

**UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

**SUMMARY ORDER**

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

1           At a stated term of the United States Court of Appeals  
2           for the Second Circuit, held at the Thurgood Marshall United  
3           States Courthouse, 40 Foley Square, in the City of New York,  
4           on the 24<sup>th</sup> day of June, two thousand sixteen.

5  
6           **PRESENT: DENNIS JACOBS,**  
7                         **GUIDO CALABRESI,**  
8                         **REENA RAGGI,**  
9   **Circuit Judges.**

10  
11           - - - - -X  
12           **UNITED STATES OF AMERICA,**  
13                         **Appellee,**

14  
15                         **-v.-**   **16-1574**

16  
17           **KAVONE HORTON,**  
18                         **Defendant-Appellant.**  
19           - - - - -X

20  
21           **FOR APPELLANT:**                         GARY G. BECKER, Gary G. Becker,  
22   PLLC, New York, New York.

23  
24           **FOR APPELLEE:**                         HAGAN SCOTTEN, Assistant United  
25   States Attorney, for Preet  
26   Bharara, United States Attorney  
27   for the Southern District of New  
28   York, New York, New York.

1  
2 Appeal from an order of the United States District  
3 Court for the Southern District of New York (Kaplan, J.).  
4

5 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**  
6 **AND DECREED** that the case be **REMANDED** with instructions that  
7 the district court **VACATE** its prior detention order and hold  
8 further proceedings consistent with this summary order.  
9

10 Defendant Kavone Horton appeals from an order of the  
11 United States District Court for the Southern District of  
12 New York (Kaplan, J.), denying bail and ordering pretrial  
13 detention. We assume the parties' familiarity with the  
14 underlying facts, the procedural history, and the issues  
15 presented for review.  
16

17 We review de novo questions of law and mixed questions  
18 of law and fact, and generally apply a "clearly erroneous"  
19 standard to the factual findings of the district court.  
20 United States v. English, 629 F.3d 311, 319 (2d Cir. 2011).  
21 The district court's ultimate finding "may be subject to  
22 plenary review if it rests on a predicate finding which  
23 reflects a misperception of a legal rule applicable to the  
24 particular factor involved." Id. at 319-20 (quoting United  
25 States v. Shakur, 817 F.2d 189, 197 (2d Cir. 1987)).  
26

27 In the present case, we cannot determine whether the  
28 district court misperceived the law when it issued its  
29 detention order. The statutes under which Horton has been  
30 charged impose a rebuttable presumption that "no condition  
31 or combination of conditions will reasonably assure" the  
32 safety of the community. See 18 U.S.C. § 3142(e). The  
33 defendant bears the burden of producing evidence to rebut  
34 that presumption. United States v. Mercedes, 254 F.3d 433,  
35 436 (2d Cir. 2001).  
36

37 If the defendant produces such evidence, the  
38 presumption does not vanish; rather, it "remains a factor to  
39 be considered among those weighed by the district court."  
40 Id. But even with the benefit of this presumption, "[a]t  
41 all times . . . the government retains the ultimate burden  
42 of persuasion by clear and convincing evidence that the  
43 defendant presents a danger to the community . . . ."  
44 United States v. English, 629 F.3d 311, 319 (2d Cir. 2011);  
45 United States v. Mercedes, 254 F.3d 433, 436 (2d Cir. 2001);  
46 United States v. Rodriguez, 950 F.2d 85, 88 (2d Cir. 1991).  
47

1           The district court stated that it was the defendant's  
2 burden to show by clear and convincing evidence that he  
3 should be released.<sup>1</sup> This statement was incorrect, as the  
4 government always bears the burden. See English, 629 F.3d  
5 at 319. The next day, the district court denied bail by  
6 using a form order that stated the correct standards  
7 governing bail. On the current record, we are unable to  
8 determine whether or not the district court applied the  
9 correct burden of persuasion.

10  
11           The bail issue is a close one on this record; there are  
12 particular facts and circumstances that militate in favor of  
13 release; and other particular facts and circumstances that  
14 militate in favor of detention. Accordingly, we remand to  
15 the district court for it to reconsider bail under the  
16 correct burden of persuasion.  
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<sup>1</sup>       THE COURT: Well, that raises a very interesting  
point. Your view, as I understand it, of the  
presumption in an adverse presumption case from  
the defendant's point of view on bail is a form of  
words without meaning at all in that, well, it is  
a presumption case, the statute says I am to  
presume that in the absence of clear and  
convincing evidence to the contrary there is no  
condition[] or combination of conditions under  
which the safety of the community can be  
reasonably assured if your client is let out on  
bail. Those are all nice words but in fact the  
burden of proof is on the government. How could  
you reconcile that?

Gov't Ex. C (May 3, 2016 Tr.) at 12.

THE COURT: Look, there is a statutory presumption  
that says unless I am really seriously convinced  
that letting your guy out on some conditions will  
reasonably insure the safety of the community, he  
is in. You're telling me that the practical effect  
of that presumption is zero, that what has to  
happen here is in order to keep him in the  
government has to satisfy the burden of proof of  
the opposite proposition.

Gov't Ex. C (May 3, 2016 Tr.) at 13.

1           For the foregoing reasons, we hereby **REMAND** the case to  
2 the district court with instructions that the district court  
3 **VACATE** its prior detention order and hold further  
4 proceedings consistent with this summary order.

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FOR THE COURT:  
CATHERINE O'HAGAN WOLFE, CLERK