COURT OF APPEALS DECISION DATED AND FILED

July 14, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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No. 97-1270-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BETZAEL CASTRO,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DOMINIC S. AMATO and TIMOTHY G. DUGAN, Judges.[1] *Judgment affirmed; order reversed and cause remanded with directions.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

[1] The Hon. Dominic S. Amato entered the judgment of conviction, and sentenced Castro. The Hon. Timothy G. Dugan heard and denied Castro's motion for postconviction relief.

CURLEY, J. Betzael Castro appeals from a circuit court judgment and sentence entered after he pleaded guilty to two counts of armed robbery, in violation of § 943.32(1)(b) & (2), STATS. Castro also appeals from a circuit court order denying his postconviction motion for sentence modification. Castro argues that he is entitled to a new sentencing hearing because, at the time of sentencing, the fact that he worked as a confidential informant for the Milwaukee Police Department, four months previous to his sentencing for the two armed robberies, was unknown to the prosecutor, the judge, and possibly, his attorney as well. Castro contends that this information constitutes a new factor justifying a new sentencing hearing. We conclude that, if Castro made a "conscious, tactical choice" to withhold the information concerning his work as an informant, that information was not "unknowingly overlooked," and does not constitute a new factor. If, however, Castro failed to convey the information to his counsel, the prosecutor, or the court, and this failure was not the result of a "conscious, tactical choice," then the information does constitute a new factor. Neither Castro's original defense counsel nor Castro were present at the motion hearing, and, therefore, whether Castro failed to convey the information, and, if so, his reasons for failing to do so are unknown. Therefore, we reverse the order denying Castro's postconviction motion, and remand to the circuit court so that it may make factual findings concerning whether Castro failed to convey the information and, if so, why, and reconsider, if necessary, Castro's sentence modification motion if the trial court finds the information constitutes a new factor.

I. BACKGROUND.

In July 1996, Castro was charged with committing three counts of armed robbery over a span of twenty-two days. Two of the three armed robberies occurred at neighborhood grocery stores. The third armed robbery took place at

an Amoco station. At the time of each robbery, Castro's *modus operandi* was to claim to have a weapon under his shirt, a fact Castro denies. None of the victims or witnesses ever saw an actual weapon. After waiving his right to a preliminary hearing, Castro agreed to plead guilty to two counts of armed robbery, with the State dismissing the third count and reading it into the record for sentencing purposes.

At the guilty plea proceeding, the trial court ordered a presentence investigation report. At sentencing, held in September 1996, the assistant district attorney noted that Castro had a prior record consisting only of a misdemeanor theft and some traffic matters. The prosecutor recommended that Castro receive six to eight years' imprisonment on Count one and a sentence of twenty years' imprisonment on Count two, to be served consecutive to Count one, but asked that the latter sentence be stayed with Castro receiving ten years' probation. She further suggested that the court order an alcohol and drug assessment and treatment for what the prosecutor perceived as Castro's drug dependency. Castro's attorney requested the identical sentence as the assistant district attorney and reiterated some of the same concerns and comments as the prosecutor. Castro's attorney told the trial court that he felt the State's recommendation was an appropriate sentence, given the seriousness of the crimes and because it afforded Castro an opportunity to address and conquer his drug addiction. The trial court sentenced Castro to twenty years on each count to be served consecutively to one another. He also ordered Castro to pay restitution for all three armed robberies.

In March of the following year, Castro's new appellate counsel filed a motion to modify his sentence, requesting a sentence modification hearing. In his motion, Castro claimed that he had voluntarily assisted the Milwaukee Police

Department as a confidential informant several months prior to his sentencing, and that this information constituted a new factor which entitled him to a new sentencing hearing. The trial court denied the motion without taking testimony from Castro or his original defense counsel, and Castro now appeals.[2]

II. ANALYSIS.

In Wisconsin, sentence modification involves a two-step process. ***State v. Franklin***, 148 Wis.2d 1, 8, 434 N.W.2d 609, 611 (1989). First, the defendant must demonstrate the existence of a new factor. *See **id***. If the defendant shows that a new factor exists, the circuit court must then decide whether the new factor warrants sentence modification. *See **id.*** A new factor is:

> [A] fact or a set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties.

Rosado v. State, 70 Wis.2d 280, 288, 234 N.W.2d 69, 73 (1975). A new factor "must be an event or development which frustrates the purpose of the original sentence. There must be some connection between the factor and the sentencing—something which strikes at the very purpose for the sentence selected by the trial court." ***State v. Michels***, 150 Wis.2d 94, 99, 441 N.W.2d 278, 280 (Ct. App. 1989). A defendant must show the existence of a new factor by clear and convincing evidence. *See **Franklin***, 148 Wis.2d at 8-9, 434 N.W.2d at 611.

[2] Castro was not present at this hearing, as he had been sent to a Texas prison, but the trial court proceeded without him. Castro was represented by new counsel at the hearing, and Castro's original defense counsel was not present.

Whether a fact or set of facts constitutes a new factor is a question of law which this court reviews *de novo*. *See* ***id.*** at 8, 434 N.W.2d at 611.

At the motion hearing, both the prosecutor and defense counsel argued to the trial court that the information concerning Castro's work for the police department constituted a new factor. The assistant district attorney advised the trial court at sentencing that she knew nothing about Castro's work as an undercover informant, and that she was confident that Castro's then-attorney knew nothing about it either. She stated that, as a consequence, the sentencing trial court was never told of Castro's work and that she was quite certain that this information would have had a bearing on the trial court's decision.

Despite some initial confusion by the trial court at the motion hearing,[3] the trial court ultimately determined that Castro's police work was not a new factor justifying sentence modification, because that information did not "frustrate[] the sentencing court's original intent when imposing that sentence." On appeal, the State agrees with the trial court's finding, and also argues that the information concerning Castro's undercover police work is not a new factor because it was in existence at the time of sentencing, and was not unknowingly overlooked by all of the parties. The State argues that the information could not have been unknowingly overlooked by all the parties because Castro knew about his police work at the time of sentencing.

[3] The trial court stated at the beginning of the motion hearing that he did not believe the information was a new factor. However, he mistakenly thought Castro had helped the police to ameliorate his sentence for some earlier drug charges. As previously noted, Castro did not have any prior record except a misdemeanor theft and some traffic matters.

By contrast, Castro argues that the information concerning his police work is a new factor for two reasons. First, Castro argues that, although he obviously knew at the time of sentencing that he had previously worked for the police, he did not make a conscious, tactical choice to withhold that information from his defense counsel, the prosecutor, and the trial court. Therefore, Castro argues that the information, although in existence at the time of sentencing, was unknowingly overlooked by all of the parties. Second, Castro contends that the information concerning his police work was highly relevant to his character, and was also relevant to the need to protect the public, his rehabilitative need to overcome his drug addiction, and his remorse, repentance and cooperativeness. Thus, Castro argues that the information did frustrate the purpose of the trial court's sentence. We conclude that, if Castro made a conscious, tactical choice to withhold the information concerning his undercover police work, that information would not be a new factor which would justify sentence modification. On the other hand, if, at a hearing, the trial court determines the reasons surrounding Castro's failure to present this information rise to the level of a new factor, the trial court should then determine whether sentence modification is appropriate.

A. Whether the information was "unknowingly overlooked" by all parties.

In ***Rosado***, the defendant was charged with and pleaded guilty to having sexual intercourse with a child, based upon one act of intercourse with a fifteen-year-old girl. *See* ***Rosado***, 70 Wis.2d at 282-83, 234 N.W.2d at 70. At the sentencing hearing, a probation and parole officer testified that, upon further investigation, she had learned that the defendant had taken the girl to Puerto Rico for nearly five months, and that during that time, they had engaged in consensual acts of intercourse, fellatio, and sodomy. *See* ***id.*** at 284, 234 N.W.2d at 71.

Defense counsel claimed total surprise in regard to this information, and the trial court granted a three-day recess in the proceedings. *See* ***id.*** At the new hearing, several character witnesses testified in Rosado's favor, but Rosado did not testify regarding the incident. ***Id.*** at 285, 234 N.W.2d at 71. The trial court then imposed a fourteen-year sentence. *See* ***id.***

Rosado filed postconviction motions, claiming, *inter alia*, the existence of new factors justifying sentence modification. *See* ***id.*** The new factors were Rosado's explanation of the Puerto Rico incident, which he had never given. *See* ***id.*** The trial court denied the motions. *See* ***id.***

The supreme court affirmed, holding that Rosado's failure to testify did not transform his side of the story into a new factor. ***Id.*** at 288-89, 234 N.W.2d at 73. The trial court held that Rosado's side of the story was not unknowingly overlooked by all of the parties because:

> [D]efendant was available to give his explanation of the Puerto Rican affair at the December 17th meeting, and his counsel was fully aware at that time that the trial court considered this incident relevant to sentencing. This failure to testify at this time can only be interpreted as a conscious tactical choice.

Id.

By contrast, in this case, we do not know if Castro's failure to inform his defense counsel, the prosecutor, or the trial court of his prior undercover police work was or was not a "conscious tactical choice." Since Castro was not present for the motion hearing, his reasons for failing to advise his counsel if, indeed, he did not tell his then-counsel or the prosecutor, are unknown. It may have resulted from the fact that he was unaware that this information would

be helpful to the trial court at sentencing, or because he was unfamiliar with the court system and assumed this information was already known to the prosecutor and trial court. On the other hand, it may have resulted from a conscious, tactical choice. For example, given the realities of prison life, if Castro believed he would only serve a few years in prison, he may have been afraid to be viewed by other inmates as a "snitch." Therefore, on remand, we direct the circuit court to make specific factual findings concerning whether Castro informed his attorney of this information and, if not, what Castro's reason was for failing to convey the information to his defense counsel, the prosecutor, and the court. If the court concludes that Castro made a conscious, tactical choice to withhold the information, it should deny Castro's motion. If however, the circuit court finds Castro did not make a conscious, tactical choice to withhold the information, the information does constitute a new factor, because, as we next discuss, the information does frustrate the purpose of the circuit court's sentence.

B. Whether the information frustrated the purpose of the trial court's sentence.

At the hearing on Castro's postconviction motion, the prosecutor who was involved in Castro's original sentencing argued that the information that Castro "had taken some efforts to rehabilitate himself in that he was cooperating with authorities and actively working to close down drug houses" constituted a new factor because it frustrated the purpose of Castro's sentence. We agree that, if Castro withheld the information, not because of a conscious, tactical choice, the lack of that information frustrated the purpose of the circuit court's sentence.

First, the information that Castro had voluntarily worked with the police as a paid undercover informant, to rid the city of drug houses and drug dealers, clearly was relevant to an assessment of Castro's character. The character

of the offender, along with the gravity of the offenses, and the need for protection of the public, are the primary factors which a trial court must consider when sentencing a defendant. *See* ***Harris v. State***, 75 Wis.2d 513, 519, 250 N.W.2d 7, 11 (1977). Although the State argues that Castro's character was not "the focus of or the purpose behind the sentence imposed," that view is incompatible with the fact that the character of the offender is always a *primary* factor which trial courts must consider. As the supreme court has stated, a defendant's "character is highly relevant to sentencing." ***Rosado***, 70 Wis.2d at 288, 234 N.W.2d at 73. Thus, because Castro's prior police cooperation obviously was relevant to a determination of his overall character, the lack of this information frustrates the purpose of the trial court's sentence.

Second, although the trial court's sentencing comments are lengthy and the trial court touched on a variety of concerns, two themes emerge which could have been influenced by the overlooked information. First, the trial court remarked on Castro's serious drug dependency problem, and noted that Castro had a "tremendous drug problem." At the time Castro assisted the police in their attempt to shut down drug houses, he had no charges pending against him, unlike many confidential informants who assist the police in exchange for a favorable sentence recommendation for their pending charges. According to the prosecutor involved in Castro's sentencing, she believed Castro had been motivated by a desire to "try[] to get out of his drug lifestyle and he was trying to do that by cooperating with the police." It is conceivable that, had the trial court known of Castro's steps towards ridding himself of his drug problem prior to being charged with a crime, the court may have put more credence into Castro's statements that he was remorseful and desirous of change. Second, the trial court was very concerned with the public's right to be protected. The trial court stated that Castro

needed to demonstrate by his conduct that he no longer posed a risk to the community. It is quite possible that the fact that Castro had, several months previously, assisted the police, may have impacted the trial court's assessment of how great a risk Castro posed to the community. Thus, at least two of the trial court's major concerns mentioned at sentencing could have been affected by the additional information. Consequently, we conclude that the trial court's lack of information regarding Castro's prior police cooperation does frustrate the purposes of the trial court's original sentence.

The issue presented by this appeal is not whether Castro's sentence should be modified, but rather, whether Castro is entitled to a hearing to demonstrate the existence of a new factor which, had it been known, may have impacted on his sentence. We conclude that if the circuit court finds that Castro withheld the information, but did not make a conscious, tactical choice to do so, Castro has proven that a new factor exists, and is entitled to a new sentencing hearing. At the new hearing, it may well be that the trial court will reach the same sentencing conclusion. On the other hand, the trial court may find that the new information lessens the need for two twenty-year consecutive sentences. Accordingly, we remand to the trial court for further factual findings, and a new sentencing hearing, if necessary.[4]

III. CONCLUSION.

[4] By remanding, the Majority neither "opens a huge loophole in the wall of sentencing-finality" nor creates a new "Castro hearing." *See* Dissent at 5. The Majority merely desires the trial court to apply the "new factor" test, as it was stated in ***Rosado***, to the facts of this case. A new hearing is required in this case because the circuit court did not have the chance to determine whether Castro "unknowingly overlooked" the information concerning his role as a police informer, or, alternatively, made a "conscious tactical choice" to withhold that information.

The information that Castro had previously cooperated with the police as a paid undercover informant in an attempt to rid the city of drug houses and drug dealers was in existence at the time of sentencing, but may have been unknowingly overlooked by all the parties. If Castro withheld the information, unless he made a conscious, tactical choice to do so, it was unknowingly overlooked, and the fact that the trial court lacked this information frustrates the purpose of the court's original sentence. Therefore, we reverse the trial court's order denying Castro's postconviction motion, and remand to the circuit court for a hearing to determine if Castro failed to advise his defense counsel of his work as a confidential informant, and if so, whether he did so as the result of a conscious tactical choice. If the trial court finds the information constitutes a new factor, the court should then determine whether sentencing modification is appropriate.

By the Court.—Judgment affirmed; order reversed and cause remanded with directions.

Not recommended for publication in the official reports.

No. 97-1270-CR(D)

FINE, J. *(dissenting)*. The Majority gives Betzael Castro, a three-time armed robber, a shot at another kick at the sentencing cat. Judge Dominic S. Amato sentenced him to prison for forty years. Judge Timothy G. Dugan upheld Castro's sentence. That may now be undone if Castro can persuade a judge other than Judge Amato or Judge Dugan that Castro's failure to mention his work as a paid police informer was not a "conscious, tactical choice."[5] Presumably, Castro is hoping to get a judge who will be more sympathetic than was Judge Amato or Judge Dugan to the prosecutor's agreement with Castro and his lawyer that Castro receive only the plea-bargained recommendation of six to eight years plus probation. I respectfully dissent.

The criminal complaint and the criminal information both charged Castro with three armed robberies.[6] One armed-robbery charge was plea-bargained away. As the Majority recognizes, something cannot be a "new factor" for sentencing purposes if it was known by the defendant at the time of sentencing, and not unknowingly overlooked. *See* ***Rosado v. State***, 70 Wis.2d 280, 288–289,

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[5] During the hearing on Castro's motion for postconviction relief, the prosecutor told the Honorable Timothy G. Dugan, who was hearing Castro's motion, that "Judge Amato vastly exceeded what my recommendation was in the sentencing of" Castro. The prosecutor gave *that* reason, in addition to Castro's pre-robbery work as a paid drug informer, as a basis for her request that Judge Dugan "reconsider" the sentence imposed by Judge Amato. On remand, Castro has the absolute right to bump both Judge Amato and Judge Dugan and get a new judge. *See* § 971.20(7), STATS.

[6] The Majority seems to credit Castro's assertion that he really did not have a gun, even though he told the victims that he did. The legislature, however, has made that fact not material to the charge of armed robbery—wisely not requiring victims to challenge a robber's claim to be armed. *See* § 943.32(1) & (2), STATS.

The criminal complaint recites that Castro admitted to a *fourth* armed robbery, which was not charged.

234 N.W.2d 69, 73 (1975). The alleged "new factor" must also be "highly relevant to the imposition of sentence." ***Id.***, 70 Wis.2d at 288, 234 N.W.2d at 73.

Castro worked as a paid informer in February and March of 1996. Several months *later*, on May 31, 1996, and June 10 and June 21, 1996, he committed the three armed robberies that are the subject of this appeal.[7] The Majority remands so Castro can prove that "he did not make a conscious, tactical choice to withhold" from his trial lawyer or the trial court the fact that he worked as a paid police informer. The Majority agrees with Castro that his work as a paid informer, if not withheld from Judge Amato as a matter of tactics, is a new factor because it shows that Castro was on the golden path to rehabilitation. I discuss briefly these two foundations for the Majority's decision to remand.

1. There is nothing in the record beyond assertions by Castro's lawyer that his failure to reveal his work as a paid informer was something that he "unknowingly overlooked." *See* ***Rosado***, 70 Wis.2d at 288, 234 N.W.2d at 73. Castro's bare, self-serving conclusions are slim threads from which to hang the result reached here. *See* ***State v. Bentley***, 201 Wis.2d 303, 313–314, 548 N.W.2d 50, 54–55 (1996) ("[A] defendant [seeking to withdraw a plea] cannot rely on conclusory allegations [in a postconviction motion], hoping to supplement them at a hearing…. [A] defendant should provide facts that allow the reviewing court to meaningfully assess his or her claim.").

As the Majority recognizes, but now shunts aside, given the realities of prison life, it is likely that Castro was afraid to let those with whom he thought

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[7] As noted, one of the armed robberies was dismissed as the result of a plea bargain. The prosecutor called it a "read in"; Judge Amato considered it in sentencing.

he would be residing under a sentence of six to eight years know about his work as what they would view as a paid "snitch." When Judge Amato sentenced him to forty years, rather than the plea-bargained recommendation of six to eight, the calculus changed; it is likely that he preferred to keep secret his work as a paid informer if he was only going to serve a few years at most, but would risk going public to avoid a forty-year sentence that would require that he serve at least ten years before parole.[8] The pre-sentence writer called Castro "manipulative"; his "forgetting" about his work as a paid informer is just too convenient to be credible.[9] Castro clearly knew about his work as a paid informer—there is no contention that he had amnesia; the Majority does not explain how he could "unknowingly overlook" this significant event in his life. Indeed, like ***Rosado***, the record reflects that Castro's failure to reveal his work as a paid drug informer "can only be interpreted as a conscious tactical choice." ***Rosado***, 70 Wis.2d at 289, 234 N.W.2d at 73.

In ***Rosado***, the supreme court held that because the defendant was available to give his explanation of the Puerto Rican affair at sentencing, and because his counsel was aware at that time that the incident was relevant to sentencing, the defendant's failure to testify at that time "can only be interpreted

[8] A study commissioned by the Wisconsin Policy Research Institute reports that "the average length of a sentence in Wisconsin is 10.5 years, but the average length of actual confinement is under 2 years." J. DiIulio, *Crime and Punishment in Wisconsin, in* 3 WISCONSIN POLICY RESEARCH INSTITUTE REPORT, No. 7 (1990). Absent extraordinary circumstances and exceptions not material here, a prisoner must serve at least twenty-five percent of a sentence (or six months, if that is more time than twenty-five percent of the sentence) before he or she is eligible for parole. Section 304.06(1)(b) & (1m), STATS.

[9] Castro's rejoinder to the pre-sentence writer's assessment that he was "manipulative" was his comment that the armed robberies were "the one time that I did manipulate, make them think that I would do something, make them see things a certain way to get what I wanted." This sophist denial underscores the accuracy of the pre-sentence writer's analysis.

as a conscious tactical choice." ***Id.*** Similarly, Castro was available at sentencing to testify about his work as a paid drug informer, his counsel was clearly aware that Castro's involvement with drugs was relevant to sentencing, and his counsel obviously had discussed the topic with Castro in preparing for the sentencing hearing.[10] Castro's counsel discussed at great length Castro's drug addiction, in an

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[10] The State made the following statements regarding Castro's involvement with drugs:

> I think after a period of time, hopefully his drug addiction, he will get some treatment in prison and get some insight into how drugs have basically ruined his life and the life [sic] of those around him.
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> …[H]e was employed at the time of these offenses, and apparently his employment did not give him sufficient cash funds for his drug use, and that's why he committed these crimes instead.

Castro's counsel made the following statements regarding Castro's involvement with drugs:

> What we are hopeful, Your Honor, is that you will follow the recommendation which Ms. Gall and I have both proposed to the court after much discussion, because I believe … that sentence, would protect society, punish Mr. Castro, and hopefully, after he's done with his incarceration, put him in a situation where he … has the internal motivation not to recommit and not to deal with drugs again ….
>
> Your Honor, as Ms. Gall indicated, this series of events occurred, these crimes occurred within a very short period of time. Mr. Castro was at the height of his drug addiction. He will for the rest of his life, as he will learn if he hasn't learned already, always be a drug addict, and it is something that he is going to have to resist the rest of his life, through treatment programs and his own will. I believe Mr. Castro understands the difference between using that drug addiction as an excuse, which he is not proposing to the court, but asking the court to understand perhaps what was his motivation in committing these crimes at the time that he did.
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> ….
>
> I believe also, up until the time he got involved in drugs, he was a hard-working individual.
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> ….

(continued)

apparent effort to reduce Castro's moral blame for the robberies by arguing that Castro was compelled to commit robberies to pay for his drug habit.[11] In light of the extensive comments regarding Castro's battle with drugs, it is unreasonable to conclude that Castro "unknowingly overlooked" his work as a drug informant. Under these circumstances, Castro's failure to testify can only be interpreted as a conscious tactical choice. The Majority opens a huge loophole in the wall of sentencing-finality by permitting defendants to claim that although they knew at sentencing of something they later claim was a critical sentencing factor, their failure to tell either the trial judge or their lawyer was merely "inadvertent." The Majority's decision today will burden the circuit courts with another layer of hearings that, in my view, are wholly unwarranted and will divert scarce resources from those who need them; a circuit judge who has to hold a "Castro" hearing cannot give a defendant locked-up *in lieu* of bail his or her speedy trial.

2. As noted, Castro's work as a paid drug informer ended *before* he committed the armed robberies. I do not understand, and the Majority does not explain, how this could possibly be relevant to Castro's remorse for and in connection with armed robberies that he committed *after* he stopped working for

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> He will – as I indicated, he will be an addict the rest of his life. Resisting that addiction is what his job is, his first job is for the rest of his life. But I believe that type of sentence, Your Honor, will protect society, because I think it will motivate Mr. Castro, along with his own motivation, not to get involved in drugs again, and therefore not to become involved in this type of activity again. And I think the great portion of his life is reflective of the fact that when he's not in an addictive state, where he is using cocaine, he does not act in this very criminal, very antisocial manner.

[11] Significantly, the information about Castro's work as a paid drug informer, if interpreted, as the Majority suggests, as an attempt "to rid the city of drug houses and drug dealers," would have undercut Castro's argument that he was unable to resist drugs and that he was compelled to commit robberies to pay for his drug habit.

the police. Moreover, the criminal complaint not only recounted that Castro bragged about the armed robberies, but the prosecutor also mentioned this during the sentencing hearing. This, too, belies Castro's claim that his earlier work as a paid drug informer is evidence of remorse and that “he no longer posed a risk to the community.” Majority op. at 9.

Based on the empirical data, the odds are that if Castro receives a lesser sentence on remand he will, during the period he would have been locked up under Judge Amato's sentence, commit serious crimes—perhaps even killing someone. In my view, there is nothing in this record that justifies subjecting the community to that risk. Indeed, Judge Amato noted during the sentencing hearing that he sentenced Castro to forty years “to protect the public.” I agree and would affirm. Simply put, Castro’s work as a paid informer *before* he committed these armed robberies does nothing to change Judge Amato’s assessment.