CHANGING OHIO'S SNITCH CODE: REQUIRE A CONVICTION IN THE LENIENCY FOR INFORMANT WORK EXCHANGE

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I. Introduction

A. Why Inform?

What could possibly motivate individuals to rat on their friends? The answer is most often a simple one: fear of incarceration. When self-preservation is at stake, individuals often agree to assist authorities in investigating, arresting, and prosecuting other criminals. Sometimes this fear of incarceration can lead criminals to snitch on even their closest friends and family members.

What is it about incarceration that makes a person commit such an act of betrayal? Is it merely selfishness, desperation, or fear? Does the person feel that the law should not apply to them? Is it that individuals only feel justified in betraying another after the police assure them that they are doing the right thing?

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* Expected J.D. candidate: May 2011. I was drawn to the world of informants through my volunteer work at the Southeastern Correctional Facility in Lancaster, Ohio. However, my intrigue with informants really blossomed under the employment and guidance of Professor Michael Rich. This article was made possible thanks to Professor Rich's opinions, research, and his latest publications dealing with what he terms "coerced informants." Thank you Professor Rich. I hope that this note can somehow make a difference.

¹ See Michael Beebe, Deal Leaves Informant Fearing Retribution: Attica Police Accused of Reneging on Pledge, Buffalo News, Nov. 14, 2009, at A1, available at http://www.buffalonews.com/incoming/article21504.ece [hereinafter Beebe, Deal Leaves]; Michael L. Rich, Case Reveals Flaws in Informant Recruitment, Buffalo News, Nov. 25, 2009, at A6, available at http://www.buffalonews.com/opinion/anothervoice/story/873056.html [hereinafter Rich, Case Reveals Flaws]; Aisling Swift, Mom Agrees to Testify Against Dad in Baby's Death, NAPLES News (Feb. 4, 2010), http://m.naplesnews.com/news/2010/feb/04/mom-agrees-testify-against-dad-babys-death/.

² See John Marzulli, Nod Father's Boy a Nightmare: Wife, N.Y. DAILY NEWS, June 14, 2010, at 3, available at http://www.nydailynews.com/news/ny_crime/the_mob/2010/06/14/2010-06-14_it_made_me_sick_when_he_testified_against_dad_nod_fathers___boy_a_nightmare_wife.html; Swift, supra note 1.

Is snitching the right thing to do? Would you choose to do "the right thing" and alert a proctor if your friend was cheating on an exam? Would you do so out of a sense of moral duty³ or an obligation to uphold the integrity of the grading system? Would your decision to snitch hinge on whether you could do so anonymously, thus, avoiding the label of a rat? Would it matter whether the cheater was a friend compared to a classmate that you despise? What if *you were the cheat* and the only way to save your career was to turn in a few *like-minded* classmates? What if you were wrongly accused, made to believe that a jury of your peers would undoubtedly find you guilty, and convinced that the only "easy" way out was to snitch on someone you know who really is guilty?

These questions may seem philosophical, but the reality is that people often face them and snitching happens.⁴ The problem is: how do we ensure a relatively safe, realistic, constitutional, and "just" model to facilitate the snitching process in our criminal justice system? The answer may not be perfectly clear. But the flaws in our current model are staggering.⁵ The purpose of this article is to point out those flaws and propose legislation aimed at curing them.

B. Article Layout

This note begins its discussion in Part II.A with a case study showing some of the more egregious flaws inherent in the existing inform-for-leniency approach. The section tells the story of two young traffic violators who were convinced to sign a confidential informant agreement by an eager-to-make-cases police officer. The author explains why this story should be shocking to average citizens and how this story demonstrates the need for reforming the current informant system.

Part II.B then generally discusses informants. It explains their utility, their continued use, and the consequences of such continued use. It further discusses a particular class of informants: those who work for the police in exchange for leniency. The author ends this section explaining why

³ See, e.g., Mike Celizic, *Daughter Turns Mom in for Ponzi Scheme*, TODAY (Apr. 2, 2010, 10:28 AM), http://today.msnbc.msn.com/id/36147685.

⁴ See id.; Beebe, Deal Leaves, supra note 1; Michael Beebe, Walking Thin Line in Village of Attica: Would-Be Informant Says Police Coerced Her into Cooperation, BUFFALO NEWS, Nov. 8, 2009, at A1, available at http://www.buffalonews.com/incoming/article20446.ece [hereinafter Beebe, Walking Thin Line]; Swift, supra note 1.

⁵ See infra Part II.A.

⁶ See Beebe, Deal Leaves, supra note 1; Beebe, Walking Thin Line, supra note 4.

requiring a conviction before using that class of informants is the best method.

Part II.C discusses Federal Rule of Criminal Procedure 35 and how the Rule enables that method. After discussing the mechanics of the Rule, which permits a judge to reduce a person's sentence in exchange for assisting authorities in bringing other criminals to justice, the author discusses problems with its application.

Next, Part II.D examines the Ohio statute that allows leniency for informing.⁸ The author explains the mechanics of the Ohio rule, its risks, and its pitfalls.

Part II.E then proposes a Model Statute. This Model Statute embodies the strongest elements of Federal Rule of Criminal Procedure 35, addresses Rule 35's inadequacies, and adds new requirements to minimize the risks associated with the current informal model of trading information for leniency. In addition, Part II.E explains what an ideal statute should contain and why it should contain it. Further, the section describes how the Model Statute itself best meets the goal of creating a constitutionally sound model for informing. Part II.E also shows how the Model Statute contains the safeguards of judicial oversight and adequate representation, helping ensure that the right kinds of people are taking the right types of risks.

Lastly, Part II.F addresses possible concerns with the new model. It explains how the goals met by the Model Statute outweigh the potential concerns from the legislature, judiciary, police, informants, and taxpayers. In summation, the author concludes by reiterating how the Model Statute benefits informants and society in general.

II. DISCUSSION

A. Case Study: Attica, New York

1. The Facts

The case of Bianca Hervey provides a particularly disturbing example of our broken informant system. Hervey was a twenty-year-old college student who the police pulled over for having a suspended driver's license. The state suspended her license because she failed to pay a few

⁷ See FED. R. CRIM. P. 35(b).

⁸ Ohio Rev. Code Ann. § 3719.70 (West 2004).

⁹ See Beebe, Walking Thin Line, supra note 4.

¹⁰ *Id*.

traffic tickets.¹¹ The officer "handcuffed her, put her in the back of the police cruiser and took her to police headquarters. Her car was impounded and towed away." Bawling her eyes out, she was handcuffed to a bench at the police station and told that she would likely spend the night in jail. The initial stop took place at three in the afternoon.¹⁴

The officer soon presented her with a way out.¹⁵ If she agreed to sign a contract to become a confidential informant, then all of her charges would go away, and she would not have to spend the night in jail.¹⁶ In sum, the police had a hysterical, scared, and naïve young woman in custody whose only crime was failure to pay traffic tickets.

What was she thinking at this point? Quoted in an interview, Hervey recalled: "He had me scared He even said if I didn't sign this paper, I would spend the night in jail." According to Hervey, she did not do drugs, she was new to the area, and she did not even know anyone who sold drugs. "That didn't stop her recruitment as a confidential informant." The officer told her that she would essentially set up a monitored drug deal in a Burger King parking lot. "She signed the contract, [the officer] took the handcuffs off her, and she became the newest confidential informant for the countywide drug task force." "21

Fortunately for Ms. Hervey, her father was an attorney practicing labor law.²² Enraged when he heard about the quid pro quo, Ms. Hervey's father helped his daughter void the contract.²³ Ms. Hervey paid the fines, and the State reinstated her driver's license.²⁴

¹¹ *Id*.

¹² *Id*.

¹³ *Id*.

¹⁴ *Id*.

¹⁵ *Id*.

¹⁶ *Id*.

¹⁷ *Id*.

¹⁸ *Id*.

¹⁹ *Id*.

²⁰ *Id*.

²¹ *Id*.

²² *Id*.

 $^{^{23}}$ *Id*.

²⁴ *Id*.

The Hervey case demonstrates many of the perplexities and problems involved with today's system of informing. It spawned an immediate reaction from both Attica residents²⁵ and scholars.²⁶

Michael Rich, then law professor at Capital University, responded to the story in the *Buffalo News* by publishing his reaction in that same media outlet.²⁷ Professor Rich highlighted several key lessons in his article noting, "Not only was this decision foolish and irrational, it could have been fatal. Just last May, two alleged drug dealers murdered Rachel Hoffman, a recent Florida State University graduate, during a botched drug buy that she set up at the instruction of the Tallahassee Police Department."²⁸

Hervey going public led to similarly situated individuals complaining about the same treatment in the small town of Attica, New York. Soon thereafter, another story surfaced. A young man, who chose to remain unnamed for safety reasons, was arrested by the same officer from the Hervey case and also agreed to become an informant to make his traffic violations go away. This officer made unfounded threats that such traffic violations would prevent the young man from being able to enlist in the military. Like Hervey, the young man also claimed to have no involvement with the drug world. Unfortunately, this young man was not lucky enough to have an attorney as a parent, and thus, agreed to carry out the monitored drug deal. The officer advised him that he was to seek out someone who sells drugs—harder than marijuana—and call the officer's cell phone when the young man had it set up. He followed the instructions and completed the deal using funds provided by the police. However, this was not enough. The officer called him the next week and

²⁵ See Barbara O'Brien, Attica Board Tells Residents to Bring Complaints About Police to Chief, Buffalo News, Nov. 19, 2009, at B1, available at http://www.buffalonews.com/cityregion/otherwny/story/866832.html.

²⁶ See Rich, Case Reveals Flaws, supra note 1.

²⁷ See id.

²⁸ *Id*.

²⁹ See Beebe, Deal Leaves, supra note 1.

³⁰ *Id*.

³¹ *Id*.

³² *Id.* ("He told me, 'you're not going to get in the service with these charges,' the informant said, 'I was crushed when he told me that.'").

³³ *Id*.

³⁴ *Id*.

³⁵ *Id*.

asked him to set up another buy.³⁶ The young man refused this time, expecting it to be a one-time deal.³⁷ Even though the young man already set up a dealer, the officer told the young man to lose his cell number and that the traffic charges would go forward.³⁸ As a result, the young man was subjected to the driving related penalties and had to carry the possibly dangerous label of "snitch" for the remainder of his stay in Attica, New York.³⁹

Attica Police Chief William Smith responded to news staff reporter Michael Beebe's questions. When asked how many buys the young man was to make, the Police Chief stated: "'I don't think I can discuss that with you, but he didn't fulfill his obligation[.]' Smith said, 'That's all. It's that simple. He didn't do what he was supposed to do." Moreover, the former-narcotics-officer supervisor for the Buffalo Police Department, now turned small-town cop, said he did not understand any possible complaints about the situation. "It's his choice, Smith said. 'Some people don't have the money to pay fines. This is a way to do it so people don't have to pay fines. It's the same whether you get off on a charge for say, shoplifting, or you don't pay a fine. It's the same difference."

2. Criticism

What is happening in tiny Attica, New York, is demonstrative of the problems associated with most states' methods for recruiting and handling informants.⁴³ The Attica cases show some of the outrageous circumstances that lead to suspected "criminals" risking their lives to do the police's job.⁴⁴ They also reveal how willing police are to risk lives by "flipping"

³⁶ *Id*.

³⁷ *Id*.

³⁸ *Id*.

³⁹ *Id.* Both the informant and his mother relayed their fear. "'It's hard for me to sleep at night,' the informant said in an interview. 'I'm afraid I'm going to get a phone call some night that he's been hurt or worse,' said the young man's mother, who wasn't told of the agreement until after her son made the drug buy." *Id.*

⁴⁰ *Id*.

⁴¹ *Id*.

⁴² *Id*.

⁴³ See Michael Rich, Coerced Informants and the Thirteenth Amendment Limitation on the Police-Informant Relationship, 50 SANTA CLARA L. REV. 681, 693, 728 (2010) [hereinafter Rich, Coerced Informants].

⁴⁴ See Beebe, Walking Thin Line, supra note 4; Beebe, Deal Leaves, supra note 1.

these so-called criminals.⁴⁵ These two cases show how unclear a potential informant's decision-making process can be.⁴⁶ As a result, the problems arising from these two particular instances of the police-informant relationship provide a narrow and interesting taste of the broader problems faced by most states' models.⁴⁷

To begin with, the Attica cases show that some police officers are willing to endanger the lives of ordinary citizens who have little or no involvement in the criminal underworld. Both the anonymous young man and Bianca Hervey were not involved in the world of drugs; they were merely delinquent on payment of traffic fines. This could mean they would stand out to those wise to the drug trade. And when police subsequently busted those dealers, these "squares" could easily have become a target for retribution, standing out both because they had no prior associations with the dealer and because they were outsiders to the Attica drug world. Thus, the risks are greater for ordinary-citizens-turned informants than they would be for repeat offenders.

Moreover, traffic violators are not likely to be capable of leading investigators to sophisticated and desirable targets. ⁵⁰ As Professor Rich pointed out, "Convicted informants would be more useful than the Bianca Herveys of the world because they'd have actual connections and experience within drug communities."

Along very similar lines, these two cases show a sub-problem with Attica-like-informant recruitment; it can get average citizens involved in criminal activities, which they may not normally be disposed to engage in.⁵² Thanks to that Attica police officer, after these two speeders' arrests, one became a member—even if only briefly—of Attica's drug world.⁵³

More importantly, these cases exemplify the coercive environment involved in back-door-informant recruitment.⁵⁴ Individuals' life

⁴⁵ See Beebe, Walking Thin Line, supra note 4; Beebe, Deal Leaves, supra note 1.

⁴⁶ See Beebe, Walking Thin Line, supra note 4; Beebe, Deal Leaves, supra note 1.

⁴⁷ See Rich, Coerced Informants, supra note 43, at 693, 728.

⁴⁸ See Beebe, Walking Thin Line, supra note 4; Beebe, Deal Leaves, supra note 1.

⁴⁹ See Beebe, Walking Thin Line, supra note 4; Beebe, Deal Leaves, supra note 1.

⁵⁰ See Rich, Coerced Informants, supra note 43, at 693 ("Non-criminals can be useful informants, but the most productive, long-term informants tend to be criminals themselves.").

⁵¹ Rich, Case Reveals Flaws, supra note 1.

⁵² See Beebe, Walking Thin Line, supra note 4; Beebe, Deal Leaves, supra note 1.

⁵³ See Beebe, Walking Thin Line, supra note 4; Beebe, Deal Leaves, supra note 1.

⁵⁴ See Beebe, Walking Thin Line, supra note 4; Beebe, Deal Leaves, supra note 1.

experiences likely influence what they view as "the end of the world" type situations.⁵⁵ For example, a person who had done substantial prison time would probably not view spending a night in jail as worth risking the dangers and labels associated with becoming an informant. However, a person like Bianca Hervey, who had never seen the inside of a jail cell,⁵⁶ may do anything to avoid spending a night in jail. Similarly, the anonymous young man viewed rejection from military service as a similar "end of the world" motivation.⁵⁷ Professor Rich recognized this lack of clear thinking in his reaction:

[T]he fear of criminal prosecution is such a powerful incentive that it is often impossible for the potential informant to make a rational choice. Hervey, for instance, was so afraid of jail that she agreed to find and befriend a hardened criminal and to convince him that she was looking to buy drugs. Not only was this decision foolish and irrational, it could have been fatal.⁵⁸

Thus, these two cases show us that a person can be coerced into becoming an informant to avoid even the most minimal sanctions.

To be sure though, the anonymous young man and Hervey both had help making the decision to become confidential informants.⁵⁹ Officer Smith created an environment that terrified Hervey from the very beginning of their encounter.⁶⁰ He immediately handcuffed her, impounded her car, handcuffed her to a bench at the police station, and told her if she did not sign the confidential informant contract then she would spend the night in jail.⁶¹ For those possessing any familiarity with small town police, or even the justice system in general, this type of treatment looks like intentional intimidation and would likely be considered "overkill" for an ordinary officer on a routine traffic stop.

Hervey was not alone in receiving this intimidating treatment. ⁶² The young man faced similar tactics from Officer Smith. ⁶³ The officer took it

⁵⁵ See Rich, Coerced Informants, supra note 43, at 694.

⁵⁶ See Beebe, Walking Thin Line, supra note 4 (noting Hervey's only run-ins with the law involved traffic violations).

⁵⁷ Beebe, *Deal Leaves*, *supra* note 1.

⁵⁸ Rich, Case Reveals Flaws, supra note 1.

⁵⁹ See Beebe, Deal Leaves, supra note 1.

⁶⁰ Beebe, Walking Thin Line, supra note 4.

 $^{^{61}}$ Id

⁶² Beebe, *Deal Leaves*, *supra* note 1.

upon himself to persuade the young man that the military would not take him with unpaid traffic fines.⁶⁴ This was unbearable for the young man.⁶⁵

These tactics were effective because the two young adults likely viewed what the officer said as "the law." This raises a key concern: the lack of legal representation for so many potential informants. If either of the two had a lawyer present, it is unlikely that they would have taken such a large risk to avoid such minimal sanctions. 67

Norman P. Effman, the longtime public defender in Wyoming County, said no lawyer ever would approve the kind of deals the [Attica] Police Department is offering. "It's absolutely ludicrous," Effman said. "Any defense lawyer in his right mind would not say this would be a good deal." "In a case like this," Effman added, "you clean up your mess and pay a fine of \$100 to \$150. No lawyer would risk a client over a traffic ticket."

Attica's method of making fines go away to flip delinquent individuals raises an interesting and all too familiar sub-question: how disparate are the methods' impact on poor versus wealthy individuals? Presumably, those with means would rather pay their fines than become an informant. Following this presumption, one could infer that these sorts of tactics adversely affect the least wealthy segment of our society. Admittedly though, Bianca Hervey's father was a professional. However, the economic aspect of her decision to inform could be explained by the notion that she was really on her own, she was embarrassed due to the traffic tickets and her failure to pay them, or she was overwhelmed by her sense of independence. However, based on the intimidating circumstances, the most likely cause of her decision to snitch was probably her ignorance concerning the consequences, which was chiefly due to her lack of legal representation. Thus, her decision was more likely between snitching and

⁶³ *Id*.

⁶⁴ *Id*.

⁶⁵ Id.

⁶⁶ See Rich, Case Reveals Flaws, supra note 1 ("[P]olice recruit and handle informants in secret, without court oversight, and often even without the involvement of prosecutors. As a result, they can threaten charges without any evidence that the potential informant did anything wrong.").

⁶⁷ See Beebe, Deal Leaves, supra note 1.

 $^{^{68}}$ Id

⁶⁹ See id.

jail and not primarily one motivated by the choice of snitching versus simply paying the fines. Similarly, we do not know the anonymous young man's financial or family status, but his decision was also more likely akin to snitch or lose the ability to enter the military, as opposed to snitch or pay a fine. Regardless of those two particular traffic violators' financial positions, Police Chief Smith tried to justify these tactics as a method where people who could not afford to pay the fines could become informants to work them off. As a result, this type of coercive recruitment appears, on its face, to be aimed at the less financially fortunate.

Even more frightening is the lack of judicial oversight depicted in the anonymous young man's case. Not only did the young man have no attorney present to help explain the terms of the confidential informant contract, but he purportedly also had no idea that the officer would require that he set up more than one deal. In his mind, it was a one-time deal. The vagueness in the agreement's terms was not a mistake. A traffic offender, like this young man, could easily assume that getting out of traffic fines would only take a small part of his life. Without a prosecutor in charge or a judge involved, the police could put confidential informants, like this young man, into life threatening situations repeatedly over something that would have cost only a few hundred dollars to resolve. Based on these two examples, it is not irrational to assume a large percentage, if not a vast majority, of informant recruitment takes place without judicial involvement. As a result, many confidential informants may have no one to turn to but an abusive handler.

⁷⁰ *Id*.

⁷¹ See Rich, Case Reveals Flaws, supra note 1.

⁷² Beebe, *Deal Leaves*, *supra* note 1.

⁷³ *Id*.

⁷⁴ Rich, *Coerced Informants*, *supra* note 43, at 695 ("When promising leniency, police are told to avoid making specific promises [either] about what amount of assistance will be sufficient to earn leniency or exactly what form that leniency will take.").

⁷⁵ See generally N.Y. VEHICLE AND TRAFFIC LAW § 1180(h)(3)(i)—(iii) (McKinney 2010) (limiting jail sentences to "no[] more than thirty days" for speeding violations in excess of thirty miles per hour of the posted speed limit and for speeding ten miles an hour over the speed limit or less a maximum fine of one hundred and fifty dollars); *id.* § 1800(b)(1) (limiting possible punishment for first-time non-misdemeanor traffic infractions to "a fine of not more than one hundred fifty dollars or by imprisonment of not more than fifteen days or by both").

Thus, these two relatively simple examples show many of the major flaws in the way state and local police treat potential informants. They show that there is a possibility for abuse when defense attorneys, prosecutors, and judges are not involved in the process.⁷⁶ They show that some officers may disregard the all important risk/reward balancing that frightened suspects may be incapable of doing for themselves.⁷⁷ They show how the poor can be the most likely targets for eager-to-flip officers.⁷⁸ Finally, the Attica cases show that police can coerce average citizens into participating in the criminal underworld to avoid even the most minimal sanctions.⁷⁹ As a result, this one case study shows us that a new informant model may be appropriate.

3. There Is a Solution

No model can be perfect, but an informant recruitment method that fosters representation and judicial oversight may lessen many of the inherent risks and minimize the potential for abuse. Fortunately, the federal government has such a method available. 80 State legislatures should model their snitch codes after Federal Rule of Criminal Procedure 35. With some tweaking to the Rule, states like Ohio can resolve most of the problems concerning informants. The proposed model will only use convicted criminals as informants who actively assist police (at least in the snitch-for-leniency cases).81

Before the utility of this proposed Model Statute can be fully comprehended, one must first possess a general understanding of informants, Federal Rule of Criminal Procedure 35, and Ohio's current informant statute.

⁷⁶ See supra Part II.A.1.

⁷⁷ See supra Part II.A.1.

⁷⁸ See supra Part II.A.1.

⁷⁹ See supra Part II.A.1.

⁸⁰ See FED. R. CRIM. P. 35(b) (providing that "the court may reduce a sentence if the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person").

⁸¹ Paid informants are likely necessary because sometimes other incentives are needed, and paid informants can operate at a professional-like level helping authorities in high level or high risk investigations. See Stephen A. Miller, The Case for Preserving the Outrageous Government Conduct Defense, 91 Nw. U. L. REV. 305, 367-68 (1996) ("[C]ourts have almost universally approved the use of paid informants as a practical necessity without which certain crimes would go undetected.").

B. Informant Use in General

1. Why Do Police Use Informants?

"Crimes without citizen complaints result in a structure demanding independent action on the police officer's part, and therefore emphasize the craftsmanlike possibilities of police work." Thus, police must take the initiative and actually seek out criminal behavior where there is no victim to notify police that someone has been harmed. These crimes are commonly referred to as vice crimes, where the state is actually the victim and seeks to punish certain behaviors involving moral turpitude. The state often employs—whether with offers of leniency or for pay—members of society who are involved in these criminal activities to help solve a variety of crimes. Most often, police use informants in drug related offenses.

Exactly how often these informants are used is difficult to ascertain. "Specific statistics on informant recruitment or use are unavailable because prosecutors and police tightly guard the identity of their informants for reasons of safety and continued utility." However, one thing is certain,

 $^{^{82}}$ Jerome H. Skolnick, Justice Without Trial: Law Enforcement in Democratic Society 134 (3d ed. 1994).

⁸³ Steven Greer, *Towards a Sociological Model of the Police Informant*, 46 BRIT. J. Soc. 509, 515 (1995) ("[I]nformers are almost invariably used in crimes of vice").

⁸⁴ John L. Kane, Jr., *Foreword* to ROBERT M. HARDAWAY, NO PRICE TOO HIGH: VICTIMLESS CRIMES AND THE NINTH AMENDMENT, at xi (2003) ("[I]t is essential to understand just what a victimless crime is. In a sense, every crime has a victim, whether it is an individual or society at large, if for no other reason than because the law making certain conduct criminal says so.").

⁸⁵ Rich, *Coerced Informants*, *supra* note 43, at 688–89 ("Informants are now involved in at least a significant minority of criminal prosecutions and are a valuable tool in almost every area of law enforcement. Specifically, they are viewed as irreplaceable in . . . the investigation of narcotics, prostitution, and other vice crimes"); Bruce A. Jacobs, *Contingent Ties: Undercover Drug Officers' Use of Informants*, 48 Brit. J. Soc. 35, 51 n.1 (1997) ("Officers were extremely protective of their 'snitches' because they depended so heavily on them to initiate and develop investigations.").

⁸⁶ Ian Weinstein, *Regulating the Market for Snitches*, 47 BUFF. L. REV. 563, 573 (1999) (describing the "boom market in cooperation" that amendments to the Anti-Drug Abuse Act of 1986 created by allowing downward departures for sentencing in exchange for a defendant's substantial assistance).

⁸⁷ Rich, Coerced Informants, supra note 43, at 683 n.11; Alexandra Natapoff, Snitching: The Institutional and Communal Consequences, 73 U. CIN. L. REV. 645, 660 (2004) ("In sum, it is hard to determine what portions of the universe of informant activities (continued)

informants play a key role in solving a large number of vice crimes in general and likely are involved in solving a vast majority of drug crimes in particular.⁸⁸

Informant use is highlighted by the emphasis narcotics agents place on their development. The critical skill of a narcotics agent is the ability to persuade a person involved in crime to supply information that is not ordinarily to his advantage to reveal or to engage in a transaction that is not in his interest to consummate. However, police often take this "skill" to extremes, including exaggerating the likelihood of the state's success at a possible trial; "trumping up" charges to make the crime appear more serious; exaggerating possible sentences; and even intentionally arresting potential informants at night, giving the police all evening to convince the suspect to "flip" before they are able to reach their attorneys.

2. Continued Use of Informants and Its Consequences

Because of informants' frequent use and the emphasis police place on them, informant use will most likely be necessary as long we criminalize vice. ⁹² Their use is also unlikely to decline ⁹³ because a growing number of arrests and convictions involve drug offenses. ⁹⁴

This growing use of informants has its consequences. Although some may view informants in a more positive light, 95 modern informant use has

are revealed through public processes, but the data suggest that it is meager. Although 5K and comparable state agreements constitute a growing proportion of cases, they necessarily represent a fraction of the informant pool, because many defendants cooperate without receiving any on-the-record recognition and others avoid going to court at all by cooperating off the record.").

⁹¹ Rich, Coerced Informants, supra note 43, at 696.

⁸⁸ See Natapoff, supra note 87, at 655 ("On the enforcement end, nearly every drug case involves an informant....").

 $^{^{89}}$ James Q. Wilson, The Investigators: Managing FBI and Narcotics Agents 47 (1978).

 $^{^{90}}$ Id

⁹² Id. at 688–89.

⁹³ *Id.* at 682–83 (stating that there is "an increasing number of civilians who assist police in exchange for leniency").

⁹⁴ See Natapoff, supra note 87, at 645 n.4.

⁹⁵ See Ross Parker, Confidential Informants and the Truth Finding Function, 4 COOLEY L. REV. 565, 567 (1987) (arguing against stereotyping informants as "snitches, stoolies" or "finks" and asserting that "[m]ost people provide information about criminal activities out of a desire to contribute toward a safe and law abiding society").

spawned the "Stop Snitching" culture, 96 which generated a sharp reaction from state officials. 97

Some scholars emphatically agree that informant use is degrading society:

The law enforcement practice of relying heavily on snitching creates large numbers of criminal informants who are communal liabilities. Snitches increase crime and threaten social organization, interpersonal relationships, and socio-legal norms in their home communities, even as they are tolerated or under-punished by law enforcement because they are useful.⁹⁸

Even though scholars like Professor Natapoff call into question the negative effect informant use has on society, there is also a negative effect on the informants themselves. Informants are often killed⁹⁹ or threatened¹⁰⁰ by other criminals.

3. Why Inform?

There are a number of different reasons a person becomes an informant. ¹⁰¹ Many informants likely do so out of what they view as

⁹⁶ See Rick Hampson, Anti-Snitch Campaign Riles Police, Prosecutors, USA TODAY, Mar. 28, 2006, at 1A.

⁹⁷ See id. ("Stop Snitching T-shirts have been banned from a number of courthouses. Boston Mayor Thomas Menino, whose city recorded the most homicides in a decade last year, threatened to send police into stores to pull them off the shelves.").

⁹⁸ Natapoff, *supra* note 87, at 646.

⁹⁹ See Lawrence Messina, Mingo Woman Sentenced to 35 Years; Defendant Pleaded Guilty in the Killing of a Drug Informant, Charleston Daily Mail, July 28, 2010, at P5A; Eric Francis, Police Charge Conn. Man with Attempted Murder of Informant in Chester, Vt., Rutland Herald (July 27, 2010), http://www.rutlandherald.com/article/20100727/NEWS02/707279879; Terrie Morgan-Besecker, Pa. Police Informant Killed During Botched Undercover Drug Buy, PoliceOne (Jan. 13, 2006), http://www.policeone.com/drug-interdiction-narcotics/articles/122377-Pa-police-informant-killed-during-botched-undercover-drug-buy/.

¹⁰⁰ See Del Quentin Wilber, Taxi Case Defendant Accused of Threat: Man Wanted Informant 'Eliminated,' Papers Say, Wash. Post, Oct. 8, 2009, at B1; Bill Estep, Couple Allegedly Threatened to Kill Drug Informant, Lexington Herald-Leader (Jan. 23, 2009), http://www.kentucky.com/2009/01/23/668561/couple-allegedly-threatened-to.html.

¹⁰¹ See Jay R. Williams & L. Lynn Guess, *The Informant: A Narcotics Enforcement Dilemma*, 13 J. PSYCHOACTIVE DRUGS 235, 238 (1981) (classifying informants based on (continued)

necessity. 102 Thus, most informants work with the police either for leniency on criminal charges or for pay. 103 The more prevalent of these two motives is seeking leniency. 104 Not surprisingly, police often prefer informants who work for leniency. 105 In fact, "[m]ost narcotics agents believe that an informant working off a beef is the only productive one; the threat of going to jail is, in their eyes, a greater inducement than the promise of small sums of money." 106

4. The Coerced Informant

Professor Rich focuses a recent article on what he terms "coerced informants." He defines coerced informants as a type of active informant "against whom the government has, or claims to have, evidence of criminal activity sufficient to sustain a conviction and who are motivated to assist the police by threats of criminal prosecution or punishment stemming from that evidence." In short, coerced informants are those who are actively "working off a beef" or who "flip" and aid the police to avoid or reduce penalties for past crimes. This aid could take a number of forms, ranging from setting up drug deals to wearing a wire on a friend. The key is that the informant is exerting effort in a manner that benefits the police, not merely providing the authorities with information already in their possession. This article focuses on addressing the unique concerns created by the use of "coerced informants."

their motives: money, fear, revenge, repentance, ego, competition reduction, citizenship, and eccentricity).

¹⁰² See Michael A. Simons, Retribution for Rats: Cooperation, Punishment, and Atonement, 56 VAND. L. REV. 1, 2–3 (2003).

¹⁰³ See Alexandra Natapoff, Beyond Unreliable: How Snitches Contribute to Wrongful Convictions, 37 GOLDEN GATE U. L. REV. 107, 108 (2006).

¹⁰⁴ See United States v. Cervantes-Pacheco, 826 F.2d 310, 315 (5th Cir. 1987) ("No practice is more ingrained in our criminal justice system than . . . having [a] witness testify under a plea bargain that promises him a reduced sentence.").

¹⁰⁵ See WILSON, supra note 89, at 66.

 $^{^{106}}$ Id

¹⁰⁷ Rich, Coerced Informants, supra note 43, at 691–92.

¹⁰⁸ *Id*. at 692.

¹⁰⁹ *Id.* at 692 n.65 ("These informants are distinguished by the fact that they assist the state under the threat of state criminal sanctions, and such threats fit the definition of criminal coercion.").

¹¹⁰ See Andrew E. Taslitz, Judging Jena's D.A.: The Prosecutor and Racial Esteem, 44 HARV. C.R.-C.L. L. REV. 393, 422–23 (2009).

¹¹¹ See Rich, Coerced Informants, supra note 43, at 699.

This particular class of informants raises serious constitutional issues. Professor Rich argues the use of coerced informants violates the Thirteenth Amendment because coerced informants work under threat of criminal sanction.¹¹² Although the state may require those convicted of a crime to work, 113 the state has not yet convicted the coerced informants, rather the informants are working to avoid a conviction. 114 The "work" they do includes obtaining valuable information involving potential future criminal arrests. This is the type of work police officers are paid to do. 115 The coerced informant has the choice to either work or face criminal sanction. 116 The two most obvious ways to avoid this constitutional violation are to (a) require the state to gain a conviction before the informant works or (b) pay all such informants. 117 Of these two choices, requiring a conviction is the better alternative because it would allow for some key safeguards missing in the inform-for-pay context, such as making an informed decision based on legal representation and allowing judicial oversight of the process.

5. Why Require a Conviction?

First, requiring an actual conviction before making a suspect work for the police would not violate the Thirteenth Amendment (as the current model arguably does). ¹¹⁸ Under the Thirteenth Amendment, involuntary servitude may be required "as a punishment for crime where of the party shall have been duly convicted." ¹¹⁹ Professor Rich persuasively posits:

[Under this exception] [t]he state could charge and convict at trial or negotiate a plea bargain with her before requiring her to work off her sentence by cooperating with the police as an active informant. Of course, unlike more

¹¹² Rich, Coerced Informants, supra note 43, at 728.

¹¹³ U.S. CONST. amend. XIII, § 1 (allowing involuntary servitude "as a punishment for crime whereof the party shall have been duly convicted").

Rich, *Coerced Informants*, *supra* note 43, at 726 ("[I]f an individual can be forced to work simply because she *may* be validly *prosecuted* for a crime, then [the duly convicted] exception is superfluous." (emphasis in original)).

¹¹⁵ *Id.* at 691 (defining "active informants" as "those who not only share with police information that they already possess, but also seek out evidence at the behest of police or prosecutors").

¹¹⁶ *Id.* at 692.

¹¹⁷ Id. at 728–29.

¹¹⁸ *Id.* at 729.

¹¹⁹ U.S. CONST. amend. XIII, § 1.

traditional forced labor, which can be imposed effectively without the convict's assent, the individual's agreement to cooperate would be required for the arrangement to be effective. Moreover, unlike current arrangements between the state and coerced informants, defense counsel would be involved in the negotiation of the agreement, and the court would at least have knowledge of its terms. Federal Rule of Criminal Procedure 35 contemplates this sort of agreement and permits a motion for reduction of sentence when a convicted defendant provides assistance in investigating or prosecuting a third party. Some states have similar rules. ¹²⁰

Second, the widespread use of informal bargaining between suspects and authorities creates opportunity for abuse. 121 The wheeling and dealing that takes place between suspects, police, and prosecutors leads to some serious concerns. 122 Both Professors Rich and Natapoff agree that there is a lack of procedural safeguards in this current police-informant relationship. 123 "[T]he lack of standards, publicity, and judicial review of prosecutorial decisions, combined with the executive institution's immense power, is inconsistent with political accountability and subject to excessive abuse,"124 which could only be curtailed by a more formal process. Although such a formal process is indeed in place under the Federal Rules of Criminal Procedure, 125 it is difficult to determine what percentage of federal informant use actually results from that process. Furthermore, it is practically impossible to know what percentage of informants are afforded an attorney's presence during their decision to flip or judicial oversight of the process. Additionally, it is difficult to estimate how many informants are currently working under informal deals with local police officers. By the same token, employing Federal Rule of Criminal Procedure 35 is merely an option for the state; thus, other avenues of recruitment are regularly employed. 126 As a result, we just do not know how many

¹²⁰ Rich, Coerced Informants, supra note 43, at 729.

¹²¹ Natapoff, *supra* note 87, at 668–70.

¹²² *Id.* at 669.

¹²³ Rich, Coerced Informants, supra note 43, at 745; Natapoff, supra note 87, at 669.

¹²⁴ Natapoff, *supra* note 87, at 669.

¹²⁵ See Fed. R. Crim. P. 35(b).

¹²⁶ Rich, Coerced Informants, supra note 43, at 729.

informants are risking their lives based on threatened charges that may not have even sustained a conviction.

If police and prosecutors were to adhere strictly to a rule similar to Federal Rule of Criminal Procedure 35(b), then fewer people would do informant work out of a desire to avoid exaggerated charges. A system requiring a conviction before informant work for leniency is permitted would force police and prosecutors to either go forward with a weak case or cut the would-be-informant loose. As a result, whether a person chooses to plead guilty under the advice of counsel or is found guilty by a jury of their peers, the justice system would be better served by allowing it to work rather than relying on the ever-increasing informal deals between suspects and the state.

A uniform system for trading informant work for leniency is needed in both the state and federal contexts. At the very least, judicial oversight should be a requisite for this relationship. Similarly, legislative action is needed to put statutes in place that allow for such a process. If a conviction is required before police and prosecutors can offer any type of leniency, then the retributive goals of our justice system will better be served, and the constitutional infirmities inherent in the current model will be addressed. Thus, if Ohio were to adopt a rule similar to Federal Rule of Criminal Procedure 35 (hereinafter Rule 35), and the legislature were to require its strict enforcement, these goals could all be met.

C. Federal Rule of Criminal Procedure 35

1. The Mechanics of the Rule

Ample cases,¹³¹ legal references,¹³² and law review articles¹³³ examine Rule 35. Rule 35 states in pertinent part that "[u]pon the government's

¹²⁷ Rich, Coerced Informants, supra note 43, at 737–38.

¹²⁸ *Id.* at 695 ("Additionally, while a court must ensure that a defendant's waiver of his constitutional rights is knowing, voluntary, and intelligent before a plea is valid, the active informant agrees to cooperate without judicial oversight of, acquiescence in, or even awareness of the deal.").

¹²⁹ See Natapoff, supra note 87, at 703 ("With better public disclosure, judicial and legislative oversight, limitations on rewards, and careful attention to community needs, the informant institution can be better regulated in order to mitigate the collateral damage that it now inflicts.").

¹³⁰ Rich, *Coerced Informants*, *supra* note 43, at 740–42.

¹³¹ See, e.g., Wade v. United States, 504 U.S. 181 (1992); United States v. Villareal, 491 F.3d 605 (6th Cir. 2007).

¹³² See 21 Am. Jur. 2D Criminal Law § 828 (2008).

motion made within one year of sentencing, the court may reduce a sentence if the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person."¹³⁴ It further permits an exception to the one-year rule, allowing the government or prosecutor to make a motion for downward departure more than one year following a conviction ¹³⁵ for:

- (A) information not known to the defendant until one year or more after sentencing;
- (B) information provided by the defendant to the government within one year of sentencing, but which did not become useful to the government until more than one year after sentencing; or
- (C) information the usefulness of which could not reasonably have been anticipated by the defendant until more than one year after sentencing and which was promptly provided to the government after its usefulness was reasonably apparent to the defendant.¹³⁶

The Rule allows a defendant's "presentence assistance" to be taken into account in determining if they provided "substantial assistance" and provides that a "court may reduce the sentence to a level below the minimum sentence established by statute." Thus, if a defendant snitches on other criminals, the prosecutor can make this 35(b) motion, and the court can then deviate from the mandatory minimum sentence requirements. In practice, this is done through written plea agreements

¹³³ See generally Julie Gyurci, Note, Prosecutorial Discretion to Bring a Substantial Assistance Motion Pursuant to a Plea Agreement: Enforcing a Good Faith Standard, 78 MINN. L. REV. 1253 (1994); Cynthia K.Y. Lee, From Gatekeeper to Concierge: Reigning in the Federal Prosecutor's Expanding Power over Substantial Assistance Departures, 50 RUTGERS L. REV. 199 (1997); Dennis G. Terez, Comment, Substantial Reform for Substantial Assistance Motions, 29 J. LEGIS. 89 (2002).

¹³⁴ FED. R. CRIM. P. 35(b)(1).

¹³⁵ *Id.* at 35(b)(2).

¹³⁶ *Id.* at 35(b)(2)(A)–(C).

¹³⁷ *Id.* at 35(b)(3).

¹³⁸ *Id.* at 35(b)(4).

¹³⁹ *Id.* at 35(b)(2)(A)–(C).

between the defendant and prosecutor, whereby, judicial oversight is present. 140

However, Rule 35(b) is merely the mode of, and not the sole authority for, such interaction between informants and the state. Section 5K1.1 of the 1989 United States Sentencing Guidelines provides that "[u]pon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the Guidelines." Authority for this mechanism is also granted by 18 U.S.C. § 3553(e) mandating that "the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." 142

2. Problems with Rule 35's Application

Controversy concerning Rule 35's application has focused mainly on the problem of what acts constitute "substantial assistance." The Rule squarely puts this determination within the discretion of the prosecutor. When the following question arose in Wade v. United States where a prosecutor refused to file a Rule 35(b) downward departure motion after the defendant entered into a plea agreement based on providing substantial assistance: what grounds are permissible to refuse to file that motion? The Court held "that federal district courts have authority to review a prosecutor's refusal to file a substantial-assistance motion and to grant a remedy if they find that the refusal was based on an unconstitutional motive." Thus, a defendant is entitled to relief if a prosecutor refused to file a substantial-assistance motion, for example, because of the defendant's race or religion.

However clear that holding, the circuits are still split as to what standard to use in reviewing a prosecutor's refusal to file a departure

¹⁴⁰ Gyurci, *supra* note 133, at 1254 n.8.

¹⁴¹ U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (1989).

¹⁴² 18 U.S.C. § 3553(e) (1988).

¹⁴³ Gyurci, *supra* note 133, at 1261.

¹⁴⁴ *Id.* at 1264–67.

¹⁴⁵ 504 U.S. 181 (1992).

¹⁴⁶ *Id.* at 183.

¹⁴⁷ *Id.* at 185–86.

¹⁴⁸ *Id*.

motion pursuant to a plea agreement. 149 For example, the Sixth Circuit Court of Appeals held that "for plea agreements that afford the government 'complete discretion' to file a motion for a downward departure, we limit our review to unconstitutional motives." 150 Conversely, both the Second and District of Columbia Circuit Courts of Appeals review for bad faith not just an unconstitutional motive—and therefore, these courts require more of an explanation from a prosecutor as to why they chose not to file the motion.¹⁵¹ Thus, in a jurisdiction following the Sixth Circuit's reasoning, all a prosecutor has to do is say in court that the defendant did not provide substantial assistance and that ends the matter, absent some affirmative evidence of an unconstitutional motive. 152 On the other hand, in a jurisdiction following the Second Circuit's rule, a district court could review the prosecutor's reasons for refusal, requiring something more than simply "the defendant did not provide substantial assistance" from the prosecutor. 153

The Second Circuit's rule appears more in line with solving the problems in the current informant system, and therefore, should be included in a model statute. ¹⁵⁴ Defendants risk a great deal both when they admit their guilt in a plea agreement ¹⁵⁵ and when they do their work as informants. ¹⁵⁶ As a result, justice should compel prosecutors to give at least a valid reason why they decided not to file a departure motion.

Regardless of the circuit split on the aforementioned standard of review, strict adherence to a Rule 35 regime could benefit both informants and the justice system. Some states have adopted permissive regimes very

¹⁴⁹ See generally Gyurci, supra note 133. "This Note describes the inconsistency in the approaches that the federal circuits use and asserts that the application of an objective good faith standard to plea agreements will protect the rights of defendants and produce greater uniformity." *Id.* at 1255.

¹⁵⁰ United States v. Villareal, 491 F.3d 605, 608 (6th Cir. 2007) (citing United States v. Moore, 225 F.3d 637, 641 (6th Cir. 2000)).

¹⁵¹ See United States v. Jones, 58 F.3d 688, 692 (D.C. Cir. 1995); United States v. Knights, 968 F.2d 1483, 1487 (2d Cir. 1992).

¹⁵² See Villareal, 491 F.3d at 608 (citing Moore, 225 F.3d at 641).

¹⁵³ See Jones, 58 F.3d at 692; Knights, 968 F.2d at 1487.

¹⁵⁴ See infra APPENDIX: AUTHOR'S MODEL STATUTE at § (1)(a).

¹⁵⁵ See Gyurci, supra note 133, at 1267.

¹⁵⁶ See generally Rich, Coerced Informants, supra note 43.

much like that allowed by Rule $35.^{157}$ However, Ohio is not one of these states. 158

D. Ohio Law Concerning Leniency for Informing

1. The Mechanics of Ohio Revised Code § 3719.70

Ohio's statute on point is Ohio Revised Code § 3719.70. 159 On its face, it appears to be a helpful instrument, especially because it allows a "judge of the court of common pleas" to grant immunity to a drug offender for furnishing helpful information. ¹⁶⁰ In effect, this allows the police to arrest a person on drug charges, and if the police, prosecutor, and judge decide that the arrestee has furnished valuable information, the judge can grant immunity. 161 More specifically, section (A) of the statute essentially is a catchall provision that allows a judge to grant immunity for any drug related offense if the informant provides or obtains valuable information. 162 However, section (B) of the statute only allows a judge to consider if a person furnished valuable information when determining whether or not to grant probation with a misdemeanor drug abuse offense. ¹⁶³ Section (B) has been termed the "come clean" section, "which authorizes the court to consider a defendant's lack of cooperation in revealing all information within his knowledge regarding drug abuse offenses." ¹⁶⁴ This interpretation seems to imply that section (B) is more often used by judges to impose harsher—rather than more lenient—sentences for those individuals who do not reveal their drug sources. However, it is unclear how often judges actually use either section (A) or (B) because only a handful of published

¹⁵⁷ See, e.g., Colo. Rev. Stat. § 18–18–409 (2009); Del. Code Ann. tit. 11, § 4220 (2009); Fla. Stat. § 893.135(4) (2008); Ga. Code Ann. § 16–13–31(g)(2) (West 2007); Nev. Rev. Stat. Ann. § 453.3405(2) (Lexis-Nexis 2009); R.I. Gen. Laws § 21–28–4.19 (2002); see also Rich, Coerced Informants, supra note 43, at 729.

¹⁵⁸ Compare Ohio Rev. Code Ann. § 3719.70 (West 2004), with Colo. Rev. Stat. § 18–18–409 (2009), Del. Code Ann. tit. 11, § 4220 (2009), Fla. Stat. § 893.135(4) (2008), Ga. Code Ann. § 16–13–31(g)(2) (West 2007), Nev. Rev. Stat. Ann. § 453.3405(2) (Lexis-Nexis 2009), and R.I. Gen. Laws § 21–28–4.19 (2002).

¹⁵⁹ Ohio Rev. Code Ann. § 3719.70.

¹⁶⁰ *Id*.

¹⁶¹ See id.

¹⁶² Id. § 3719.70(A).

¹⁶³ *Id.* § 3719.70(B).

¹⁶⁴ State v. English, No. 6644, 1980 WL 352594, at *1 (Ohio Ct. App. Apr. 28, 1980).

cases reference these sections. In fact, the only discoverable case that both cites and post-dates the latest revisions to the statute is $State\ v$. Thompson. In the statute is $State\ v$.

In *Thompson*, the defendant admitted to drug charges during an interrogation and asked the police what he could do. ¹⁶⁷ The police officer told him he would be required to provide substantial assistance but that the officer needed to talk to his supervisor and the prosecutor. ¹⁶⁸ The defendant signed a cooperating witness agreement, and then the police charged him with the drug offense he admitted to during the initial interrogation. ¹⁶⁹ The court reasoned, "a common pleas judge is permitted, but not required, to grant immunity to an individual who furnishes evidence," ¹⁷⁰ and thereby, declined to accept the defendant's public policy argument that "encouraging people to divulge information, and then using the resulting statements to prosecute the individuals who give them, will 'dry up information sources.'" ¹⁷¹ The court stated that "[i]f the legislature, in its deliberations, determined that public policy required, rather than permitted, a grant of immunity in situations like the one presented herein, then it would have created it in the statute."

Presumably, people would be more willing to take advantage of section (A) of the statute because it allows a judge, in even felony drug cases, to grant immunity whereas section (B) only covers misdemeanors and merely allows for probation. ¹⁷³ It seems unlikely that a person would

¹⁶⁵ See United States v. Streck, 958 F.2d 141 (1992); State v. Luckett, 655 N.E.2d 757,
758 (Ohio Ct. App. 1995); State v. Thompson, No. 1-05-34, 2006 WL 1062015, at *2 (Ohio Ct. App. Apr. 24, 2006); State v. Rodriguez, No. B-940287, 1996 WL 400503, at *2 (Ohio Ct. App. June 5, 1996); State v. Moreland, No. 8931, 1985 WL 6925, at *2 (Ohio Ct. App. Sept. 17, 1985); English, 1980 WL 352594, at *1; State v. Taylor, No. 6316, 1979 WL 208517, at *4 (Ohio Ct. App. Nov. 8, 1979); State v. Ramey, 348 N.E.2d 371, 374 (Ohio Ct. App. 1975).

¹⁶⁶ Thompson, 2006 WL 1062015, at *2.

¹⁶⁷ *Id.* at *3.

¹⁶⁸ *Id*.

¹⁶⁹ *Id*.

¹⁷⁰ *Id.* at *4.

¹⁷¹ *Id.* at *2.

¹⁷² *Id.* at *4.

Compare Ohio Rev. Code Ann. § 3719.70(A) (LexisNexis 2005) ("[A] judge of the court of common pleas may grant to that person immunity from prosecution for any offense based up the testimony, information, or other evidence furnished by that person"), with id. § 3719.70(B) ("When a person is convicted of any misdemeanor drug abuse offense, the court, in determining whether to place the person under a community control sanction . . . (continued)

do much active informant work to avoid a relatively small misdemeanor jail sentence, especially when they are receiving the conviction anyway. However, suspects have been known to flip to avoid extremely insubstantial jail sentences, and it is likely that misdemeanor offenders have sufficient knowledge of the drug world to furnish valuable information. ¹⁷⁴

2. Problems with Ohio Revised Code § 3719.70

Unfortunately, Ohio's statute suffers from a number of flaws. First, Ohio Revised Code (R.C.) § 3719.70 (A) operates in a way that violates the Thirteenth Amendment, per Professor Rich's theory. Because the police may arrest a person and then offer immunity only after the person works as an informant for the police, the person is working under the threat of criminal sanction. Again, if one who does not fall under the duly convicted exception is working under the threat of criminal sanction, the Thirteenth Amendment's ban on involuntary servitude should apply. By the same token, the minimal amount of case law interpreting the statute seems to indicate that Ohio's current system emphasizes informal deals between informants and the police instead of utilizing R.C. § 3719.70 (A). This sort of informal deal making can lead to numerous types of abuse. It also sows distrust and violence in already high crime areas because everyone knows that all a person must do to avoid punishment is provide information about other crimes, seems to a violence who the

shall take into consideration whether the person truthfully has revealed all information within the person's knowledge concerning illicit traffic in or use of drugs of abuse ").

(continued)

¹⁷⁴ See supra Part II.A.

¹⁷⁵ See Rich, Coerced Informants, supra note 43, at 684–85.

¹⁷⁶ *Id.* at 716.

¹⁷⁷ *Id.* at 726.

 $^{^{178}}$ See cases cited supra note 165 (listing the only cases to date referencing Ohio Revised Code § 3719.70).

¹⁷⁹ See supra text accompanying note 165.

Rich, *Coerced Informants, supra* note 43, at 696 ("Shortly after an arrest, police maximize the arrestee's fear of a long sentence by emphasizing the maximum penalties for the crimes with which they might be charged and suggesting that the only easy way out is for them to cooperate. And because many criminal defense attorneys will discourage their clients from becoming informants, police make arrests at night, when defense counsel are least likely to be available, or discourage arrestees from contacting their attorneys.").

¹⁸¹ Natapoff, *supra* note 87, at 646.

informants name likely reside in the same communities as the cooperating witness. 182

Even if Ohio utilized the official process often, when a criminal receives immunity it is as if the crime never happened, which hampers the retributive goals of the justice system. Consequently, Ohio's process lacks flexibility under § 3719.70 (A). The rule does not expressly permit a judge to grant a reduction in the informant's sentence; it merely provides that the judge may grant immunity. This discrepancy does not provide the state with an avenue to weigh the value of an informant's work, making for an all-or-nothing judgment call: either the candidate's information is valuable enough to justify immunity, or the information does not warrant implementing the rule. Thus, Ohio's information-for-leniency method could lead to moderately valuable information being discarded or slightly valuable information being traded for outright immunity. A statute similar to Rule 35 could resolve both of these situations.

More importantly, unlike Federal Rule 35, no conviction occurs under R.C. § 3719.70 (A). Again, this leaves Ohio's rule susceptible to Professor Rich's constitutional challenge. However, more pragmatically, an actual conviction would enable later courts to consider imposing a

The caustic effects of the informant institution are not limited to the legal system; they can have a disastrous impact in low-income, high-crime, urban communities where a high percentage of residents-predominantly young African American men-are in contact with the criminal justice system and therefore potentially under pressure to snitch. The law enforcement practice of relying heavily on snitching creates large numbers of criminal informants who are communal liabilities. Snitches increase crime and threaten social organization, interpersonal relationships, and socio-legal norms in their home communities, even as they are tolerated or under-punished by law enforcement because they are useful. *Id*.

¹⁸² Id

¹⁸³ See Joseph Goldstein, Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice, 69 YALE L.J. 543, 569 (1960).

¹⁸⁴ Ohio Rev. Code Ann. § 3719.70(A) (West 2004) ("[A] judge of the court of common pleas may grant to that person immunity from prosecution for any offense based upon the testimony, information, or other evidence furnished by that person").

¹⁸⁵ See id. (providing only for immunity or criminal process at the discretion of a judge of the court of common pleas).

¹⁸⁶ See id.

¹⁸⁷ See Rich, Coerced Informants, supra note 43, at 744.

harsher sentence if the informer reoffends, ¹⁸⁸ thus, possibly deterring the informant from engaging in future crimes.

As a result, Ohio's statute is a paradigm of the major issues present in many states' inform-for-leniency models. 189

E. Proposed Legislation: The Model Statute 190

Ohio should mold its informant system in part to reflect the ideal aspects of Rule 35(b). However, implementing such a system will be no easy task because federal officers may still offer informal deals because Rule 35 is merely a permissive method in trading leniency for information. The ideal statute needs to be both broad and mandatory. As a result, the legislature must first prohibit the use of informant work based on leniency without a conviction. The ideal statute needs to be both broad and mandatory.

1. Conviction Required

According to Professor Rich, the Thirteenth Amendment requires a conviction before informant work can be accepted; 193 and thus, the legislature should probably not need to write the conviction requirement into the statute. However, courts could be reluctant to accept this constitutional argument; thus, it would be best to include a provision requiring compliance with the model statute in all inform-for-leniency contexts. 194

To pass constitutional muster under the duly convicted exception, it is essential that the model informant system require a conviction prior to

¹⁸⁸ See, e.g., Ohio Rev. Code Ann. § 2929.14(D)(2)(b)(i) (West 2010) (allowing the court to impose an additional penalty under certain conditions for repeat offenders).

¹⁸⁹ See Beebe, Walking Thin Line, supra note 4.

 $^{^{190}}$ See infra APPENDIX: AUTHOR'S MODEL STATUTE. This article refers to the proposed statute as "Model Statute."

¹⁹¹ FED. R. CRIM. P. 35(b).

¹⁹² See infra APPENDIX: AUTHOR'S MODEL STATUTE § (1) ("Any court may reduce any individual's sentence, upon the filing of a motion by a prosecutor stating that the individual has provided substantial assistance to the State in the discovery, investigation, or prosecution of other criminal offenses only after the individual providing substantial assistance has been duly convicted of a crime."). This will undoubtedly receive harsh criticism from the police and prosecutors. See discussion infra Part II.F.

¹⁹³ See Rich, Coerced Informants, supra note 43, at 728–29.

¹⁹⁴ See infra APPENDIX: AUTHOR'S MODEL STATUTE § (2) ("Offers of leniency in exchange for active assistance in the discovery, investigation, or prosecution of other crimes by any state or local agency or official must be offered pursuant to section (1) of this statute.").

doing any active informant work.¹⁹⁵ Once the state convicts the potential informant, the informant could begin to provide "substantial assistance." The phrase "substantial assistance" is not easily capable of one particular definition because what constitutes substantial assistance does—and should—ultimately rest within the purview of the court and prosecutors.¹⁹⁶

2. Secrecy

Of course, such arrangements should be non-public, or at the very least, the court should seal anything pertaining to the plea agreement or post conviction agreement to minimize the likelihood of injury or retaliation to the informant. This is essential to a safe and effective model because potential informants would likely fear both being labeled as a snitch and suffering reprisals from the targets of their informing. The risk of exposing an informant's role through unsealed court records is grave, and there are websites exclusively devoted to exposing such informants. Again, the state could resolve this by a statute that mandates in camera hearings and sealed court records.

¹⁹⁵ See infra APPENDIX: AUTHOR'S MODEL STATUTE § (1) ("Any court may reduce any individual's sentence, upon the filing of a motion by a prosecutor stating that the individual has provided substantial assistance to the State in the discovery, investigation, or prosecution of other criminal offenses only after the individual providing substantial assistance has been duly convicted of a crime.") (emphasis added); supra Part II.B.4–II.B.5.

¹⁹⁶ See, e.g., United States v. Flores, 559 F.3d 1016, 1018 (9th Cir. 2009) (defining substantial assistance as "complete, truthful, forthright, material, important, valuable and meaningful information"); see also United States v. Hardy, 325 F.3d 994, 995 (8th Cir. 2003) (defining the same as "cooperation that leads to the prosecution, plea, or conviction of another individual for a criminal offense").

¹⁹⁷ See infra APPENDIX: AUTHOR'S MODEL STATUTE § (4) ("Any proceedings concerning substantial assistance must be held in camera, with the record of such proceedings sealed, and any agreement involving substantial assistance shall also be sealed, unless a showing is made that the information in these proceedings is both necessary to another criminal proceeding and that information is otherwise unobtainable.").

¹⁹⁸ See, e.g., Natasha Lindstrom, Released Court Records Reveal CI's Identity, Despite Judge's Order, V V DAILY PRESS (Aug. 25, 2009, 11:36 AM), http://www.vvdailypress.com/articles/0px-14063-records-geneva.html.

¹⁹⁹ See, e.g., Who's A RAT, http://www.whosarat.com/ (last visited Aug. 27, 2010) (providing an online database devoted to exposing informants' and undercover agents' identities).

²⁰⁰ See infra APPENDIX: AUTHOR'S MODEL STATUTE § (4) ("Any proceedings concerning substantial assistance must be held in camera, with the record of such proceedings sealed").

Any disclosure of information pertaining to the informant's agreement or participation should occur only if a "showing is made that the information... is both necessary to another criminal proceeding and that information is otherwise unobtainable." This test and its high threshold should be familiar to courts because courts use a similar standard to determine when the court may reveal an informant's identity. 202

3. Attorney Participation

Additionally, a model statute regulating and allowing informant work for leniency should require that the possible informant have access to a defense attorney before deciding whether to risk their life to benefit the police and receive a sentence reduction. This might get rid of the class of snitches who "flip" based on fear of charges that would not hold up in court. Similarly, the presence of an attorney could allow potential informants to make their decisions based on an informed risk/benefit analysis, which was missing in the Attica cases. As a result, an attorney could advise potential snitches of their likelihood of success at trial and the possible penalties for which they may risk their lives to avoid.

4. Judicial Oversight

Of similar importance, an ideal statute should provide an avenue for the informant to seek redress during the course of their work. For example, if informants believe that they have provided substantial assistance but the state is requiring them to continue aiding authorities, the model should allow the informants to petition the court to declare that they have fulfilled their obligation. By the same token, if the informants believe the authorities are asking them to get into too dangerous of a situation, the model should make judicial oversight available to stop this before it

²⁰¹ See infra Appendix: Author's Model Statute § (4).

²⁰² See Roviaro v. United States, 353 U.S. 53, 59–60 (1957) (discussing when disclosure of an informant's identity is necessary).

²⁰³ See infra APPENDIX: AUTHOR'S MODEL STATUTE § (3) ("The individual who may offer substantial assistance must have an attorney present, and a right thereto, at any such negotiations, and the court will hear any complaints pursuant to carrying out the substantial assistance in discovering, investigating, or prosecuting other crimes, upon a motion filed by the person offering such assistance.").

²⁰⁴ See, e.g., supra Part II.A.

²⁰⁵ See discussion supra Part A.1.

happens. Allowing informants to petition directly to the court could achieve these goals. ²⁰⁶

5. Temporal Flexibility

Similarly, an agreement does not need to always take place at a preconviction plea bargain.²⁰⁷ By keeping the option to inform open at all stages of the criminal proceedings, an individual whom the court has already convicted and is serving time may reconsider and decide to provide authorities with valuable information. This decision to inform could take place years into a convicted felon's sentence.²⁰⁸ Thus, the statute should not limit agreements to pre-conviction plea bargains and avoid strict temporal requirements.²⁰⁹

Even though it contains express exceptions, ²¹⁰ a similar concern raised with Federal Rule 35's time restraints²¹¹ involves its limited recruitment base. A model statute that does not have any such time limits and includes expungement²¹² as an additional option could further several goals. First, it could allow people who have previously been convicted of a crime but have already served their punishments to take affirmative steps to clear up the wreckage of their past. Repentance is a very rare motivation for an individual to become an informant;²¹³ however, if convicted criminals were expressly permitted to have past violations cleared up, then this could act as a good faith showing that they are now respectful of the law. Furthermore, this could serve as a valuable incentive because they would

²⁰⁶ See infra APPENDIX: AUTHOR'S MODEL STATUTE § (3) ("[T]he court will hear any complaints pursuant to carrying out the substantial assistance in discovering, investigating, or prosecuting other crimes, upon a motion filed by the person offering such assistance.").

²⁰⁷ See, e.g., FED. R. CRIM. P. 35 (allowing a minimum of one year for defendants to file a substantial assistance motion).

²⁰⁸ See infra APPENDIX: AUTHOR'S MODEL STATUTE § (2)(A)–(C) (allowing a reduction of a sentence based on a defendant's substantial assistance a year or more after sentencing).

²⁰⁹ See infra APPENDIX: AUTHOR'S MODEL STATUTE §§ (1)–(4) (making no temporal references in order to facilitate these types of arrangements).

²¹⁰ See infra APPENDIX: AUTHOR'S MODEL STATUTE § (1)(a).

²¹¹ FED. R. CRIM. P. 35(b)(2)(A)–(C).

 $^{^{212}}$ See infra APPENDIX: AUTHOR'S MODEL STATUTE § (1)(b)(iii) ("Upon the prosecutor's recommendation, the court has the power to...(s)eal or expunge an individual's record").

²¹³ Williams & Guess, *supra* note 101, at 238 ("Repentance is another motive for the informant that . . . is rare.").

qualify for more jobs with a clean record.²¹⁴ Similarly, this option may allow people who are no longer involved in criminal behavior (usually drug addiction)²¹⁵ to assist police in solving crimes. This could in turn lead to a more positive relationship with the police, a more positive view of informing, and help with issues concerning informants continuing ongoing illegal behavior while working for the police.²¹⁶ More broadly, the state should promote informing as a civic duty.²¹⁷ Allowing convicted criminals to make informant agreements at any stage in the criminal process could help promote that goal.²¹⁸

6. Contract Enforcement

However, if the negotiations take place before the conviction, the parties should draft a plea agreement that outlines the informant's specific tasks that will meet the "substantial assistance" requirement for a reduction in their sentence.²¹⁹ The mandatory presence of defense counsel could achieve this goal,²²⁰ and fair enforcement could be guaranteed by allowing a direct petition to the court if there is an issue during the course of the informant's work.²²¹

7. Clear Standards

An ideal rule would address the obvious weakness of Rule 35(b). Thus, a model statute should simplify the issue concerning a prosecutor's

²¹⁴ See, e.g., Mona Lewandowski, Barred from Bankruptcy: Recently Incarcerated Debtors in and Outside Bankruptcy, 34 N.Y.U. Rev. L. & Soc. CHANGE 191, 217 (2010) (asserting that "criminal records make it difficult for released prisoners to find jobs").

²¹⁵ MICHAEL MAGUIRE & CLIVE NORRIS, THE CONDUCT AND SUPERVISION OF CRIMINAL INVESTIGATIONS 91 (1992) (quoting a police officer saying, "If I'm looking for an informant, I'm looking for someone who is weak. Heroin addicts are the easiest, you can lock them up, and lock them up again until they agree.").

²¹⁶ See Williams & Guess, supra note 101, at 241 (noting "the possibility that the informant is gathering information on the unit to be traded or sold to persons in the drug subculture").

²¹⁷ See Parker, supra 95, at 567 ("Most people provide information about criminal activities out of a desire to contribute toward a safe and law abiding society.").

²¹⁸ *Id.* ("[L]aw enforcement is everybody's business.").

²¹⁹ See infra APPENDIX: AUTHOR'S MODEL STATUTE § (3) (allowing an informant to petition the court during the course of providing substantial assistance).

²²⁰ See infra APPENDIX: AUTHOR'S MODEL STATUTE § (3) (requiring an attorney to be present at negotiations).

²²¹ See infra APPENDIX: AUTHOR'S MODEL STATUTE § (3) (allowing the informant to petition the court).

failure to file a departure motion.²²² This could easily be done by adding a provision such as: "[T]he prosecution must file the motion unless the prosecutor makes a good faith showing that the individual seeking the motion did not provide substantial assistance." Adding this statutory good faith standard could allow Ohio to avoid the confusion discussed in *United States v. Villareal*, ²²⁴ ensure judicial oversight, and avoid arbitrariness on behalf of prosecutors.

8. Flexible Rewards

Moreover, a model statute should allow a judge great leeway in rewarding the informant's work with leniency. This could avoid the current all-or-nothing tradeoff, which Ohio currently employs. Thus, the statute should allow prosecutors to recommend any form of leniency based on the nature and quality of the informant's assistance. 226

9. Any Individual's Sentence May Be Reduced

Along the same lines, a model statute should not differentiate between misdemeanors and felonies, ²²⁷ drug offenses and non-drug offenses, ²²⁸ or common pleas judges and municipal court judges. ²²⁹ First, there is little reason to believe that a person facing a stiff jail sentence on their second or third OVI offense could not offer just as valuable of assistance as a person being charged with a felony drug possession offense. Drug crimes should not be the only area where Ohio's statute explicitly allows trading leniency for information. Informants have proved useful in a variety of areas ranging from narcotics to political corruption cases. ²³⁰ Moreover, concerns

²²² See generally Gyurci, supra note 133 (demonstrating no clear standards exist governing the use of substantial assistance motions by prosecutors).

²²³ See infra Appendix: Author's Model Statute § (1)(a).

²²⁴ 491 F.3d 605, 609 (6th Cir. 2007).

²²⁵ See Ohio Rev. Code Ann. § 3719.70(A) (West 2006) (restricting judicial discretion to granting immunity).

²²⁶ See infra APPENDIX: AUTHOR'S MODEL STATUTE § (1)(b)(iv) (permitting the court to "[t]ake any other measure the court deems appropriate in light of the individual's substantial assistance").

²²⁷ See Ohio Rev. Code Ann. § 3719.70(B) (West 2006).

²²⁸ See id. § 3719.70(A).

²²⁹ Id

²³⁰ See Carillo v. Perkins, 723 F.2d 1165, 1166–67 (5th Cir. 1984) (reviewing Carrillo's conviction for using a publicly owned postage meter for personal campaign mail based on (continued)

about possible racial bias in law enforcement and legislation arise when a state openly and aggressively only seeks out drug violators as informants.²³¹ Not surprisingly, informants have also proven especially effective in theft and burglary cases,²³² which is further evidence that Ohio needs a broader statute.²³³

Furthermore, the participation required for providing substantial assistance in a misdemeanor case may be much less rigorous than that which is required to work off a more serious charge. In effect, a person faced with a misdemeanor has less incentive to snitch; therefore, it may require some sort of expungement after a conviction to entice assistance when the person is facing little to no jail sentence. However, this lack of incentive for snitches²³⁴ is welcomed by both the "stop snitching" movement and by Professor Natapoff. Thus, society could presumably encourage that consequence.

10. Inter-Agency Relationships

Similarly, a model statute should allow police agencies to share informants. Informants are in high demand because they are used by federal, state, county, and municipal police and prosecutors. As a result, federalism can lead to either four times as many informants as a country with one national police force or individual informants working for multiple agencies at the same time. To assist in remedying some of the effects of this phenomenon, the statute should allow state, local, or federal

testimony of Ruben Chapa, who was a Carrillo campaign worker but had several unrelated weapons offenses).

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²³¹ See generally Patricia Y. Warren & Amy Farrell, The Environmental Context of Racial Profiling, 623 Annals Am. Acad. Pol. & Soc. Sci. 52 (2009); Diana R. Gordon, Drug Policy and the Dangerous Classes: A Historical Overview, 10 Temp. Pol. & Civ. Rts. L. Rev. 315 (2001).

²³² See, e.g., Massachusetts v. Upton, 466 U.S. 727, 733–34 (1984).

²³³ See infra APPENDIX: AUTHOR'S MODEL STATUTE § (1) (allowing any court to reduce "any individual's sentence").

²³⁴ Rick Hampson, *Anti-Snitch Campaign Riles Police, Prosecutors*, USA TODAY: NATION, March 29, 2006, at A1, *available at* http://www.usatoday.com/news/nation/2006-03-28-stop-snitching_x.htm; *see* Natapoff, *supra* note 87, at 646.

²³⁵ WILSON, *supra* note 89, at 58.

²³⁶ See Gary T. Marx, Thoughts on a Neglected Category of Social Movement Participant: The Agent Provocateur and the Informant, 80 Am. J. Soc. 402, 412 n.11 (1974).

prosecutors to bring the substantial assistance motion.²³⁷ This may raise some federalism concerns of its own, but the key is that both a judge and a defense attorney are present throughout the process. It is likely unnecessary to write into the statute that any prosecutor could bring the motion because different agencies could simply work together and have the prosecutor working in the particular state jurisdiction bring the motion. To be safe though, a model statute should not be restrictive in its wording to achieve this end.

11. Enforcing the Statute

The issue of enforcement is especially difficult.²³⁸ However, the legislature could choose from several options to promote adherence to the statute.²³⁹ Admittedly, none of these options are perfect. Each option may raise unique concerns ranging from legislative unpopularity to the possibility of abuse from would-be informants.

Accordingly, a model statute should create an avenue for redress if a person is recruited on an inform-for-leniency basis outside the protection of the statute. Similarly, there should be a personal disincentive built into the statute to deter police and prosecutors from offering informal deals outside the safeguards of the statute. Although particular private remedies or official sanctions may be difficult to fashion, they are possible elements in revamping the current model. An explicit reminder in the statute that noncompliance is a violation of a law enforcement officer's duty to uphold the laws may seem superfluous; nevertheless, such a reminder may be a helpful. However, sanctioning local police would be

²³⁷ See infra APPENDIX: AUTHOR'S MODEL STATUTE $\{(1) \ ("[U]pon \ the \ filing \ of \ a \ motion \ by \ a \ prosecutor" (emphasis added)).$

²³⁸ See generally Natapoff, supra note 87 (describing the breadth and strength of social and legal distortions arising from police dependence upon informants that leads to an entrenched culture unlikely to change quickly or willingly).

²³⁹ See infra APPENDIX: AUTHOR'S MODEL STATUTE § (2)(Option (a)–(d)).

²⁴⁰ See, e.g., See infra Appendix: Author's Model Statute §§ (2)(Option (a)), (3)(Option (b)).

²⁴¹ See infra APPENDIX: AUTHOR'S MODEL STATUTE § (2)(Option (b)) ("Offers of leniency in exchange for assistance made without compliance to this statute must be considered both a violation of the law enforcement officer's official duty of care and the officer's duty to uphold the laws of this state.").

²⁴² See infra APPENDIX: AUTHOR'S MODEL STATUTE § (2)(Option (b)).

especially difficult because that is a matter of self-governance within the authority of each municipality.²⁴³

As a result, a private right of action for an improperly recruited informant may be more effective to ensure compliance. However, this would do nothing to ensure that back-door deals do not occur where everyone is happy because the informant would have to bring a complaint. Moreover, creating such a private right may cause legislative unpopularity because it creates liability on the part of the state, and damages issues would be difficult to contemplate. Similarly, this may raise concerns of abuse on the part of defendants. Informants could take advantage of information that is presented as requiring immediate police action and then later sue. Thus, creating a private right of action could be hard to push through the legislature.

As another enforcement option, a model statute could attach the right to counsel during an offer stage. Having the right to counsel attach as soon as the police or prosecutor offer leniency²⁴⁶ may address the concerns created by informal deals based on coercive police tactics. Thus, under this option a person who is offered a deal without the presence of counsel may have a Sixth Amendment challenge to any resulting charges.²⁴⁷

Under a similar option, a model statute could suppress any evidence gathered in the arrest that led to a deal and did not conform to the statute. ²⁴⁸ This may have a similar evidentiary effect on deals that took place without defense counsel present but would be broader in that it would be effective

²⁴³ See Cincinnati v. Weaver, 245 F. Supp. 529, 531 (S.D. Ohio 1965).

²⁴⁴ See infra APPENDIX: AUTHOR'S MODEL STATUTE § (2)(Option (a)) ("Individuals offered leniency in exchange for assistance not in compliance with this statute have a private right of action.").

²⁴⁵ See infra APPENDIX: AUTHOR'S MODEL STATUTE § (3)(Option (b)) ("Any person recruited by a state, county, or municipal law enforcement agency in violation of this statute has a private right of action against that state, county, or municipality.").

²⁴⁶ See infra APPENDIX: AUTHOR'S MODEL STATUTE § (3)(Option (a)) ("The right to counsel attaches at the time an offer of leniency in exchange for assistance is made and no such offer may be accepted without an attorney present."); Rich, Coerced Informants, supra note 43, at 701–02 (discussing the Sixth Amendment right to counsel as applied to informants).

²⁴⁷ See U.S. CONST. amend. VI.

²⁴⁸ See infra APPENDIX: AUTHOR'S MODEL STATUTE § (2)(Option (d)) ("Any evidence gathered from the events leading to the offer of leniency for cooperation is inadmissible in a subsequent criminal proceeding if the offer of leniency for cooperation is made in noncompliance with this statute.").

against any arrangement lacking a conviction.²⁴⁹ Although this enforcement mechanism could achieve compliance with the statute, there is an inherent risk that more guilty people could go free; thus, a "tough on crime" legislator may have problems enacting this option.²⁵⁰

Having a similar effect, a final enforcement option would be to require dismissal of any charges arising from the events that led to an informal deal.²⁵¹ This would mean that as soon as an officer attempts to make a back-door deal, then whatever charges that officer was holding over the would-be informant's head could not be pursued. This option lacks the unpopular liability issues surrounding creating a private right of action (as does the exclusion of evidence option), but again, may create the risk of guilty people going free. However, this seems to be the soundest option for enforcement. If the authorities are eager enough to put a suspect to work without giving them the benefit of the built-in safeguards of a model statute, then they should not be surprised that the coerced informant can disobey their requests without fear of reprisal. As a result, the police really would not have anything to hold over these informants' heads; and thus, this option may ensure that the system of back-door dealing will eventually collapse. Undoubtedly though, it may look unpopular, but it is likely a necessary way to enact a better model for trading information for leniency.

F. Possible Concerns

Although the current model raises many concerns, the proposed statute is not without its downfalls. Professor Rich raises many of these concerns in response to his argument that the use of coerced informants violates the ban on involuntary servitude. The Model Statute raises many of the same concerns because a basic premise behind both arguments is that leniency as a reward for informant work without pay is only constitutional after the judicial system has convicted the would-be snitch. 253

²⁴⁹ See infra Appendix: Author's Model Statute § (2)(Option (d)).

 $^{^{250}}$ See infra Appendix: Author's Model Statute $\$ (2)(Option (d)).

²⁵¹ See infra APPENDIX: AUTHOR'S MODEL STATUTE § (2)(Option (c)) ("Any criminal charges arising out of the events leading to the offer of leniency for cooperation must be dismissed if the offer of leniency for cooperation is made in noncompliance with this statute.").

²⁵² See Rich, Coerced Informants, supra note 43, at 733–38.

²⁵³ See id. at 728–29.

1. Police Issues

First, police will likely have the most objections to this new model because they are so reliant on informant use to solve crimes of vice. ²⁵⁴ The Model Statute removes much of the police discretion that the current system of informant use entails. ²⁵⁵ Under the proposed model, police could no longer make offers of leniency without the court's involvement. ²⁵⁶

This could undoubtedly slow the recruitment process of informants and could adversely affect situations where police need to get the information quickly and then rapidly act on that information in order to successfully solve other crimes. However, the benefit of judicial oversight in the recruitment process likely overrides this concern. Additionally, the system can resolve this concern by adopting a system similar to that which allows police to quickly obtain search warrants. ²⁵⁷ Unfortunately, the requirement of an attorney's presence would pose a problem, but the judicial system could resolve this problem with court-appointed lists enumerating those attorneys who would be willing to be "on-call" for such rare instances. As a result, viable options mitigate any expediency concerns the proposed model raises. ²⁵⁸

Similarly, police would no longer be able to bluff suspects into agreeing to become informants.²⁵⁹ For instance, the current system allows police to "flip" informants without attorneys present.²⁶⁰ Because the would-be informant is given a mandatory right to have an attorney present

²⁵⁴ Id. at 688–89, 733.

²⁵⁵ Compare infra APPENDIX: AUTHOR'S MODEL STATUTE § (3) ("The individual who may offer substantial assistance must have an attorney present, and a right thereto, at any such negotiations, and the court will hear any complaints pursuant to carrying out the substantial assistance in discovering, investigating, or prosecuting other crimes, upon a motion filed by the person offering such assistance."), with OHIO REV. CODE ANN. § 3719.70(A) (West 2006).

²⁵⁶ See infra Appendix: Author's Model Statute §§ (1)–(3).

²⁵⁷ See Laurence A. Benner & Charles T. Samarkos, Searching for Narcotics in San Diego: Preliminary Findings from the San Diego Search Warrant Project, 36 CAL. W. L. REV. 221, 263 n.108 (2000) (referring to the practice of judges being on call after-hours to enable law enforcement to obtain search warrants more quickly); Justin H. Smith, Press One for Warrant: Reinventing the Fourth Amendment's Search Warrant Requirement Through Electronic Procedures, 55 VAND. L. REV. 1591, 1595 (2002) (noting the speed with which law enforcement can obtain search warrants over the telephone).

²⁵⁸ See Rich, Coerced Informants, supra note 43, at 735.

²⁵⁹ See id. at 717 n.206.

²⁶⁰ See id. at 693–94; supra Part II.A.

during any negotiations involving substantial assistance, the Model Statute would essentially require police to have charges that will hold up at trial in order to convince a person to become an informant. This gives the police much less leeway in their recruiting because they can no longer threaten suspects with maximum sentences or bluff that the charges would be a sure thing to hold up at trial. Although this may be a concern for police in recruiting informants, overriding policy considerations undoubtedly favor an informant's right to counsel over the police's ability to recruit informants through threatening baseless charges. 263

By the same token, informants would have a new avenue to raise concerns of police misconduct.²⁶⁴ As Professor Rich notes, informants could bring to the court concerns about their safety or complaints that they had fulfilled their obligations under the agreement.²⁶⁵ This allows for more protection against police abuse than the current model, especially when police are often intentionally vague about what an informant must do to provide substantial assistance.²⁶⁶ Under the Model Statute, police, prosecutors, defense attorneys, and judges will all take part in formulating and determining what constitutes substantial assistance because prosecutors are required to make a good faith showing that an informant did not provide such assistance under section (1)(a) of the Model Statute. This safeguard easily outweighs any risks associated with penalizing abusive handlers and ensures that police and prosecutors keep the deals they make.²⁶⁷

Some of the aforementioned police concerns are indeed valid. However, the number of potential informants under the Model Statute would not likely decrease drastically. Even if the number of potential

²⁶¹ See infra APPENDIX: AUTHOR'S MODEL STATUTE § (3) (requiring an individual who offers substantial assistance to have an attorney present at any such negotiations).

²⁶² See infra APPENDIX: AUTHOR'S MODEL STATUTE § (3); see Rich, Coerced Informants, supra note 43, at 717 n.206.

²⁶³ See, e.g., People v. Mason, 411 N.Y.S.2d 970 (Sup. Ct. 1978) (dismissing charges where the defendant was arrested and recruited as a police informant and denied the right to counsel when speaking with police).

²⁶⁴ See infra APPENDIX: AUTHOR'S MODEL STATUTE § (3) (allowing an informant direct involvement with the court).

²⁶⁵ Rich, Coerced Informants, supra note 43, at 730–31.

²⁶⁶ *Id.* at 695 ("When promising leniency, police are told to avoid making specific promises either about what amount of assistance will be sufficient to earn leniency or exactly what form that leniency will take.").

²⁶⁷ *Id.* at 734, 738.

informants did decrease, then a big part of society's desire to have less snitches would be furthered. Similarly, our criminal justice system is set up so that police often have to jump through many hoops to ensure justice.²⁶⁸ Thus, an extra hoop to alleviate the flaws in our current system of trading leniency for informant work seems justified.

2. Informants' Concerns

The most obvious concern for would-be informants is that the proposed model requires a conviction prior to leniency. However, the conviction really acts as a safeguard against being duped into becoming an informant because of charges that have no chance at trial. Thus, requiring a conviction ensures more safeguards for informants. They would then have judicial involvement and an attorney who could stand between them and the police.

Similarly, if a person really wants to be an informant, they are free to do so voluntarily or for pay.²⁷⁰ But, when offers of leniency are involved, a conviction is necessary to pass the constitutional muster of the Thirteenth Amendment and provide the safest environment for the informant.²⁷¹

A conviction does not necessarily mean incarceration because judges are free under the Model Statute to do whatever the prosecutor is willing to recommend.²⁷² The more dangerous or valuable the informant's involvement, the more likely that individual will have a more drastically reduced sentence. This solves the all-or-nothing problems inherent in Ohio's statute²⁷³ and allows a judge more discretion in rewarding the informant by reducing the sentence based on the quality and nature of their assistance. Of course, the judge will take other things into consideration,

²⁶⁸ *Id.* at 734 (quoting United States v. Di Re, 332 U.S. 581, 595 (1948)).

²⁶⁹ See infra APPENDIX: AUTHOR'S MODEL STATUTE § (1) (allowing sentence reduction only after the individual providing substantial assistance has been duly convicted of a crime).

²⁷⁰ See, e.g., Thomas A. Mauet, *Informant Disclosure and Production: A Second Look at Paid Informants*, 37 ARIZ. L. REV. 563, 564 (1995) ("Much of the recent increase in informant use is in the area of paid informants.").

Rich, *Coerced Informants*, *supra* note 43, at 744 ("[T]he application of the Thirteenth Amendment . . . forbids only the use of threats of criminal sanctions as leverage to compel informant cooperation absent a criminal conviction.").

See infra APPENDIX: AUTHOR'S MODEL STATUTE § (1)(b)(i-iv) (allowing a prosecutor to recommend to court probation, expungment of record, or any other measures the court may deem appropriate).

²⁷³ See Ohio Rev. Code Ann. § 3719.70(A) (West 2006).

like the informant's past criminal record and the severity of the crime that they are trying to work off.²⁷⁴ But the sentence reduction will ultimately be a reflection of the assistance provided, thus, fairer to both informants and society.

In some instances, however, the criminal receiving what is deserved may be more important than obtaining valuable information. For example, bringing the negotiations out into the open (at least with the prosecutor, defense counsel, and the judge) makes it less likely that police would be willing to let more serious or repeat offenders²⁷⁵ trade snitch-work to merely get police another bust and help make the department look good.²⁷⁶ Police should be less likely to make a deal with the devil if other entities are involved.²⁷⁷ Thus, bringing these deals out of interrogation rooms and into the courtrooms will likely result in more criminals getting what they deserve

A critical issue with requiring a conviction is the informant's inherent fear that they will be discovered as a rat.²⁷⁸ The Model Statute seeks to eliminate this by allowing courts to hold substantial assistance proceedings *in camera* and to seal the agreements.²⁷⁹

As a result, all major issues on behalf of potential informants have positive trade-offs that significantly outweigh any negative concerns.

3. Balance of Power Issues

Another possible criticism is that the proposed model may put too much discretion in the hands of judges and prosecutors. The legislature may want to limit how much downward sentence departure is permitted based on the informants' prior records. However, this would best be left at the prosecutor's discretion after negotiations with a defense attorney and

²⁷⁴ See Aaron J. Rappaport, Rationalizing the Commission: The Philosophical Premises of the U.S. Sentencing Guidelines, 52 EMORY L.J. 558, 588–89 (2003).

²⁷⁵ See, e.g., John Diedrich & Ryan Haggerty, Suspected Serial Killer Was Informant, MILWAUKEE JOURNAL SENTINEL (Sept. 19, 2009), http://www.jsonline.com/news/milwauke e/59892397.html.

²⁷⁶ See Rich, Coerced Informants, supra note 43, at 699.

²⁷⁷ See id. at 696.

²⁷⁸ *Id.* at 694–95 ("Potential informants often are reluctant to assist the police for a variety of reasons, including societal pressures against informing, loyalty to criminal associates, and fear of physical harm should the individual's cooperation be discovered.").

²⁷⁹ See infra APPENDIX: AUTHOR'S MODEL STATUTE § (4) (providing for in camera hearings and sealed records).

then put into the plea agreement as a recommendation. But there is an argument for allowing the legislature to have more say in exactly how much leniency to allow for substantial assistance because the prosecutors already have a large amount of discretion. Too much discretion on the part of police and prosecutors can lead to irreparable harm to the wrongly accused. Therefore, a statute must 'provide explicit standards for those who apply them. Some would further argue that prosecutors already have too much overall discretion in the court system today. However, the Model Statute minimizes these concerns by having both defense attorneys and judges serve as a check on the prosecutors.

On the other hand, the prosecutorial discretion argument is not the only one that favors giving the legislature the ultimate say in exactly how much a judge should reduce a defendant's sentence. There has been a clear movement in the United States disfavoring the use of informants, and as the most representative branch, the legislature may want to consider this movement. The "Stop Snitching" movement is not limited to those involved in drugs. Even some scholars are concerned that the pervasiveness of buying leniency for information is hampering the retributive goals of the criminal justice system. Another scholar posits that the current use of informants actually increases crime. Thus, it is

²⁸⁰ See infra APPENDIX: AUTHOR'S MODEL STATUTE § (1)(b)(i-iv).

²⁸¹ See Frank O. Bowman, III & Michael Heise, Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences, 86 IOWA L. REV. 1043, 1116–18 (2001) (noting prosecutorial discretion in filing substantial assistance motions).

²⁸² Stacy Nowicki, No Free Lunch (or Wi-Fi): Michigan's Unconstitutional Computer Crime Statute, 2009 UCLA J. L. & TECH. 1, 16 (2009).

²⁸³ See generally Mark Osler, This Changes Everything: A Call for a Directive, Goal-Oriented Principle to Guide the Exercise of Discretion by Federal Prosecutors, 39 Val. U. L. Rev. 625 (2005).

²⁸⁴ See infra APPENDIX: AUTHOR'S MODEL STATUTE § (3)(Option(a)) (attaching the right to counsel at the time an offer of leniency is made).

²⁸⁵ See Damon Hodge, See No Evil: To Tell or Not to Tell? Why the Stop-Snitching Phenomenon Is More Complicated than You Might Think, LAS VEGAS WEEKLY (June 26, 2008, 12:00AM), http://www.lasvegasweekly.com/news/2008/jun/26/see-no-evil/ (noting the frustration "born of prosecutors granting immunity and informant fees to criminals in exchange for their testimony only to see these same criminals leave prison and resume a life of crime in the hood").

²⁸⁶ *Id.* (noting that the recent movement has "turned McGruff the Crime Dog's 'Take a bite of crime' call for collective responsibility into a pop-cultural punch line").

²⁸⁷ Rich, *Coerced Informants*, *supra* note 43, at 740.

²⁸⁸ Natapoff, *supra* note 87, at 646.

not far-fetched to assume that lawmakers could view taking a "tough on crime" stance as creating serious limits to what a defendant can receive in return for being a snitch. Fortunately for the legislature, they do have the final word in whether the Model Statute is even enacted.²⁸⁹ Thus, if the legislature feels strongly enough about the amount of departure from mandatory sentences, then they may simply decline to vote for the statute.

4. Judicial Economy

The Model Statute also raises concerns regarding the added judicial involvement in the process. Under the Model Statute, a judge will always play a role in an agreement concerning substantial assistance.²⁹⁰ Judges will also need to hear complaints raised by informants concerning possible abuse.²⁹¹ This may put an unwanted strain on judicial resources. But the United States Supreme Court has held judicial economy must yield to the protection of individual rights.²⁹² Thus, judicial economy is just not that important when lives and liberties are at stake. 293 As a result, courts should bear the burden of extra judicial involvement given the nature of the risks associated with becoming an informant. The burdens placed on the courts should also be offset by the notion that only those suspects who would likely be found guilty at trial will be put into these life-threatening situations. This extra involvement will also ensure that informants have an outlet for redress; when a handler abuses his discretion, the judge can step in. 294 Thus, judicial involvement mandated by section (3) of the Model Statute may curb possible police abuse. As a result, informants will be safer, agreements will be upheld, and innocent people will no longer "turn snitch" to avoid the risks associated with defending base-less charges.

²⁸⁹ See supra notes 146–48 and accompanying text (comparing the legislative purposes and wording enacted by the legislatures of various states in the informant area).

²⁹⁰ See infra APPENDIX: AUTHOR'S MODEL STATUTE §§ (1)–(2) (noting that under the model statute the judge will always play a role because any court may reduce an individual's sentence if the informant has provided substantial assistance).

²⁹¹ See infra Appendix: Author's Model Statute § (3).

²⁹² Riley v. Nat'l Fed'n of Blind, 487 U.S. 781, 795 (1988) ("[T]he First Amendment does not permit the State to sacrifice speech for efficiency.").

²⁹³ See Sanders v. United States, 373 U.S. 1, 8 (1963).

²⁹⁴ See infra APPENDIX: AUTHOR'S MODEL STATUTE § (1) (noting that the judge can reduce an individual's sentence if he or she feels the assistance was more substantial than the prosecutor).

5. Taxpayer Concerns

The Model Statute may also use tax dollars. The mandate that all agreements concerning substantial assistance require the defendant to have an attorney present²⁹⁵ will undoubtedly lead to more time spent by court-appointed attorneys for indigent would-be informers. This, in turn, could mean more tax dollars spent.²⁹⁶ Fortunately, the fines, contraband, and cash resulting from informants' assistance should help offset these costs. In addition, there has been no clear taxpayer outrage concerning dollars spent on paid informants;²⁹⁷ thus, the response to this added expense should be similar.

Surprisingly though, the added expenses may not be that significant considering that those who are facing a conviction and who could afford their own attorney would likely hire independent counsel regardless of the context. And the poorer would-be informants would likely require court-appointed attorneys to defend their cases at trial regardless of whether an informant situation arose. This raises two points: (1) the costs of providing a public defense at trial may be saved by pre-trial agreements and (2) wealthier would-be snitches will probably use private attorneys during negotiations (just as they would at a trial). Thus, the costs of ensuring representation may actually be minimal.

More substantively, if the right to an attorney is fundamental whenever jail time is a possible sentence, ²⁹⁸ then the constitution should mandate that defendants have an attorney present when they decide to risk their life in exchange for leniency. The risks associated with snitching on the criminal element are at least as great as spending a few days in jail. As a result, the right to counsel has overriding policy considerations justifying the additional costs involved with the Model Statute. ²⁹⁹

²⁹⁵ See infra APPENDIX: AUTHOR'S MODEL STATUTE § (3) ("The individual who may offer substantial assistance must have an attorney present").

²⁹⁶ See United States v. Santiago-Fraticelli, 818 F. Supp. 27, 30–31 (D.P.R. 1993) (noting that court-appointed counsel are paid for by public funds).

²⁹⁷ See generally Natapoff, supra note 87 (cataloging the many and varied corrosive effects of ever-expanding use of informants without including any indication of a taxpayer backlash against the costs of the practice).

²⁹⁸ Ohio Const. art. I, § 10; United States v. Wade, 388 U.S. 218, 227–28 (1967).

²⁹⁹ Wade, 388 U.S. at 226 ("It is central to [constitutional] principle[s] that in addition to counsel's presence at the trial, the accused is guaranteed that he need not stand alone against the state at any stage of the prosecution . . . where counsel's absence might derogate from the accused's right to a fair trial.").

III. CONCLUSION

Informant use is likely a necessary evil. This article shows that there are ways the legislature, judicial system, and police can employ a system that minimizes a number of the harms associated with using snitches. But no model can completely alleviate the dangers that accompany betrayal. Informants will likely be despised and targeted regardless of which particular system states put into place.

However, informant recruitment based on leniency allowed only after a conviction could provide a number of benefits.³⁰⁰ The Model Statute allows potential informants to make a fair and informed decision on whether to wear the brand of a snitch. They will be able to make that decision after consulting with an attorney about the likelihood of a conviction at trial.³⁰¹ The terms of the agreement will be on paper and enforceable.³⁰² The system will stand against constitutional scrutiny, and police can make better calculations about the candidate's usefulness with the aid of prosecutors.³⁰³ As a result, the system will work better from a defense standpoint, and society will no longer have to accept an eager-to-make-cases police officer's snap judgments about who should inform.

The Model Statute set forth in this note is aimed at recruitment but some of the benefits will spill over into handling and release.³⁰⁴ With a more formal recruitment process comes more certainty in what is required of the informants.³⁰⁵ The Model Statute also gives informants the benefit of defense counsel³⁰⁶ and the court to act as a buffer for police abuse.³⁰⁷ As

³⁰⁰ See discussion supra Part II.B.5.

³⁰¹ See infra APPENDIX: AUTHOR'S MODEL STATUTE § (3) (providing that a right to an attorney attaches at the time an offer of leniency in exchange for information is made).

³⁰² See infra APPENDIX: AUTHOR'S MODEL STATUTE § (1) (providing that the prosecutor must notify the court of any offer of leniency by motion, and that such motion must contain the written plea agreement between the informant and the prosecutor).

³⁰³ See discussion supra Part II.B.4.

³⁰⁴ See infra APPENDIX: AUTHOR'S MODEL STATUTE (providing rights and protections to potential informants based on whether the prosecutor and the court properly follow the dictates of the statute).

³⁰⁵ See Paul E. Loving, The Justice of Certainty, 73 Or. L. Rev. 743, 764 (1994).

³⁰⁶ See infra APPENDIX: AUTHOR'S MODEL STATUTE § (3) (providing the assistance of counsel is required when an offer for leniency is made).

³⁰⁷ See infra APPENDIX: AUTHOR'S MODEL STATUTE § (2)(Option (b))–(Option (c)) (stating that offers of leniency made in violation of the model statute by officers will be considered a violation of the officer's duty of care and will result in the original charges against the informant being dropped).

a result, informants may be more likely to help investigators in areas that are not out of the particular informant's league. Thus, we will not likely see a person whose only offense was failure to pay a few speeding tickets setting up drug deals with hardened criminals. This is good for both informants and society in general. There will probably be plenty of willing takers in a conviction-required model (as well as paid informants), so society could go without worrying if their lead footed neighbor is going to set them up to avoid a \$150 fine. We have enough mistrust in our society today. We don't need any extra help creating that mistrust from the authorities.

³⁰⁸ See, e.g., Natapoff, supra note 87, at 685–87.

APPENDIX: AUTHOR'S MODEL STATUTE

- (1) Any court may reduce any individual's sentence, upon the filing of a motion by a prosecutor stating that the individual has provided substantial assistance to the State in the discovery, investigation, or prosecution of other criminal offenses only after the individual providing substantial assistance has been duly convicted of a crime.
- (a) If such a motion is offered pursuant to a written plea agreement, the prosecution must file the motion unless the prosecutor makes a good faith showing that the individual seeking the motion did not provide substantial assistance in the discovery, investigation, or prosecution of other criminal offenses.
- (b) Upon the prosecutor's recommendation, the court has the power to:
- (i) Reduce any sentence;
- (ii) Grant probation in lieu of any sentence;
- (iii) Seal or expunge an individual's record; or
- (iv) Take any other measure the court deems appropriate in light of the individual's substantial assistance.
- (2) Offers of leniency in exchange for active assistance in the discovery, investigation, or prosecution of other crimes by any state or local agency or official must be offered pursuant to section (1) of this statute.
- (Option (a)) Individuals offered leniency in exchange for assistance not in compliance with this statute have a private right of action.
- (Option (b)) Offers of leniency in exchange for assistance made without compliance to this statute must be considered both a violation of the law enforcement officer's official duty of care and the officer's duty to uphold the laws of this state.
- (Option (c)) Any criminal charges arising out of the events leading to the offer of leniency for cooperation must be dismissed if the offer of leniency for cooperation is made in noncompliance with this statute.

- (Option (d)) Any evidence gathered from the events leading to the offer of leniency for cooperation is inadmissible in a subsequent criminal proceeding if the offer of leniency for cooperation is made in noncompliance with this statute.
- (3) The individual who may offer substantial assistance must have an attorney present, and a right thereto, at any such negotiations, and the court will hear any complaints pursuant to carrying out the substantial assistance in discovering, investigating, or prosecuting other crimes, upon a motion filed by the person offering such assistance.
- (Option (a)) The right to counsel attaches at the time an offer of leniency in exchange for assistance is made and no such offer may be accepted without an attorney present.
- (Option (b)) Any person recruited by a state, county, or municipal law enforcement agency in violation of this statute has a private right of action against that state, county, or municipality.
- (4) Any proceedings concerning substantial assistance must be held in camera, with the record of such proceedings sealed, and any agreement involving substantial assistance shall also be sealed, unless a showing is made that the information in these proceedings is both necessary to another criminal proceeding and that information is otherwise unobtainable.