

NONPRECEDENTIAL DISPOSITION

To be cited only in accordance with
Fed. R. App. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

May 28, 2010

Before

FRANK H. EASTERBROOK, *Chief Judge*

WILLIAM J. BAUER, *Circuit Judge*

TERENCE T. EVANS, *Circuit Judge*

No. 08-3799

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MARCUS L. WELTON,
Defendant-Appellant.

} On Remand from the
Supreme Court of the United
States.

Order

Our prior opinion, 583 F.3d 494 (7th Cir. 2009), affirmed Welton's sentence after concluding that the principle of *Kimbrough v. United States*, 552 U.S. 85 (2007), does not apply to the career-offender Guideline, U.S.S.G. §4B1.1. While Welton's petition for certiorari was pending, we overruled the panel's opinion in this case. *United States v. Corner*, 598 F.3d 411 (7th Cir. 2010) (en banc). The Supreme Court then granted Welton's petition and remanded with instructions to reconsider in light of *Corner*. No. 09-8367 (U.S. Mar. 20, 2010).

Welton contended in the district court that the principle of *Kimbrough* applies to §4B1.1, and *Corner* holds that this position is correct. The district court erred in thinking otherwise (though the district judge is not responsible for this error, which was based on earlier decisions that *Corner* overruled). In a post-remand filing under Circuit Rule

54, the United States contends that the judge's error was harmless. But the burden of demonstrating harmless error is on the prosecutor, and it is not evident to us that the district judge was determined to impose the same sentence without regard to the effect of *Kimbrough* on §4B1.1.

A remand for resentencing is the best way to find out. If, as the United States contends, *Corner* does not affect Welton's sentence, the district judge has only to say so. But if it does affect the exercise of discretion in sentencing, Welton is entitled to the benefit.

Welton's sentence is vacated, and the case is remanded for resentencing consistent with *Kimbrough* and *Corner*.