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

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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