

1 **UNITED STATES COURT OF APPEALS**
2
3 **FOR THE SECOND CIRCUIT**

4
5 August Term, 2007

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7
8 (Argued: April 1, 2008 Decided: April 24, 2008)

9
10 Docket No. 06-3614-cr

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12 - - - - -X

13
14 UNITED STATES OF AMERICA,

15
16 Appellee,

17
18 - v.-

19
20 JOSE NEGRON, RAFAEL GONZALES, ANGEL
21 MALDONADO, ALEXIS PRATTS, CHRISTIAN
22 SILVERIO, JOHN RODRIGUEZ, LIONEL
23 PINEIRO,

24 Defendants,

25
26 JULIO SILVERIO,¹
27 Defendant-Appellant

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29 - - - - -X
30

31 Before: JACOBS, Chief Judge, KEARSE and POOLER,
32 Circuit Judges.

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34 Julio Silverio appeals from an order of the United

¹We direct the Clerk of the Court to amend the official caption to reflect this spelling of Silverio's name.

1 States District Court for the Eastern District of New York
2 (Weinstein, J.), declining to resentence him after a Crosby
3 remand. Silverio argues that the district court erred in
4 refusing to consider the terms of a rejected plea offer in
5 which the government had offered to recommend a lower
6 sentence. For the following reasons, we affirm.

7 LAWRENCE MARK STERN, New York,
8 NY, for Defendant-Appellant.
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10 JEFFREY H. KNOX, Assistant
11 United States Attorney (Susan
12 Corkery, Assistant United States
13 Attorney, on the brief), for
14 Benton J. Campbell, United
15 States Attorney for the Eastern
16 District of New York, Brooklyn,
17 NY, for Appellee.
18

19 PER CURIAM:

20 Julio Silverio appeals from an order entered on August
21 2, 2006, in the United States District Court for the Eastern
22 District of New York (Weinstein, J.), declining to
23 resentence him after remand pursuant to United States v.
24 Crosby, 397 F.3d 103 (2d Cir. 2005). Silverio's sole
25 argument on this appeal is that the district court
26 erroneously refused to consider the terms of a rejected plea
27 offer in which the government had offered to recommend a
28 lower prison term than ultimately imposed. We affirm

1 because nothing in 18 U.S.C. § 3553(a) or controlling
2 precedent requires a sentencing court to consider a rejected
3 plea offer.

4 Silverio was one of the ringleaders of a criminal gang
5 that engaged in a series of home and business robberies over
6 an 18-month period. The victims, including families with
7 small children, were held hostage and threatened and
8 terrorized at gunpoint until cash and valuables were turned
9 over. During plea negotiations, the government expressed
10 willingness to enter an agreement under Fed. R. Crim. P.
11 11(e)(1)(C) (2000), which would include a binding sentence
12 recommendation of 17 years' imprisonment--notwithstanding an
13 estimated Sentencing Guidelines range of approximately 22 to
14 27 years. Against counsel's advice, Silverio rejected this
15 offer, believing he might obtain greater leniency from the
16 sentencing judge. Silverio later accepted a plea agreement
17 that contained no binding sentence recommendation. Pursuant
18 to that agreement, he was convicted of kidnapping in aid of
19 racketeering in violation of 18 U.S.C. §§ 1959(a)(1) and
20 (2), conspiracy to commit robbery in violation of 18 U.S.C.
21 § 1951, and use of a firearm in furtherance of crimes of
22 violence in violation of 18 U.S.C. §§ 924(c)(1)(A)(ii) and

1 (2). He was sentenced principally to 272 months of
2 incarceration.

3 Silverio's initial appeal argued (inter alia) that the
4 district court erred in restricting a downward departure for
5 diminished capacity to a single level. By summary order
6 dated May 21, 2004, this Court affirmed the sentence,
7 specifically finding each of Silverio's arguments without
8 merit. See United States v. Negron, 96 F. App'x 788 (2d
9 Cir. 2004) (unpublished), vacated on other grounds sub nom.
10 Silverio v. United States, 543 U.S. 1102 (2005).

11 Subsequently, the Supreme Court vacated that summary order
12 and remanded in light of United States v. Booker, 543 U.S.
13 220 (2005); and this Court remanded to the district court
14 for a Crosby review. See United States v. Silverio, No. 01-
15 1210 (2d Cir. Nov. 15, 2005) (unpublished). However, our
16 May 21, 2004 decision as to the arguments presented in the
17 initial appeal was explicitly made part of our November 15,
18 2005 remand order to the extent it was consistent with
19 Crosby, and thus remains the law of the case. See United
20 States v. Williams, 475 F.3d 468, 475-76 (2d Cir. 2007).

21 On appeal from the district court's decision following
22 the Crosby remand, Silverio argues that: (a) his rejection

1 of the earlier plea offer was a manifestation of his
2 diminished capacity at the time; and (b) the rejected offer
3 was an acknowledgment by the government that a lesser
4 sentence would have been sufficient. We review a sentence
5 for reasonableness, under an abuse-of-discretion standard,
6 see Gall v. United States, 128 S. Ct. 586, 594 (2007),
7 including when the district court has declined to resentence
8 pursuant to Crosby, see Williams, 475 F.3d at 474. Insofar
9 as Silverio is asserting an error in the extent of the
10 downward departure for diminished capacity in the original
11 sentence, the argument is barred by the law of the case
12 doctrine because it was adjudicated on his direct appeal.
13 See United States v. Quintieri, 306 F.3d 1217, 1229 (2d Cir.
14 2002).

15 "The law of the case doctrine will not, however, bar a
16 defendant who is not resentenced after a Crosby remand from
17 challenging the procedures used by the district court during
18 the Crosby remand." Williams, 475 F.3d at 476. Here, the
19 district court fully complied with Crosby's procedural
20 requirements, including appropriate consideration of the
21 factors set forth in 18 U.S.C. § 3553(a). Nothing in §
22 3553(a) or controlling precedent requires a district court

1 to consider a rejected plea offer. See Rita v. United
2 States, 127 S. Ct. 2456, 2465 (2007) (“[The sentencing
3 judge] may hear arguments by prosecution or defense that the
4 Guidelines sentence should not apply” (emphasis
5 added)); cf. United States v. Hamdi, 432 F.3d 115, 124 (2d
6 Cir. 2005) (noting “the well-settled legal principle that
7 ‘the sentencing judge is of course not bound by the
8 estimated range’ in a plea agreement” (quoting United States
9 v. Rosa, 123 F.3d 94, 98-99 (2d Cir. 1997))).

10 In any event, the record shows that during the Crosby
11 remand, defense counsel was given full opportunity to make
12 this argument. “[W]e entertain a strong presumption that
13 the sentencing judge has considered all arguments properly
14 presented to [him], unless the record clearly suggests
15 otherwise. This presumption is especially forceful when, as
16 was the case here, the sentencing judge makes abundantly
17 clear that [he] has read the relevant submissions and that
18 [he] has considered the § 3553(a) factors.” United States
19 v. Fernandez, 443 F.3d 19, 29 (2d Cir. 2006). The
20 sentencing decision carefully applied the § 3553(a) factors
21 to Silverio’s case, and specifically considered the kinds of
22 sentences available and the location of the sentence within

1 the Guidelines range. The district court declined to
2 resentence Silverio, in large part because of the
3 "horrendous" and "serious" nature of the offense. See id.
4 at 27 ("[I]n the overwhelming majority of cases, a
5 Guidelines sentence will fall comfortably within the broad
6 range of sentences that would be reasonable in the
7 particular circumstances."). In doing so, the district
8 court committed no procedural or substantive error.

9
10 **CONCLUSION**

11 For the foregoing reasons, the order of the district
12 court is affirmed.