STATE OF NEW YORK

4554--A

2021-2022 Regular Sessions

IN SENATE

February 5, 2021

Introduced by Sens. BAILEY, BIAGGI -- read twice and ordered printed, and when printed to be committed to the Committee on Children and Families -- recommitted to the Committee on Children and Families in accordance with Senate Rule 6, sec. 8 -- 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 Sections 331.1, 331.2, 331.3, 331.4, 331.5, 331.6 and 331.7 of the family court act are REPEALED.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 against the respondent that are within the presentment agency's possession at that time;

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

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(b) electronic recordings relating to the juvenile delinquency proceeding against the respondent that are within the presentment agency's possession at that time, in accordance with paragraph (g) of subdivision one of section 331.3 of this part; and

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

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

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

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

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

2. Respondent's performance of obligations. The respondent shall perform his or her discovery obligations under subdivision four of section 331.3 of this part not later than twenty-five calendar days after being served with the presentment agency's certificate of compliance pursuant to subdivision two of section 331.6 of this part or not later than three days prior to the first scheduled fact-finding hearing date, whichever is earlier. Portions of materials claimed to be non-dis-

coverable may be withheld pending a determination and ruling of the court under section 331.11 of this part; but the presentment agency shall be notified in writing that information has not been disclosed under a particular section.

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

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

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

(b) All transcripts of the testimony of a person who has testified before a grand jury in a related criminal proceeding, including but not limited to the respondent or a co-respondent. The presentment agency shall request that the prosecutor of the matter before the grand jury provide a transcript of the testimony and, upon receipt of the request, the prosecutor shall promptly apply to the appropriate criminal court, with written notice to the presentment agency and the respondent, for a written order pursuant to section three hundred twenty-five of the judiciary law releasing a transcript to the presentment agency; provided, however, that the transcripts of the grand jury proceedings in a case removed from the youth part pursuant to article seven hundred twenty-five of the criminal procedure law shall be annexed to the petition or transferred to the family court in accordance with subdivision seven of section 311.1 of this article. If in the exercise of reasonable diligence, and due to the limited availability of transcription resources, a transcript is unavailable for disclosure within the time period specified in subdivision one of section 331.2 of this part, such time period may be stayed by up to an additional fifteen calendar days or, if the respondent is in detention, an additional period of three days, without need for a motion pursuant to subdivision two of section 331.11 of this part; provided, however, that such disclosure shall be made as soon as practicable and not later than fifteen calendar days prior to the first scheduled fact-finding hearing date, unless the respondent is in detention, in which case such disclosure shall be made not later than three days prior to the first scheduled fact-finding hearing date, unless an order is obtained pursuant to section 331.11 of this part. When the court is required to review grand jury transcripts, the presentment agency shall disclose such transcripts to the court expeditiously upon receipt by such agency, notwithstanding the otherwise applicable time periods for disclosure in this part.

(c) The names of, and adequate alternative contact information for, all persons other than law enforcement personnel whom the presentment agency knows to have evidence or information relevant to any act of juvenile delinquency charged or to any potential defense thereto, including a designation by the presentment agency as to which of those persons may be called as witnesses. Nothing in this paragraph shall require the disclosure of physical addresses; provided, however, upon a

motion and good cause shown the court may direct the disclosure of a physical residence. Information under this subdivision relating to a confidential informant may be withheld, and redacted from discovery materials, without need for a motion pursuant to section 331.11 of this part; but the presentment agency shall notify the respondent in writing that such information has not been disclosed, unless the court rules otherwise for good cause shown.

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

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

(f) Expert opinion evidence, including the name, business address, current curriculum vitae, a list of publications, and all proficiency tests and results administered or taken in the current employment or within the past ten years, whichever is longer, of each expert witness whom the presentment agency intends to call as a witness at the fact-finding hearing or at a pre-trial motion hearing, and all reports prepared by the expert that pertain to the case, or if no report is prepared, a written statement of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. If in the exercise of reasonable diligence this information is unavailable for disclosure within the time period specified in subdivision one of section 331.2 of this part, that period shall be stayed without need for a motion pursuant to subdivision two of section 331.11 of this part; except that the presentment agency shall notify the respondent in writing that such information has not been disclosed, and such disclosure shall be made as soon as practicable and not later than fifteen calendar days prior to the first scheduled fact-finding hearing date, or, if the respondent is in detention, not later than three days prior to the first scheduled fact-finding hearing date, unless an order is obtained pursuant to section 331.11 of this part. When the presentment agency's expert witness is being called in response to disclosure of an expert witness by the respondent, the court shall alter a scheduled fact-finding hearing date, if necessary, to allow the presentment agency fifteen calendar days to make the disclosure and the respondent fifteen calendar days to prepare and respond to the new materials, unless the respondent is in detention, in which case the court may alter the scheduled fact-finding hearing date, if necessary, to allow the presentment agency an additional three days to make the disclosure and 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 restrictiveness of the disposition. Information under this subdivision shall be disclosed whether or not such information is recorded in tangible form and irrespective of whether the presentment agency credits the

information. The presentment agency shall disclose the information expeditiously upon its receipt and shall not delay disclosure if it is obtained earlier than the time period for disclosure in subdivision one of section 331.2 of this part.

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

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

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

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

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

(q) When it is known to the presentment agency, the existence of any pending criminal action against all persons designated as potential presentment agency witnesses pursuant to paragraph (c) of this subdivision.

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

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

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

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

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

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

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

2. Duties of the presentment agency. The presentment agency shall make a diligent, good faith effort to ascertain the existence of material or information discoverable under subdivision one of this section and to cause such material or information to be made available for discovery where it exists but is not within the presentment agency's possession, custody or control; provided that the presentment agency shall not be required to obtain by subpoena duces tecum material or information which

the respondent may thereby obtain. For purposes of subdivision one of this section, all items and information related to the presentment agency of a charge in the possession of any New York state or local police or law enforcement agency, and any information in the possession of a laboratory having contact with evidence related to the presentment agency of a charge, shall be deemed to be in the possession of the prosecution agency. This subdivision shall not require the presentment agency to ascertain the existence of witnesses not known to the police or another law enforcement agency, or the written or recorded statements thereof, under paragraph (c) or (e) of subdivision one of this section.

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

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

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

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

5. Stay of automatic discovery; remedies and sanctions. Sections 331.1 and 331.2 of this part and subdivisions one, two, three and four of this section shall have the force and effect of a court order, and failure to provide discovery pursuant to such section or subdivision may result in application of any remedies or sanctions permitted for noncompliance with a court order under section 331.12 of this part. However, if in the judgment of either party, good cause exists for declining to make any of the disclosures set forth above, such party may move for a protective order pursuant to section 331.11 of this part and

production of the item shall be stayed pending a ruling by the court. The opposing party shall be notified in writing that information has not been disclosed under a particular section. When some parts of material or information are discoverable but in the judgment of a party good cause exists for declining to disclose other parts, the discoverable parts shall be disclosed and the disclosing party shall give notice in writing that non-discoverable parts have been withheld.

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

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

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

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

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

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

§ 331.5. Court orders for preservation, access or discovery. 1. Order to preserve evidence. At any time, a party may move for a court order to any individual, agency or other entity in possession, custody or control

of items which relate to the subject matter of the case or are otherwise relevant, requiring that such items be preserved for a specified period of time. The court shall hear and rule upon such motions expeditiously. The court may modify or vacate such an order upon a showing that preservation of particular evidence will create significant hardship to such individual, agency or entity, on condition that the probative value of that evidence is preserved by a specified alternative means.

2. Order to grant access to premises. At any time, the respondent may move for a court order to any individual, agency or other entity in possession, custody or control of a crime scene or other premises that relates to the subject matter of the case or is otherwise relevant, requiring that counsel for the respondent be granted prompt and reasonable access to inspect, photograph or measure such crime scene or premises, and that the condition of the crime scene or premises remain unchanged in the interim. The court shall consider the respondent's expressed need for access to the premises including the risk that the respondent will be deprived of evidence or information relevant to the case, the position of any individual or entity with possessory or ownership rights to the premises, the nature of the privacy interest and any perceived or actual hardship of the individual or entity with possessory or ownership rights, and the position of the presentment agency with respect to any application for access to the premises. The court may deny access to the premises when the probative value of access to such location has been or will be preserved by specified alternative means. If the court grants access to the premises, the individual or entity with ownership or possessory rights to the premises may request law enforcement presence at the premises while the respondent's counsel or a representative thereof is present.

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

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

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

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

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

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

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

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

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

§ 331.7. Non-testimonial evidence from the respondent; DNA comparison order. 1. Availability. After the filing of the petition, and subject to constitutional limitations, the court may, upon motion of the presentment agency showing probable cause to believe the respondent has committed the act that if committed by an adult would constitute a crime, a clear indication that relevant material evidence will be found,

and that the method used to secure such evidence is safe and reliable, require a respondent to provide non-testimonial evidence, including to:

(a) appear in a lineup;

(b) speak for identification by a witness or potential witness;

(c) be fingerprinted if authorized in accordance with section 306.1 of this article;

(d) pose for photographs not involving reenactment of an event, provided respondent is subject to photographing pursuant to section 306.1 of this article;

(e) permit the taking of samples of the respondent's blood, hair, and other materials of the respondent's body that involves no unreasonable intrusion thereof or a risk of serious physical injury thereto;

(f) provide specimens of the respondent's handwriting; and

(g) submit to a reasonable physical or medical inspection of the respondent's body.

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

3. DNA comparison order. Where property in the presentment agency's possession, custody, or control consists of a DNA profile obtained from probative biological material gathered in connection with the investigation of the crime, and the respondent establishes: (a) that such profile complies with federal bureau of investigation or state requirements, whichever are applicable and as such requirements are applied to law enforcement agencies seeking a keyboard search or similar comparison, and (b) that the data meets state DNA index system or national DNA index system criteria as such criteria are applied to law enforcement agencies seeking such a keyboard search or similar comparison, the court may, upon motion of a respondent against whom a petition is pending, order an entity that has access to the combined DNA index system or its successor system to compare such DNA profile against DNA databanks by keyboard searches, or a similar method that does not involve uploading, upon notice to both parties and the entity required to perform the search, upon a showing by the respondent that such a comparison is material to the presentation of his or her defense and that the request is reasonable. For purposes of this section, a "keyboard search" shall mean a search of a DNA profile against the databank in which the profile that is searched is not uploaded to or maintained in the databank. Nothing in this section authorizes the taking of a DNA profile from the respondent, whether taken from their person or otherwise, unless specifically authorized by law.

§ 331.8. Flow of information. 1. Sufficient communication for compliance. The presentment agency shall endeavor to ensure that a flow of information is maintained with the police and other investigative personnel and sufficient to place within the presentment agency's possession or control all material and information pertinent to the respondent and the offense or offenses charged, including, but not limited to, any evidence or information discoverable under paragraph (k) of subdivision one of section 331.3 of this part.

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

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

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

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

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

§ 331.11. Protective orders. 1. Any discovery subject to protective order. Upon a showing of good cause by either party, the court may at any time order that discovery or inspection of any kind of material or information under this part be denied, restricted, conditioned or deferred, or make such other order as is appropriate. The court may impose as a condition on discovery to a respondent that the material or information to be discovered be available only to counsel for the

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

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

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

4. Showing of good cause. In determining good cause under this section the court may consider: constitutional rights or limitations; danger to the integrity of physical evidence or the safety of a witness; risk of intimidation, economic reprisal, bribery, harassment or unjustified annoyance or embarrassment to any person, and the nature, severity and likelihood of that risk; a risk of an adverse effect upon the legitimate needs of law enforcement, including the protection of the confidentiality of informants, and the nature, severity and likelihood of that risk; the nature and circumstances of the factual allegations in the case; whether the respondent has a history of witness intimidation or tampering and the nature of that history; the nature of the stated reasons in support of a protective order; the nature of the witness identifying information that is sought to be addressed by a protective order, including the option of employing adequate alternative contact information; danger to any person stemming from factors such as a respondent's substantiated affiliation with a criminal enterprise as defined in subdivision three of section 460.10 of the penal law; and other similar factors found to outweigh the usefulness of the discovery.

5. Successor counsel. In cases in which the attorney-client relationship is terminated prior to trial for any reason, any material or information disclosed subject to a condition that it be available only to counsel for the respondent, or limited in dissemination by protective order or otherwise, shall be provided only to successor counsel for the respondent under the same condition or conditions or be returned to the presentment agency, unless the court rules otherwise for good cause shown or the presentment agency gives written consent. Any work product derived from such material or information shall not be provided to the respondent, unless the court rules otherwise or the presentment agency

gives written consent; provided, however, any such work product may be provided to the successor counsel.

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

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

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

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

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

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

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

2. Where an application follows a demand to produce any transcript of testimony at a grand jury proceeding pursuant to paragraph (b) of subdivision [~~two~~] one of section [~~331.2 or paragraph (a) of subdivision one~~

~~of section 331.4~~] 331.3 of the family court act the presentment agency and respondent shall be given notice of such application and an opportunity to be heard.

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

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

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