charge, shall be deemed to be in the possession of the present-
9 ment agency. This subdivision shall not require the presentment agency
10 to ascertain the existence of witnesses not known to the police or
11 another law enforcement agency, or the written or recorded statements
12 thereof, under paragraph (c) or (e) of subdivision one of this section.

13 3. Supplemental discovery for the respondent. The presentment agency
14 shall disclose to the respondent a list of all misconduct and acts of
15 juvenile delinquency of the respondent not charged in the petition,
16 which the presentment agency intends to use at fact-finding hearing for
17 purposes of (a) impeaching the credibility of the respondent, or (b) as
18 substantive proof of any material issue in the proceeding. In addition,
19 the presentment agency shall designate whether it intends to use each
20 listed act for impeachment and/or as substantive proof.

21 4. Reciprocal discovery for the presentment agency. (a) The respondent
22 shall, subject to constitutional limitations, disclose to the present-
23 ment agency, and permit the presentment agency to discover, inspect,
24 copy or photograph, any material and relevant evidence within the
25 respondent's or counsel for the respondent's possession or control that
26 is discoverable under paragraphs (f), (g), (h), (j), (l) and (o) of
27 subdivision one of this section, which the respondent intends to intro-
28 duce at fact-finding or a pre-trial motion hearing, and the names,
29 addresses, birth dates, and all statements, written or recorded or
30 summarized in any writing or recording, of those persons other than the
31 respondent whom the respondent intends to call as witnesses at fact-
32 finding hearing or at a pre-trial motion hearing.

33 (b) Disclosure of the name, address, birth date, and all statements,
34 written or recorded or summarized in any writing or recording, of a
35 person whom the respondent intends to call as a witness for the sole
36 purpose of impeaching a presentment agency witness is not required until
37 after the presentment agency witness has testified at fact-finding hear-
38 ing.

39 (c) If in the exercise of reasonable diligence the reciprocally
40 discoverable information under paragraph (f) or (o) of subdivision one
41 of this section is unavailable for disclosure within the time period
42 specified in subdivision two of section 331.2 of this part, such time
43 period shall be stayed without need for a motion pursuant to subdivision
44 two of section 331.11 of this part; but the disclosure shall be made as
45 soon as practicable, provided, however, that if the respondent is in
46 detention, such disclosure shall be made no later than three days prior
47 to the first scheduled fact-finding hearing date. All reciprocally
48 discoverable information under this subdivision is subject to the
49 continuing duty to disclose pursuant to section 331.9 of this part.

50 5. Stay of automatic discovery; remedies and sanctions. Sections
51 331.1 and 331.2 of this part and subdivisions one, two, three and four
52 of this section shall have the force and effect of a court order, and
53 failure to provide discovery pursuant to such section or subdivision may
54 result in application of any remedies or sanctions permitted for non-
55 compliance with a court order under section 331.12 of this part. Howev-
56 er, if in the judgment of either party, good cause exists for declining

1 to make any of the disclosures set forth above, such party may move for
2 a protective order pursuant to section 331.11 of this part and
3 production of the item shall be stayed pending a ruling by the court.
4 The opposing party shall be notified in writing that information has not
5 been disclosed under a particular section. When some parts of material
6 or information are discoverable but in the judgment of a party good
7 cause exists for declining to disclose other parts, the discoverable
8 parts shall be disclosed and the disclosing party shall give notice in
9 writing that non-discoverable parts have been withheld.

10 6. Redactions permitted. Either party may redact social security
11 numbers and tax numbers from disclosures under this part.

12 7. Presumption of openness. There shall be a presumption in favor of
13 disclosure when interpreting sections 331.1, 331.2 and 331.4 of this
14 part and subdivision one of this section.

15 § 331.4. Disclosure prior to an admission by the respondent; waiver of
16 discovery by respondent. 1. Disclosure of crime. Where the presentment
17 agency has made an offer to accept an admission pursuant to section
18 321.3 of this article to an act that, if committed by an adult, would be
19 a crime, the presentment agency shall disclose to the respondent, and
20 permit the respondent to discover, inspect, copy, photograph and test,
21 all items and information that would be discoverable prior to the fact-
22 finding hearing under subdivision one of section 331.3 of this part and
23 are in the possession, custody or control of the presentment agency. The
24 presentment agency shall disclose the discoverable items and information
25 not less than three calendar days prior to the expiration date of the
26 offer by the presentment agency for the respondent to make an admission
27 or any deadline imposed by the court for acceptance of the offer of an
28 admission.

29 2. Timing of disclosure. If the presentment agency does not comply
30 with the requirements of this subdivision, then, notwithstanding any
31 other provision of law, such offer shall be deemed available to the
32 respondent until three calendar days after the presentment agency has
33 complied, absent extraordinary circumstances involving new adverse
34 information bearing on the respondent occurring or discovered in the
35 interim that, after appropriate notice and an opportunity for a hearing,
36 are shown by the presentment agency and found by the court. Where the
37 offer of an admission has lapsed or been withdrawn in light of non-com-
38 pliance by the presentment agency with this subdivision, the respondent
39 may make a motion alleging such non-compliance and the court shall
40 consider the impact of any non-compliance on the respondent's decision
41 to accept or reject the offer of an admission. If the court finds that
42 the non-compliance materially affected the respondent's decision and if
43 the presentment agency declines to reinstate the lapsed or withdrawn
44 plea offer, the court, as a presumptive minimum sanction, shall preclude
45 the admission at trial of any evidence not disclosed as required under
46 this subdivision. The court may take other additional appropriate
47 action as necessary to address the non-compliance.

48 3. Exception. The rights under this subdivision do not apply to items
49 or information that are the subject of a protective order under section
50 331.11 of this part; but if such information tends to be exculpatory,
51 the court shall reconsider the protective order.

52 4. Waiver. A respondent may provide a voluntary, knowing and intelli-
53 gent waiver in the presence of his or her counsel of his or her rights
54 under this section; but an offer of an admission may not be conditioned
55 on such waiver.

1 § 331.5. Court orders for preservation, access or discovery. 1. Order
2 to preserve evidence. At any time, a party may move for a court order to
3 any individual, agency or other entity in possession, custody or control
4 of items which relate to the subject matter of the case or are otherwise
5 relevant, requiring that such items be preserved for a specified period
6 of time. The court shall hear and rule upon such motions expeditiously.
7 The court may modify or vacate such an order upon a showing that preser-
8 vation of particular evidence will create significant hardship to such
9 individual, agency or entity, on condition that the probative value of
10 that evidence is preserved by a specified alternative means.

11 2. Order to grant access to premises. At any time, the respondent may
12 move for a court order to any individual, agency or other entity in
13 possession, custody or control of a crime scene or other premises that
14 relates to the subject matter of the case or is otherwise relevant,
15 requiring that counsel for the respondent be granted prompt and reason-
16 able access to inspect, photograph or measure such crime scene or prem-
17 ises, and that the condition of the crime scene or premises remain
18 unchanged in the interim. The court shall consider the respondent's
19 expressed need for access to the premises including the risk that the
20 respondent will be deprived of evidence or information relevant to the
21 case, the position of any individual or entity with possessory or owner-
22 ship rights to the premises, the nature of the privacy interest and any
23 perceived or actual hardship of the individual or entity with possessory
24 or ownership rights, and the position of the presentment agency with
25 respect to any application for access to the premises. The court may
26 deny access to the premises when the probative value of access to such
27 location has been or will be preserved by specified alternative means.
28 If the court grants access to the premises, the individual or entity
29 with ownership or possessory rights to the premises may request law
30 enforcement presence at the premises while the respondent's counsel or a
31 representative thereof is present.

32 3. Discretionary discovery by order of the court. The court in its
33 discretion may, upon a showing by the respondent that the request is
34 reasonable and that the respondent is unable without undue hardship to
35 obtain the substantial equivalent by other means, order the presentment
36 agency, or any individual, agency or other entity subject to the juris-
37 isdiction of the court, to make available for disclosure to the respondent
38 any material or information which potentially relates to the subject
39 matter of the case and is reasonably likely to be material.

40 4. Procedure. A motion under this section shall be on notice to any
41 individual, agency or entity affected by the order. A motion may be made
42 orally on the record so long as such notice is provided. The court may,
43 on its own or upon request of any individual, agency or entity affected
44 by the order, modify or vacate the order if compliance would be unrea-
45 sonable or will create significant hardship to such individual, agency
46 or entity. For good cause shown, the court may permit a party seeking or
47 opposing a discretionary order of discovery under this subdivision, or
48 another affected individual, agency or entity, to submit papers or, for
49 good cause shown, testify on the record ex parte or in camera. For good
50 cause shown, any such papers and a transcript of such testimony may be
51 sealed and shall constitute a part of the record on appeal.

52 § 331.6. Court ordered procedures to facilitate compliance; certifi-
53 icates of compliance. 1. Discretion of courts. To facilitate compliance
54 with this part, and to reduce or streamline litigation of any disputes
55 about discovery, the court in its discretion may issue an order:

1 (a) requiring that the presentment agency and counsel for the respondent
2 diligently confer to attempt to reach an accommodation as to any
3 dispute concerning discovery prior to seeking a ruling from the court;

4 (b) requiring a discovery compliance conference at a specified time
5 prior to the fact-finding hearing between the presentment agency, counsel
6 for all respondents, and the court or its staff;

7 (c) requiring the presentment agency to file a certificate of compliance
8 that states that the presentment agency and/or an appropriate named
9 agent has made reasonable inquiries of all police officers and other
10 persons who have participated in investigating or evaluating the case
11 about the existence of any favorable evidence or information within
12 paragraph (k) of subdivision one of section 331.3 of this part, including
13 such evidence or information that was not reduced to writing or
14 otherwise memorialized or preserved as evidence, and has disclosed any
15 such information to the respondent; and/or

16 (d) requiring other measures or proceedings designed to carry into
17 effect the goals of this part.

18 2. Certificates of compliance. (a) When the presentment agency has
19 provided the discovery required by subdivision one of section 331.3 of
20 this part, except for any items or information that are the subject of
21 an order pursuant to section 331.11 of this part, it shall serve upon
22 the respondent and file with the court a certificate of compliance. The
23 certificate of compliance shall state that, after exercising due diligence
24 and making reasonable inquiries to ascertain the existence of
25 material and information subject to discovery, the presentment agency
26 has disclosed and made available all known material and information
27 subject to discovery. It shall also identify the items provided. If
28 additional discovery is subsequently provided prior to the fact-finding
29 hearing pursuant to section 331.9 of this part, a supplemental certificate
30 shall be served upon the respondent and filed with the court identifying
31 the additional material and information provided. No adverse
32 consequence to the presentment agency or the prosecutor shall result
33 from the filing of a certificate of compliance in good faith; but the
34 court may grant a remedy or sanction for a discovery violation as
35 provided in section 331.12 of this part.

36 (b) When the respondent has provided all discovery required by subdivision
37 four of section 331.3 of this part, except for any items or
38 information that are the subject of an order pursuant to section 331.11
39 of this part, counsel for the respondent shall serve upon the presentment
40 agency and file with the court a certificate of compliance. The
41 certificate shall state that, after exercising due diligence and making
42 reasonable inquiries to ascertain the existence of material and information
43 subject to discovery, counsel for the respondent has disclosed and
44 made available all known material and information subject to discovery.
45 It shall also identify the items provided. If additional discovery is
46 subsequently provided prior to trial pursuant to section 331.9 of this
47 part, a supplemental certificate shall be served upon the presentment
48 agency and filed with the court identifying the additional material and
49 information provided. No adverse consequence to the respondent or counsel
50 for the respondent shall result from the filing of a certificate of
51 compliance in good faith; but the court may grant a remedy or sanction
52 for a discovery violation as provided in section 331.12 of this part.

53 § 331.7. Non-testimonial evidence from the respondent; DNA comparison
54 order. 1. Availability. After the filing of the petition, and subject
55 to constitutional limitations, the court may, upon motion of the
56 presentment agency showing probable cause to believe the respondent has

1 committed the act that if committed by an adult would constitute a
2 crime, a clear indication that relevant material evidence will be found,
3 and that the method used to secure such evidence is safe and reliable,
4 require a respondent to provide non-testimonial evidence, including to:

- 5 (a) appear in a lineup;
- 6 (b) speak for identification by a witness or potential witness;
- 7 (c) be fingerprinted if authorized in accordance with section 306.1 of
8 this article;
- 9 (d) pose for photographs not involving reenactment of an event,
10 provided respondent is subject to photographing pursuant to section
11 306.1 of this article;
- 12 (e) permit the taking of samples of the respondent's blood, hair, and
13 other materials of the respondent's body that involves no unreasonable
14 intrusion thereof or a risk of serious physical injury thereto;
- 15 (f) provide specimens of the respondent's handwriting; and
- 16 (g) submit to a reasonable physical or medical inspection of the
17 respondent's body.

18 2. Limitations. This section shall not be construed to alter or in any
19 way affect the issuance of a similar court order, as may be authorized
20 by law, before the filing of the petition, consistent with such rights
21 as the respondent may derive from this article, the state constitution
22 or the United States constitution. This section shall not be construed
23 to alter or in any way affect the administration of a chemical test
24 where otherwise authorized. An order pursuant to this section may be
25 denied, limited or conditioned as provided in section 331.11 of this
26 part.

27 3. DNA comparison order. Where property in the presentment agency's
28 possession, custody, or control consists of a DNA profile obtained from
29 probative biological material gathered in connection with the investi-
30 gation of the crime, and the respondent establishes: (a) that such
31 profile complies with federal bureau of investigation or state require-
32 ments, whichever are applicable and as such requirements are applied to
33 law enforcement agencies seeking a keyboard search or similar compar-
34 ison, and (b) that the data meets state DNA index system or national DNA
35 index system criteria as such criteria are applied to law enforcement
36 agencies seeking such a keyboard search or similar comparison, the court
37 may, upon motion of a respondent against whom a petition is pending,
38 order an entity that has access to the combined DNA index system or its
39 successor system to compare such DNA profile against DNA databanks by
40 keyboard searches, or a similar method that does not involve uploading,
41 upon notice to both parties and the entity required to perform the
42 search, upon a showing by the respondent that such a comparison is mate-
43 rial to the presentation of his or her defense and that the request is
44 reasonable. For purposes of this section, a "keyboard search" shall mean
45 a search of a DNA profile against the databank in which the profile that
46 is searched is not uploaded to or maintained in the databank. Nothing in
47 this section authorizes the taking of a DNA profile from the respondent,
48 whether taken from their person or otherwise, unless specifically
49 authorized by law.

50 § 331.8. Flow of information. 1. Sufficient communication for compli-
51 ance. The presentment agency shall endeavor to ensure that a flow of
52 information is maintained with the police and other investigative
53 personnel and sufficient to place within the presentment agency's
54 possession or control all material and information pertinent to the
55 respondent and the offense or offenses charged, including, but not

1 limited to, any evidence or information discoverable under paragraph (k)
2 of subdivision one of section 331.3 of this part.

3 2. Provision of law enforcement agency files. Absent a court order or
4 a requirement that the respondent's counsel obtain a security clearance
5 mandated by law or authorized government regulation, upon request by the
6 presentment agency, each New York state and local law enforcement agency
7 shall make available to the presentment agency a complete copy of its
8 complete records and files related to the investigation of the case or
9 related to the presentment agency regarding compliance with this part.

10 3. 911 telephone call and police radio transmission electronic
11 recordings, police-worn body camera recordings and other police
12 recordings. (a) Whenever an electronic recording of a 911 telephone call
13 or a police radio transmission or video or audio footage from a police-
14 worn body camera or other police recording was made or received in
15 connection with the investigation of an apparent criminal incident, the
16 arresting officer or lead detective shall expeditiously notify the
17 presentment agency in writing upon the filing of the petition of the
18 existence of all such known recordings. The presentment agency shall
19 expeditiously take whatever reasonable steps are necessary to ensure
20 that all known electronic recordings of 911 telephone calls, police
21 radio transmissions and video and audio footage and other police
22 recordings made or available in connection with the case are preserved.
23 Upon the respondent's timely request and designation of a specific elec-
24 tronic recording of a 911 telephone call, the presentment agency shall
25 also expeditiously take whatever reasonable steps are necessary to
26 ensure that it is preserved.

27 (b) If the presentment agency fails to disclose such an electronic
28 recording to the respondent pursuant to paragraph (e), (g) or (k) of
29 subdivision one of section 331.3 of this part due to a failure to comply
30 with this obligation by police officers or other law enforcement or
31 prosecution personnel, the court upon motion of the respondent shall
32 impose an appropriate remedy or sanction pursuant to section 331.12 of
33 this part.

34 § 331.9. Continuing duty to disclose. If either the presentment agency
35 or the respondent subsequently learns of additional material or informa-
36 tion which it would have been under a duty to disclose pursuant to any
37 provisions of this part had it known of it at the time of a previous
38 discovery obligation or discovery order, it shall expeditiously notify
39 the other party and disclose the additional material and information as
40 required for automatic discovery under this part. This section also
41 requires expeditious disclosure by the presentment agency of material or
42 information that became relevant to the case or discoverable based on
43 reciprocal discovery received from the respondent pursuant to subdivi-
44 sion four of section 331.3 of this part.

45 § 331.10. Work product. This part does not authorize discovery by a
46 party of those portions of records, reports, correspondence, memoranda,
47 or internal documents of the adverse party which are only the legal
48 research, opinions, theories or conclusions of the adverse party or its
49 attorney or the attorney's agents, or of statements of a respondent,
50 written or recorded or summarized in any writing or recording, made to
51 the attorney for the respondent or the attorney's agents.

52 § 331.11. Protective orders. 1. Any discovery subject to protective
53 order. Upon a showing of good cause by either party, the court may at
54 any time order that discovery or inspection of any kind of material or
55 information under this part be denied, restricted, conditioned or
56 deferred, or make such other order as is appropriate. The court may

1 impose as a condition on discovery to a respondent that the material or
2 information to be discovered be available only to counsel for the
3 respondent; or, alternatively, that counsel for the respondent, and
4 persons employed by the attorney or appointed by the court to assist in
5 the preparation of a respondent's case, may not disclose physical copies
6 of the discoverable documents to a respondent or to anyone else,
7 provided that the presentment agency affords the respondent access to
8 inspect redacted copies of the discoverable documents at a supervised
9 location that provides regular and reasonable hours for such access,
10 such as a presentment agency's office, police station, facility of
11 detention, or court. Should the court impose as a condition that some
12 material or information be available only to counsel for the respondent,
13 the court shall inform the respondent on the record that his or her
14 attorney is not permitted by law to disclose such material or informa-
15 tion to the respondent. The court may permit a party seeking or opposing
16 a protective order under this section, or another affected person, to
17 submit papers or testify on the record ex parte or in camera. Any such
18 papers and a transcript of such testimony may be sealed and shall
19 constitute a part of the record on appeal. This section does not alter
20 the allocation of the burden of proof with regard to matters at issue,
21 including privilege.

22 2. Modification of time periods for discovery. Upon motion of a party
23 in an individual case, the court may alter the time periods for discov-
24 ery imposed by this part upon a showing of good cause.

25 3. Prompt hearing. Upon request for a protective order, the court
26 shall conduct an appropriate hearing within three business days to
27 determine whether good cause has been shown and when practicable shall
28 render decision expeditiously. Any materials submitted and a transcript
29 of the proceeding may be sealed and shall constitute a part of the
30 record on appeal.

31 4. Showing of good cause. In determining good cause under this section
32 the court may consider: constitutional rights or limitations; danger to
33 the integrity of physical evidence or the safety of a witness; risk of
34 intimidation, economic reprisal, bribery, harassment or unjustified
35 annoyance or embarrassment to any person, and the nature, severity and
36 likelihood of that risk; a risk of an adverse effect upon the legitimate
37 needs of law enforcement, including the protection of the confidentiali-
38 ty of informants, and the nature, severity and likelihood of that risk;
39 the nature and circumstances of the factual allegations in the case;
40 whether the respondent has a history of witness intimidation or tamper-
41 ing and the nature of that history; the nature of the stated reasons in
42 support of a protective order; the nature of the witness identifying
43 information that is sought to be addressed by a protective order,
44 including the option of employing adequate alternative contact informa-
45 tion; danger to any person stemming from factors such as a respondent's
46 substantiated affiliation with a criminal enterprise as defined in
47 subdivision three of section 460.10 of the penal law; and other similar
48 factors found to outweigh the usefulness of the discovery.

49 5. Successor counsel. In cases in which the attorney-client relation-
50 ship is terminated prior to trial for any reason, any material or infor-
51 mation disclosed subject to a condition that it be available only to
52 counsel for the respondent, or limited in dissemination by protective
53 order or otherwise, shall be provided only to successor counsel for the
54 respondent under the same condition or conditions or be returned to the
55 presentment agency, unless the court rules otherwise for good cause
56 shown or the presentment agency gives written consent. Any work product

1 derived from such material or information shall not be provided to the
2 respondent, unless the court rules otherwise or the presentment agency
3 gives written consent; provided, however, any such work product may be
4 provided to the successor counsel.

5 6. Compliance with protective order. Any protective order issued under
6 this part is a mandate of the court for purposes of the offense of crim-
7 inal contempt in subdivision three of section 215.50 of the penal law.

8 § 331.12. Remedies or sanctions for non-compliance. 1. Need for remedy
9 or sanction. (a) When material or information is discoverable under this
10 part but is disclosed belatedly, the court shall impose an appropriate
11 remedy or sanction if the party entitled to disclosure shows that it was
12 prejudiced. Regardless of a showing of prejudice the party entitled to
13 disclosure shall be given reasonable time to prepare and respond to the
14 new material.

15 (b) When material or information is discoverable under this part but
16 cannot be disclosed because it has been lost or destroyed, the court
17 shall impose an appropriate remedy or sanction if the party entitled to
18 disclosure shows that the lost or destroyed material may have contained
19 some information relevant to a contested issue. The appropriate remedy
20 or sanction is that which is proportionate to the potential ways in
21 which the lost or destroyed material reasonably could have been helpful
22 to the party entitled to disclosure.

23 2. Available remedies or sanctions. For failure to comply with any
24 discovery order imposed or issued pursuant to this part, the court may
25 make a further order for discovery, grant a continuance, order that a
26 hearing be reopened, order that a witness be called or recalled, draw an
27 adverse inference regarding the non-compliance, preclude or strike a
28 witness's testimony or a portion of a witness's testimony, admit or
29 exclude evidence, order a mistrial, order the dismissal of all or some
30 of the charges, or make such other order as it deems just under the
31 circumstances; except that any sanction against the respondent shall
32 comport with the respondent's constitutional right to present a defense,
33 and precluding a witness from testifying on behalf of the respondent
34 shall be permissible only upon a finding that the respondent's failure
35 to comply with the discovery obligation or order was willful and moti-
36 vated by a desire to obtain a tactical advantage.

37 3. Consequences of non-disclosure of statement of witness testifying
38 for the presentment agency. The failure of the presentment agency to
39 disclose any written or recorded statement made by a witness testifying
40 on the agency's behalf, which relates to the subject matter of the
41 witness's testimony, shall not constitute grounds for any court to order
42 a new pre-trial hearing or set aside an adjudication, or reverse, modify
43 or vacate an adjudication, in the absence of a showing by the respondent
44 that there is a reasonable possibility that the non-disclosure mate-
45 rially contributed to the result of the trial or other proceeding;
46 provided, however, that nothing in this section shall affect or limit
47 any right the respondent may have to a reopened pre-trial hearing when
48 such statements were disclosed before the close of evidence at the fact-
49 finding hearing.

50 § 331.13. Admissibility of discovery. The fact that a party has indi-
51 cated during the discovery process an intention to offer specified
52 evidence or to call a specified witness is not admissible in evidence or
53 grounds for adverse comment at a pre-trial or fact-finding hearing.

54 § 3. Subdivision 2 of section 325 of the judiciary law, as added by
55 chapter 920 of the laws of 1982, is amended to read as follows:

1 2. Where an application follows a demand to produce any transcript of
2 testimony at a grand jury proceeding pursuant to paragraph (b) of subdivi-
3 sion [~~two~~] one of section [~~331.2 or paragraph (a) of subdivision one~~
4 ~~of section 331.4~~] 331.3 of the family court act the presentment agency
5 and respondent shall be given notice of such application and an opportu-
6 nity to be heard.

7 § 4. Subdivision 5 of section 330.1 of the family court act, as added
8 by chapter 398 of the laws of 1983, is amended to read as follows:

9 5. Court ordered bill of particulars. Where a presentment agency has
10 timely served a written refusal pursuant to subdivision four of this
11 section and upon motion, made in writing, of a respondent, who has made
12 a request for a bill of particulars and whose request has not been
13 complied with in whole or in part, the court must, to the extent a
14 protective order is not warranted, order the presentment agency to
15 comply with the request if it is satisfied that the items of factual
16 information requested are authorized to be included in a bill of partic-
17 ulars, and that such information is necessary to enable the respondent
18 adequately to prepare or conduct his defense and, if the request was
19 untimely, a finding of good cause for the delay. Where a presentment
20 agency has not timely served a written refusal pursuant to subdivision
21 four of this section the court must, unless it is satisfied that the
22 presentment agency has shown good cause why such an order should not be
23 issued, issue an order requiring the presentment agency to comply or
24 providing for any other order authorized by subdivision one of section
25 [~~331.6~~] 331.12 of this part.

26 § 5. This act shall take effect January 1, 2023.