Citizens Crime Commission Breakfast
October 1, 2015
Hon. Jonathan Lippman

If you are familiar with Alice's Adventures in Wonderland by Lewis Carrol, you may recall the phrase "Sentence first—verdict afterwards." These words invoke a nonsense, topsy-turvy world of absurd illogic, a world where it is acceptable to mete out punishment before trial. They are meant as a parody of justice. Yet, the words ring too true for New York's bail system. Today, defendants who are unable to post bail serve a sentence before their cases are ever resolved. They do so regardless of innocence or guilt. And the harm that this injustice causes is intolerable.

The story of Kalief Browder, familiar to many of you, is an especially wrenching example. He was arrested in the Bronx at age 16, accused of robbing a backpack. He never wavered in maintaining his innocence. He declined all offers

of a guilty plea. But unable to make bail, set at $3,000, Kalief was sent to Rikers Island for over 1,000 days. After three years, prosecutors finally dismissed the charges. They were unable to produce their only witness, who had left the country. In the meantime, Rikers was a horrific experience for Kalief, one that included violence and abuse at the hands of guards and other inmates, extended periods of solitary confinement, and attempted suicide. When he was released from prison, he had difficulty recovering from those experiences and from the loss of his adolescence. This past June, Kalief Browder committed suicide, two years after his release.

These heartbreaking and deeply frustrating events exemplify much of what is wrong with our criminal justice system in New York. Kalief Browder was still a child when

he was arrested, and he should not have been treated as an adult in the criminal justice system. Yet New York's criminal laws continue to treat 16 and 17 year olds as adults. As you know, no other state in the country, with the exception of North Carolina, sets the age of criminal responsibility this low. It continues to be absolutely mind boggling, with all we now know about adolescent brain development, that our laws in New York have not yet been changed. Furthermore, this seemingly straightforward robbery case should never have taken three years to resolve. The delays were simply unacceptable. We have taken steps to address these two problems. We have proposed comprehensive legislation to raise New York's age of criminal responsibility to 18, and we continue to await action on that proposal. And we are working closely with prosecutors, the defense bar and Mayor

De Blasio's office to attack backlogs and address delays in adjudication of cases in which defendants are in custody.

But today, I want to address the third problem that the Browder tragedy starkly illustrated: our unsafe, unfair bail system. Two years ago, I proposed legislation to fundamentally reform our system of bail, and since then I have talked day and night about this issue. When a defendant is charged with a serious offense, the legislation would require judges when making a bail determination to consider whether the defendant poses a risk to the "safety of any person or community." Unlike 46 other states and the District of Columbia, New York does not require or even permit judges to take public safety or the dangerousness of the defendant into account. Studies show that evidence-based risk assessment instruments can accurately

distinguish between low, moderate and high-risk defendants at the pretrial stage. The risk of re-offense on release, when appropriately balanced with the presumption of innocence and an opportunity to contest the underlying considerations of the risk assessment instrument, must be part of the bail determination. It defies common sense that judges must ignore the safety of victims and communities when setting bail.

The proposed legislation would also create a statutory presumption of release without bail where the judge concludes that the defendant poses no risk to public safety or legitimate risk of failure to return to court. It also makes clear that judges are authorized to impose conditions on a defendant's pretrial release, such as participation in drug treatment or a supervised release program.

A statutory presumption of release, as provided for in the proposed legislation, is critically needed. Bail in New York is intended to ensure a defendant's return to court. Instead, what it does is set up a two-tiered system of justice, one for those with money and one for those without. The numbers are alarming. Each year in New York City, nearly 50,000 defendants are jailed because they cannot make bail. Defendants are detained at arraignment in one quarter of all non-felony cases and 60% of felony cases. Nearly 90% of those for whom bail is imposed do not make bail at arraignment, and over half of those defendants remain in jail for the entire duration of their case – from arraignment to disposition – without ever being released. Fully 40% of the city's jail population is made up of pretrial detainees who are in custody simply because they are unable to post bail.

These numbers do not lie – far too many people are trapped in pretrial detention simply because they are poor.

The consequences of unnecessary pre-trial detention are deeply corrosive. Pretrial detention can tear apart the very fabric of people's lives. Being incarcerated for even a week can mean loss of income, loss of employment, and loss of public assistance. A person in a low-wage, blue-collar job may well be fired if he does not show up for work for a few days. Lack of steady wages, even for a matter of days, can cause people to fall behind on their rent and face eviction. For defendants who care for children or aging relatives, pretrial detention impacts their dependents as well as themselves. Children can end up in foster care. The elderly may end up hungry or uncared for. Defendants – and their families -- may lose their public housing or shelter

beds. Those still in school lose days or weeks of their education. And let us not forget that pretrial detention can have health consequences, with exposure to violence and disease in the tight quarters of a city jail. Lives that may be precarious to begin with can fall apart, creating an avalanche of social ills. It is critical that bail not be needlessly imposed, and that it not be needlessly high when it must be imposed.

But despite the clear need for reform and the recent public attention to the injustices of the current bail system, the legislation has languished as our policy makers are paralyzed by tough on crime/soft on crime finger pointing. The need for reform, by any standard, is stronger than ever. We cannot wait to act for one second longer, and, as the steward of the Judiciary, I will not wait to act when it is within my ability to do so. Accordingly, I am announcing today a

series of reforms that the courts can undertake immediately – steps that we can and will take within the constraints of existing law. These reforms will ensure that the Judiciary is doing everything it can to limit the great damage and human costs that result from excessive pretrial detention.

Don't get me wrong: there are cases -- and many of them -- where pretrial detention is warranted and the public safety is threatened. And judges must have the discretion to make independent bail determinations according to their judgment under the statute. The reality is that, day in and day out, judges are held to account for the decisions they make – by the media, by victims, by elected officials, by the public, and most of all by themselves. The reforms I announce today are undertaken with full consideration of the very real pressures judges confront, the somber

responsibility they bear, and the difficult job they do.

The first of these reforms is a system of automatic judicial review of bail in each and every case. Over 80% of defendants for whom bail is imposed have bail set at less than $5,000; in misdemeanor cases, 95% have bail set at less that $2,500. But for far too many defendants, bail of $2,500 might as well be $25 million. Defendants who are struggling financially far too often are not able to post even a low bail amount or secure a bail bond. In fact, a bail bond may not even be available. Experience has shown that bail bond companies -- profit-making entities -- generally are unwilling to write bonds for amounts less than $1,000 because they are not sufficiently lucrative, even with burdensome non-refundable fees and collateral requirements. Of course, it is not uncommon for bail to be

set at $1,000 or more, even for relatively minor, non-violent offenses. Indeed, the median bail amount in misdemeanor cases in New York City is $1,000. And bail may vary significantly for similar defendants with similar charges.

At the same time – and this is critically important -- research shows that a defendant's likelihood of returning to court after release on bail is barely affected by the amount of bail set, if at all. According to studies by the New York City Criminal Justice Agency, defendants out on bail in the $50 to $500 range have a 12% rate of failure to return to court; and those whose bail is between $500 and $1,000 and between $1,000 to $5,000 have an 11% failure to return rate. If the goal is to release defendants with the assurance that they will return to court, the amount of bail does not seem to matter much or at all.

In order to ensure that bail is fair and that defendants do not remain locked up unnecessarily, we are now implementing a judicial bail review program throughout New York City Criminal Court for all misdemeanor cases.

This automatic review will be triggered whenever the defendant has been unable to make bail. The review will be conducted "de novo," as already authorized by New York's Criminal Procedure Law, by a single judge in each borough. This means that the judge will take a fresh look at the case and make an independent determination whether the bail amount should be adjusted (higher or lower) or whether bail should be permitted in a less onerous form. In contrast to the arraignment parts, where enormous case volume and legally-imposed time constraints often preclude a more thorough consideration of relevant factors and where

information about the defendant's circumstances may be limited, this process will give the reviewing judge a fuller opportunity to make a more considered bail determination and defense counsel the time to present a more accurate picture of the defendant that will be relevant to that determination. With more information available and with one judge in each county conducting the reviews, this new process will also lead to greater consistency in bail decisions in misdemeanor cases.

As for felony cases, we will be issuing new court rules requiring regular, periodic judicial review of case viability and bail. When felony defendants are in custody pending disposition of the charges against them, the rules will require a status conference at designated milestones in the case. At the status conferences, the judge will evaluate the

continuing viability of the prosecution's case and readiness for trial, and where appropriate, make modifications of the defendant's bail status. For example, the judge may inquire of the prosecution when they were last in contact with their key witnesses; or if the parties state they are not ready for trial, the judge would require a specific explanation of why that is so. In the Kalief Browder case, there were numerous adjournments – one after the other. It was not until three years into the case that a judge, after pressing the prosecutor and proactively seeking to resolve the case, learned that the prosecution had lost contact with its key witness. That, in turn, finally led to a resolution of the case – a dismissal. By institutionalizing this structure for regular review of the viability of a case and, where necessary, review of bail, the courts will be able to better ensure that

felony defendants do not languish in pretrial detention.

The third initiative I announce today is a pilot electronic supervision program in Manhattan Criminal Court. Electronic supervision can be a valuable option for judges, giving them the additional security they may prefer in appropriate cases that defendants will return to court without having to post bail. Other states and the federal courts began using pretrial electronic supervision over 20 years ago. And District Attorney Cy Vance will soon be spearheading an electronic supervision pilot for 16- and 17-year-old defendants in Manhattan. So it is time that we take greater advantage of modern technology that can electronically track defendants while they are on pretrial release and quickly identify where they are if they fail to appear in court when required.

This fall, working with Herb Sturz, a nationally-recognized pioneer in criminal justice reform, Manhattan judges will be able to release defendants charged with misdemeanor offenses on electronic supervision while they await adjudication (domestic violence, assault, and sex offense cases will not be eligible).

Defendants will be considered for electronic supervision at their first court appearance after arraignment if they remain incarcerated, ensuring that it will be used only for defendants who are unable to make bail. They will also receive robo- telephone calls and texts reminding them of their court appearances.

Apart from the benefits to those who would otherwise be detained, electronic monitoring will save huge amounts money for tax payers. The annual cost of detention in New

York City is over $100,000, drastically more than the modest costs of electronic supervision -- pennies by comparison. And the economics of unnecessary, excessive incarceration are the same throughout the country. That is why conservative and liberal states and smart-on-crime political leaders in jurisdictions around the country have joined forces to support programs like electronic supervision and, more broadly, to end America's dubious claim to being the world's leader in imprisoning more of its own citizens that any other nation. This is not a right-left issue but one purely of sound, reasoned, economically prudent and humane criminal justice policy.

Finally, we will work with judges to increase the use of less onerous types of bail that are currently authorized under New York's bail statute but are rarely, if ever, used. New

York's bail statute provides for seven types of bail bonds, as well as cash bail and credit card bail. In practice, however, judges exclusively use only two types – cash bail or insurance company bail bonds. Given the crushing volume of cases in the arraignment parts and the overwhelming time pressures they face there, it is understandable that judges resort to these two familiar, traditionally-used types of bail. But we need to make much better use of every available option that will allow those who are presumed innocent to more readily post bail.

Just one example of a form of bail authorized by law but rarely used is a partially secured bail bond. This is similar to the commonly-used insurance company bail bond, in which the defendant posts a small percentage of the bail amount in cash, usually 10 percent, and then signs a bond for the

remainder with the bail bondsman. A partially secured bail bond works the same way, except that rather than signing a bond with a bail bondsman who may charge a significant fee or who may not even issue a bond because it would be unprofitable, the defendant signs the bond, for no fee, directly with the court. So rather than requiring $1,000 cash bail or an insurance company bond, the judge can set bail at $1,000 with a requirement that a much smaller amount, say $100, be paid upfront and the remainder in the form of a partially secured bond be filed with the court. This will allow a defendant of modest means who may be unable to secure an insurance company bail bond to be released pending disposition of the case.

To encourage and facilitate wider use of these forms of bail, we will be enhancing training for judges and clerks on

the availability of alternate types of bail and the procedures required. We will also share with them the extensive research that documents the efficacy of alternate forms of bail and varied bail amounts in ensuring return to court. The Criminal Court judges who will be sitting in the new bail review parts we are creating will be ideally suited to make greater use of these legally available options. Other jurisdictions and states use alternatives to cash bail -- from D.C. to Arizona and in between -- and there is absolutely no reason why New York should not be a leader in this same regard. Make no mistake, in my view the ultimate goal may well be to end our reliance on cash bail in New York. To put it simply, it is fundamentally unfair for a person's liberty to be all about how much money they have. It is wrong, by any standard, and money should be removed from the equation.

I should also note that the courts are not alone in recognizing the need for bail reform. In an effort to reduce the jail population at Rikers Island and to inject more fairness into the process, the Mayor's Office and the City Council are setting up a $1 million non-profit bail fund to assist low-income defendants in posting bail. The Mayor's Office is combining this effort with an expansion of supervised release programs, building on the small but successful programs in Queens, Manhattan, and Brooklyn. We all recognize that a bail system that punishes people before they are convicted and that punishes people for being poor is inconsistent with basic principles of justice.

Again, public officials and politicians of all stripes are now acknowledging that we face a crisis in mass incarceration in this country. Not only do we imprison large

swaths of the population, but a grossly disproportionate number from minority communities. Clearly, many in our jails and prisons have committed serious crimes, and it is critical that our justice system respond swiftly and strongly in those cases. But what of the many who present no risk to public safety who have been accused but have not been convicted of anything? How can we maintain the presumption of innocence guaranteed by our Constitution when so many people charged with low-level offenses are held in jail before trial simply because they lack the means to post bail? It is wholly unacceptable to allow the current system to continue when we have many tools for change within our grasp. While we wait for the Legislature to act -- and we have already waited far too long -- the court system can not and will not stand idly by. By taking the series of

steps I have outlined this morning, we can dramatically improve the quality of justice in New York right now.

It is my hope that, with the reforms I announce today, we can make major strides in overhauling our broken system of bail and bringing about much needed change in New York. As I've noted, all the things I am announcing can be accomplished within existing law. What we can't do alone, however, is to make public safety a part of judicial determinations or change the present statutory scheme that place people of limited economic means at such a serious disadvantage. Nevertheless, without jeopardizing public safety, these reforms will make the abstract, intangible concept we call justice concrete and real for more New Yorkers who are poor or of limited means, and more often than not are from minority communities, whose confidence

in the justice system is at a low ebb around the country. New York should be the last place where that is the case. Reforming the institution of bail in New York, from this day forward, will go a long way in ensuring that our justice system not only protects the public safety, but also is fair and just for each and every New Yorker no matter their station in life or the amount of money in their pockets. Thank you.