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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF JAMAL S.

(Papers Sealed)

No. 146

20 Eagle Street
Albany, New York 12207
September 15, 2016

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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1 CHIEF JUDGE DIFIORE: First matter on the
2 calendar is number 146, the Matter of Jamal S.
3 Counsel.

4 MS. SADRIEH: Good afternoon, Tahirih
5 Sadrieh appearing on behalf of the presenting agency.
6 I would like the - - - the Agency would like to
7 reserve three minutes for rebuttal.

8 CHIEF JUDGE DIFIORE: Three minutes?

9 MS. SADRIEH: Yes, please.

10 CHIEF JUDGE DIFIORE: Okay. Try to keep
11 your voice up.

12 MS. SADRIEH: Thank you. The question here
13 is whether the police may ask a juvenile who is
14 lawfully in custody to tap out his shoes as part of a
15 standard safety procedure, which included the removal
16 of his belt and his shoelaces.

17 JUDGE RIVERA: Why is he lawfully in
18 custody?

19 MS. SADRIEH: He was lawfully in custody
20 because he was lawfully arrested for - - - on
21 probable cause to believe that he had committed
22 disorderly conduct with probable cause to believe he
23 was sixteen-years-old, and he was brought to the
24 precinct under that understanding. And - - -

25 JUDGE RIVERA: Once they know he's fifteen,

1 what - - - why are they holding him?

2 MS. SADRIEH: Well, at that - - - for one
3 thing, at that point, all that the officers really
4 knew was that he had lied at one point about his age.
5 He had first stated that he was sixteen and then he
6 had stated that he was fifteen. At that point, the -
7 - - the respondent still didn't have any
8 identification, and he still had not provided the
9 officers with a phone number - - -

10 JUDGE RIVERA: But he had provided a way by
11 which they could contact his mother, correct?

12 MS. SADRIEH: They - - - he stated that he
13 had - - - that his mother's phone number was in his
14 phone, but the phone was not charged, and it - - -

15 JUDGE RIVERA: They did reach the mother?

16 MS. SADRIEH: Eventually, they reached the
17 mother but - - -

18 JUDGE RIVERA: Through that number on the
19 phone?

20 MS. SADRIEH: The mother - - - the number
21 was on the phone, but at the time that they were
22 lodging him into the juvenile room, they did not have
23 the number yet.

24 JUDGE RIVERA: But if they didn't think he
25 was fifteen, why are they sending him to the juvenile

1 room? It must be that they think this is his actual
2 age?

3 MS. SADRIEH: Well, they think - - - they
4 have - - - they, at this point, don't know what his
5 actual age is and so they elected to proceed
6 cautiously and to protect his rights as much as
7 possible by placing him in the juvenile room.

8 JUDGE GARCIA: Counsel - - -

9 MS. SADRIEH: But objectively, they still
10 have as much reason to believe that he is sixteen as
11 they do that he is fifteen.

12 CHIEF JUDGE DIFIORE: Ms. Sadrieh, the
13 Appellate - - - I believe the Appellate Division
14 found that - - - I believe their words were that the
15 police had no reason to believe Jamal was over
16 fifteen. And in the trial record, it indic - - - the
17 police officer testified that he was told the young
18 man was fifteen, and he put him in the juvenile room.
19 How does the finding in the Appellate Division and
20 that trial record allow - - - what impact does that
21 have on us?

22 MS. SADRIEH: The - - - I think the - - -
23 what - - - the evidence in the trial record is that
24 he stated that he was - - - he stated first that he
25 was sixteen, and he was arrested on that basis. And

1 then after - - - some twenty minutes after arriving
2 at the precinct he said that he was fifteen. So they
3 elected to - - - to treat him as if he was fifteen,
4 but they still had reason to believe that he was
5 sixteen. They don't - - - they at that - - - he had
6 created a difficulty because he had stated - - - he
7 had lied about his age at some point. But they, at
8 that point, did not have an objective basis for
9 believing either that he - - - you know, through
10 crediting the statement that he was - - - he was
11 fifteen over that that he was sixteen. And so they
12 elected to proceed cautiously. They put him in the
13 juvenile room, and they tried to find out. They
14 tried to - - - tried to - - - they charged his phone
15 and tried to reach his - - - to - - - in the effort
16 to try to reach a parent.

17 JUDGE GARCIA: Is it clear - - -

18 JUDGE RIVERA: Did they tell his mother
19 eventually don't come down?

20 MS. SADRIEH: At the - - -

21 JUDGE RIVERA: Don't come to the precinct,
22 excuse me.

23 MS. SADRIEH: Right. He did not - - - the
24 officer did not - - - was not able to reach the
25 mother until aft - - - did not reach the mother until

1 after the gun had been discovered, and at that point,
2 arrest processing for possession of a - - - for
3 possession of a weapon would take - - - often takes
4 quite some time. And so they - - - they told the
5 mother not to come in until, he - - - Officer Lear
6 (ph.) told the mother not to come in until later
7 because he - - - he knew that he was not going to be
8 able to release him - - -

9 JUDGE FAHEY: You know it seems - - -

10 MS. SADRIEH: - - - to her at that - - -
11 immediately.

12 JUDGE FAHEY: It seems procedurally that -
13 - - that this was proceeded as a temporary detention,
14 not an arrest detention initially when the search of
15 the shoe took place. So if we rule in your favor,
16 are we saying that there needs to be a full search of
17 every juvenile temporarily detained?

18 MS. SADRIEH: Well, the - - - there needs -
19 - -

20 JUDGE FAHEY: In other words, you know, the
21 shoe, well, I can see the shoe in a frisk but what
22 about a strip search? What - - - what about a more
23 comprehensive search? Where does it lead?

24 MS. SADRIEH: I don't think that - - - that
25 tapping out shoes leads to - - - leads to a strip

1 search. I think even - - - I mean a search, as a
2 search incident to arrest, the police are authorized
3 to conduct a full search of the person. That - - -
4 this court has not held that that necessarily
5 includes a strip search and certainly not for a
6 violation. And - - - but even if this was not consid
7 - - - even if this was just considered a detention,
8 it is a - - - it is a reasonable measure, as an
9 adminstra - - - as an administrative search for
10 security reasons.

11 JUDGE FAHEY: Admin - - - administrative
12 searches, I believe - - - well, in other custody
13 settings they do allow searches of shoes in
14 administrative searches; is that correct?

15 MS. SADRIEH: I believe that that is
16 correct. And just looking at it as an - - - as an
17 administrative search, the question is whether the
18 balancing of the government interest in the search
19 outweighs the privacy interest of the individual.
20 And - - -

21 CHIEF JUDGE DIFIORE: What is an
22 administrative search, and what's the standard for an
23 administrative - - -

24 MS. SADRIEH: An administrative search is a
25 - - - is a search that is not an investigative

1 search. It's not a search that is designed to
2 uncover evidence of crime. It is conducted for some
3 other reason. In this case - - -

4 CHIEF JUDGE DIFIORE: For example?

5 MS. SADRIEH: In - - - well, for instance,
6 I mean, an inventory search is not - - - is not a
7 investigative search. It's an administrative search
8 that's conducted for other reasons. This particular
9 search was conducted to protect the safety of the
10 detainee and to protect the safety of the precinct as
11 a whole. And it was - - - and so - - -

12 CHIEF JUDGE DIFIORE: Can anyone be - - -
13 so if I talked into the precinct, could I be subject
14 to an administrative search under one of the reasons
15 that you say are various reasons?

16 MS. SADRIEH: Presumably, if you are
17 walking into a police precinct voluntarily, you are
18 not in custody. And the - - -

19 CHIEF JUDGE DIFIORE: I understand that.

20 MS. SADRIEH: Right. But the interests - -
21 - the interests are different when there's a person -
22 - - when somebody is in custody, in police custody,
23 the police have a responsibility towards that person
24 to ensure that he does not harm himself and to ensure
25 generally the safety of the precinct against people

1 that they are - - - that they are holding. And there
2 is also a difference in your privacy interest. As
3 this court has articulated it, taking somebody into
4 custody is the greater seizure, a more - - - a search
5 that incident to being in custody is - - - is
6 permissible because it is a lesser seizure.

7 CHIEF JUDGE DIFIORE: Thank you. Thank
8 you, counsel.

9 JUDGE RIVERA: And if - - - may I just ask
10 one more, quick?

11 CHIEF JUDGE DIFIORE: Yes.

12 JUDGE RIVERA: If - - - when they're on the
13 - - - the street - - -

14 MS. SADRIEH: Yes.

15 JUDGE RIVERA: - - - the initial stop when
16 - - - when he's talking to the defendant. The
17 defendant says - - - when he asks him the age, he
18 says sixteen. But before he actually takes him to
19 the precinct, if the defendant then says I'm fifteen,
20 could he take him to the precinct anyway? Under your
21 theory, you're saying he's got reasonable cause to
22 believe he's sixteen because he has lied. Could he
23 do that at that point?

24 MS. SADRIEH: If - - - you mean if - - - if
25 he never said that he was sixteen?

1 JUDGE FAHEY: No, no, no. He says he's
2 sixteen but he doesn't take the amount of time you're
3 referring to, that is between the interaction on the
4 street when he first says he's sixteen and about
5 fifteen minutes at the precinct he then says, well,
6 I'm fifteen. If he had said that before he gets to
7 the precinct, if he - - - before they even put him in
8 the police car, he says, no, no, I'm fifteen.

9 MS. SADRIEH: Right.

10 JUDGE RIVERA: Under your theory, can't
11 they take him anyway because they're not sure and
12 they have enough reason to believe he's really
13 sixteen?

14 MS. SADRIEH: It difficult to say on that -
15 - - on that - - - in that scenario whether or not - -
16 - whether or not it would be reasonable to credit one
17 or the other. I mean it - - - it could be that they
18 would have reasonable - - -

19 JUDGE RIVERA: Does it make a difference if
20 it's on the street or at the precinct? Why does it
21 matter?

22 MS. SADRIEH: I think the only - - - well,
23 that's - - - I mean I think that it - - - certainly,
24 it could be that he would - - - that the police
25 officer would have reason to believe that he was

1 sixteen if he said that he was sixteen. It's - - -
2 and he has no identification and he has no way - - -
3 there is no way at that point of contacting a parent
4 or somebody else who can confirm what his age is. I
5 mean there - - - it is possible that there could be
6 circumstances where it would not be reasonable. But
7 - - -

8 JUDGE RIVERA: Thank you.

9 MS. SADRIEH: - - - not on this record.

10 CHIEF JUDGE DIFIORE: Thank you, counsel.

11 MS. SADRIEH: Thank you.

12 CHIEF JUDGE DIFIORE: Counsel.

13 MR. ROGERS: May it please the court,
14 Raymond Rogers for the respondent. I want to begin
15 by briefly discussing the jurisdictional issue in
16 this case. Which is this case is here by way of a
17 notice of appeal on a two-justice dissent which must
18 be on an issue of law here. The issues in the case
19 are the reasonableness of the police search, whether
20 it was a proper search incident to arrest, protective
21 search. This court has held, repeatedly, that those
22 are all mixed questions of law and fact, so we
23 believe the case should be dismissed on the ground
24 it's not properly before the court.

25 But even if the case is here, that - - -

1 that goes to the appealability of the case and the
2 reviewability. And I think the Chief Judge was
3 getting to that in the question. It's a very - - -
4 these are mixed questions of law and fact. It's a
5 very limited scope of review.

6 JUDGE GARCIA: Let's get to that issue on
7 the facts. The time line here, there's a statement
8 I'm sixteen, they come to the precinct. I think it's
9 fairly clear from the record that twenty minutes
10 later he says no, I'm fifteen. I don't have the
11 number for my mother. It's in my phone. My phone
12 needs to be charged. Is it clear in the record that
13 it's while the phone is charging that the gun is
14 discovered?

15 MR. ROGERS: It's not clear exactly when
16 the gun was discovered, just as it's not clear
17 exactly when the phone call is made to the mother.
18 The police officer actually gives approximately three
19 different times, 11, 11:30, and midnight. So - - -

20 JUDGE GARCIA: But does he gives the times
21 - - - I'm asking does he gives the times in a
22 relation to what else is happening rather than a
23 specific time?

24 MR. ROGERS: There's - - - the only other
25 time I think is referred to is about twenty minutes

1 after he's there - - -

2 JUDGE GARCIA: Right.

3 MR. ROGERS: - - - Jamal says that he's
4 fifteen.

5 JUDGE GARCIA: Right.

6 MR. ROGERS: But the finding of fact, which
7 I think if there's record support for that, is that
8 the Appellate Division said the police then treated
9 him as a juvenile as if he was fifteen and had no
10 reason to think he was older than fifteen. There is
11 record support for that here. And this court has
12 very limited scope of review beyond that. It's only
13 to look to see if the - - -

14 JUDGE GARCIA: But what if they're treating
15 him as fifteen in an excess of caution?

16 MR. ROGERS: They - - - that's probably
17 what they should do - - -

18 JUDGE GARCIA: Right.

19 MR. ROGERS: - - - is - - - is treat him as
20 he's fifteen in an excess of caution.

21 JUDGE GARCIA: But they're not assuming
22 he's fift - - - they're - - - they're saying, okay,
23 we'll treat you like you're fifteen, we don't know.

24 MR. ROGERS: Right.

25 JUDGE GARCIA: And they could have thrown

1 him in an adult holding facility but instead they put
2 him in a juvenile waiting area.

3 MR. ROGERS: Right. But at the time that
4 he's fifteen, which is a holding off the Appellate
5 Division, they have no grounds for holding him.

6 JUDGE PIGOTT: But don't they both - - -
7 don't the majority and the dissent both say it's a
8 question of whether or not it's a safety measure or
9 not?

10 MR. ROGERS: There is discussion of the
11 safety measure but the - - - the majority says when
12 they - - -

13 JUDGE PIGOTT: But they don't disagree on
14 the facts is my point. The majority and the dissent
15 take the facts as they are and then they make a legal
16 determination on that. And the majority, as I
17 understand it said, you know, there's no reason to
18 ask him to remove his shoes as a safety measure, and
19 the dissent says, yes, there is, right?

20 MR. ROGERS: That's a - - - that's a later
21 point. But the earlier point the majority holds that
22 once the police determined he was fifteen, they had
23 no grounds to hold him whatsoever, no grounds to put
24 him in that juvenile room. Because the only grounds
25 they have him down there for are either disorderly

1 conduct, a violation, or a traffic infraction,
2 neither of which a juvenile can be taken into custody
3 for.

4 JUDGE PIGOTT: But your - - - your entire
5 case rests on - - - on they never should have taken
6 him to the precinct.

7 MR. ROGERS: No. Well, we think - - - we
8 don't think this is a narrow case involving just the
9 - - - the last shoe search that took place We do
10 think you look - - - this is a street encounter, you
11 look from the very beginning of it until the very
12 end.

13 And under Victor M., this court's
14 precedent, it's clear that when he didn't have ID - -
15 - and the police were always only going to write a
16 summons. This was never a full custodial arrest.
17 That's an important distinction. Judge Fahey said it
18 was a temporary detention, that's all it ever was.
19 In Victor M., the court said when you have a teenager
20 - - - and in that case it was - - - they were going
21 to write a summons for gambling, you have a teenager
22 who doesn't have identification but lives nearby, and
23 my client had given the police his - - -

24 JUDGE GARCIA: That was a teenager. Victor
25 M. actually says "Victor was fifteen years old at the

1 time of his arrest and there is no evidence in the
2 record that the officer either believed or had reason
3 to believe that he was older." Isn't that very
4 different?

5 MR. ROGERS: No, I don't think so. Because
6 they say it was unreasonable to take Victor to the
7 precinct - - -

8 JUDGE GARCIA: Because they knew he was
9 fifteen.

10 MR. ROGERS: No, no. They already took him
11 home to get his identification to write the summons.

12 JUDGE GARCIA: Right, because they had no
13 reason to believe he wasn't fifteen. Here, your
14 client said I'm sixteen.

15 MR. ROGERS: That's a different part of the
16 holding in Victor M. There were two or three
17 holdings and the one part about where to take him,
18 it's very clear, the court said that it wasn't
19 reasonable - - -

20 JUDGE PIGOTT: But I - - - I want to get
21 back - - - you're saying they should not have taken
22 him to the precinct.

23 MR. ROGERS: That's right.

24 JUDGE PIGOTT: They had no reason to. He
25 said he was sixteen. They - - - they should not have

1 believed that. They should have said you're fifteen
2 and we're letting you go, as much as you want to say
3 you're sixteen.

4 MR. ROGERS: No. We're saying he - - - if
5 they wanted to write a summons - - -

6 JUDGE PIGOTT: I know. But my point is
7 that - - -

8 MR. ROGERS: - - - they should have taken
9 him home.

10 JUDGE PIGOTT: My point is that if he says
11 he's sixteen, they take him into custody. Is that -
12 - - nothing wrong with that, right?

13 MR. ROGERS: Well, they cannot - - - they
14 possibly could have but they did not make a full
15 custodial arrest here. They took him to the precinct
16 only to issue the summons. So he's never - - -

17 JUDGE PIGOTT: Because they could. Because
18 he was sixteen, as far as they were concerned. He
19 then says he's fifteen.

20 MR. ROGERS: Yes.

21 JUDGE PIGOTT: And they - - - and they take
22 him to this room. What - - - what I wanted to focus
23 was what I thought would be the thing where the - - -
24 where the majority says this is not a safety measure,
25 that they should have let - - - let him keep his

1 shoes on. Which meant he, therefore, could have kept
2 his weapon. And I - - - I just don't see that. I
3 would think that if you're going to - - - if you're
4 going to put him someplace, you ought to make sure he
5 doesn't has a gun that he can shoot somebody with or
6 himself, for that matter.

7 MR. ROGERS: Well, it's - - - once again, I
8 think it's very important to focus on the fact that
9 it's only a temporary detention, not a full custodial
10 arrest.

11 JUDGE FAHEY: But the - - - but staying on
12 that for a second, Judge Pigott's point, the
13 interesting part about that is let's say forget about
14 the gun, no one could contest that they could take
15 his shoelaces or his belt in the temporary detention.
16 So wouldn't you check for a gun?

17 MR. ROGERS: Well, we don't think he should
18 have been detained in the - - - in the juvenile room.

19 JUDGE FAHEY: No, I - - - I understand
20 that. But let - - - let's talk about the frisk
21 itself or the search itself, a search and a temporary
22 detention because it seems to me to be boiling down
23 to that. I think it is a temporary detention, so
24 what's proper in that situation? That's what we're
25 talking about here. So the safety issue then becomes

1 absolutely relevant. So if you can take somebody's
2 shoelaces, somebody's belt to protect them, you can't
3 tell them to bang their shoes on the floor to make
4 sure there's nothing in there they can hurt
5 themselves with?

6 MR. ROGERS: I don't think there's - - -
7 there are any grounds here. When you look at the
8 law, even for a search incident to arrest, under this
9 court's recent precedent Jimenez with - - - with
10 Gokey, a search incident to arrest - - -

11 JUDGE PIGOTT: Not to interrupt you, but
12 looking at the majority, and maybe you can get me off
13 this, but the - - - it said "The removal of Jamal's
14 shoes cannot be justified as a protective measure."
15 And said "The dissent's suggestion that the search
16 conducted here was necessary to prevent Jamal from
17 shooting himself or a police officer was unsupported
18 by the record."

19 MR. ROGERS: It was additionally intrusive
20 to have him take his shoes off. He'd already been
21 frisked three times, and both officers - - -

22 JUDGE PIGOTT: Well, that's my point. You
23 agree with them that - - - that they should not have
24 told him to take off his shoes.

25 MR. ROGERS: That's correct.

1 JUDGE PIGOTT: All right. And even though
2 we know now that he had a gun he could shoot - - -

3 MR. ROGERS: Well, we - - - we don't look
4 at the results of the search, Your Honor.

5 JUDGE PIGOTT: Well, we do to the extent
6 that if - - - if they say we're doing it for safety
7 and you say, well, that's - - - it's not for safety,
8 it's not, they just shouldn't have done it, I - - - I
9 don't get it.

10 JUDGE STEIN: Are - - -

11 JUDGE PIGOTT: I mean they obviously wanted
12 to do it for safety. That's what they always do for
13 safety, as Judge Fahey - - - Fahey's saying, that's
14 why the belt goes, that's why the shoe - - -

15 MR. ROGERS: But this - - - this court has
16 limited even safety searches. Strip searches, for
17 example, this court has said there must be reasonable
18 suspicion that the individual is concealing
19 contraband. In this case, both police officers
20 testified they had no reason to suspect my client was
21 concealing anything.

22 JUDGE STEIN: Okay. So are we - - - are we
23 then looking at what the reasonableness of the search
24 under - - - or the - - - of the issue under the
25 circumstances of this particular case? And if so,

1 why isn't this a mixed question?

2 MR. ROGERS: Well, I think it - - - it is -
3 - - everything in here is a mixed question of law and
4 fact. And the question is is there record support
5 for that, and - - - and I believe there is here that
6 the police had no - - -

7 JUDGE STEIN: But it wasn't the same - - -

8 MR. ROGERS: - - - suspicion.

9 JUDGE STEIN: It wasn't the same officer
10 who had done the pat down and it was - - - it was - -
11 -

12 MR. ROGERS: And he testified he had no
13 reason to suspect that - - - that this individual was
14 armed in any way. He was fully cooperative from the
15 very beginning. There was no justification - - -

16 JUDGE PIGOTT: So you're argu - - -

17 MR. ROGERS: - - - for the initial risk.

18 JUDGE PIGOTT: You're arguing that we
19 should write a decision that says if you detain a
20 juvenile, whether it - - - justifiably or not, don't
21 search him?

22 MR. ROGERS: No. We're saying you need
23 reasonable suspicion.

24 JUDGE PIGOTT: Right, don't search him.

25 MR. ROGERS: No, you need - - -

1 JUDGE PIGOTT: There's no reason to suspect
2 somebody may hang themselves or - - - or use their
3 shoelaces. Leave that alone and by the way, don't
4 search his pockets and don't - - - and don't look for
5 weapons because he's a juvenile.

6 MR. ROGERS: He's not being put into a
7 detention facility.

8 JUDGE PIGOTT: Right.

9 MR. ROGERS: That's the important
10 difference.

11 JUDGE PIGOTT: Right.

12 MR. ROGERS: This is one individual - - -

13 JUDGE PIGOTT: So don't touch him, right?

14 MR. ROGERS: Pardon?

15 JUDGE PIGOTT: So don't touch him.

16 MR. ROGERS: That's correct. Do not search
17 him.

18 JUDGE PIGOTT: Right.

19 MR. ROGERS: He's only being temporarily
20 detained. You have no - - - no reasonable suspicion
21 to search him for anything.

22 JUDGE PIGOTT: No. They don't - - - it's
23 not - - - they don't want to do that. They want to
24 make sure he's safe.

25 MR. ROGERS: Right. And they could keep an

1 eye on him. The never even had to bring him to the -
2 - - to the precinct in the first place. In Victor M.
3 - - -

4 JUDGE PIGOTT: I know but we're already
5 there - - - I guess - - -

6 MR. ROGERS: In Victor M. this court said
7 you shouldn't.

8 JUDGE PIGOTT: I guess for you - - - excuse
9 me, I'm want - - - I'm going to concede for you. I'm
10 saying you want to talk about before they got to the
11 precinct. I want to talk about after they got there.

12 MR. ROGERS: I'm okay at the precinct, too,
13 though. And I think even if it's an adult - - - when
14 you have a temporary detention of an adult, let's say
15 they take an adult in for a traffic infraction
16 because the adult doesn't have ID. In that
17 situation, unless you have reasonable suspicion, you
18 shouldn't be searching the adult, either.

19 JUDGE PIGOTT: Let's take - - - let's
20 assume they impound a car. Can they search it?

21 MR. ROGERS: Ah, you impound a car. Well,
22 you might - - - for a car you can do an inventory
23 search, sure.

24 JUDGE PIGOTT: Exactly. And so - - -

25 MR. ROGERS: But he's not being put - - -

1 he's not being incarcerated. My client is not being
2 put into jail. If - - - if he's being booked and put
3 through the system, you can do an inventory search.
4 You can do a jail processing search.

5 JUDGE PIGOTT: I don't mean to be
6 facetious. But I'm just wondering if he walks in
7 with - - - with holsters and two guns on him, you
8 know, and you just put him in detention?

9 MR. ROGERS: Well, that's it. He didn't
10 walk in with holsters and two guns on him, Your
11 Honor.

12 JUDGE PIGOTT: What if he did?

13 JUDGE RIVERA: So - - - so can I just - - -
14 I'm sorry. I'm sorry.

15 JUDGE PIGOTT: What if he did?

16 MR. ROGERS: Then we have reasonable
17 suspicion to search him.

18 JUDGE PIGOTT: Okay, never mind.

19 MR. ROGERS: But you have no - - - the
20 police officers testified they had no suspicion
21 whatsoever. He was fully cooperative. It's a
22 bicycle infraction. Remember, he's down there - - -

23 JUDGE STEIN: But he - - - but you concede
24 that they can ask him to take off his belt and his
25 shoelaces, right? So if - - -

1 MR. ROGERS: Well, I don't really concede
2 that, no.

3 JUDGE STEIN: Oh, you don't concede that.

4 MR. ROGERS: No.

5 JUDGE STEIN: All right. So - - -

6 JUDGE RIVERA: Well, if I'm understanding
7 your argument, your argument is there's a mixed
8 question of law and fact as to whether or not they
9 believed he was fifteen and treated him thusly. And
10 you're arguing there's enough record support for the
11 Appellate Department's decision on that, and that
12 that determination about whether or not to remove the
13 shoes is, again, based on whether there's reasonable
14 suspicion. And the Appellate Department could have
15 concluded there isn't based on the record. And that
16 those are all those mixed questions of law and fact,
17 and we are stuck with the factual determinations - -
18 - or we're bound by them. Am I understanding - - -

19 MR. ROGERS: That's an excellent - - -

20 JUDGE RIVERA: Is this part of that mixed
21 question of law and fact argument?

22 MR. ROGERS: That was an excellent job of
23 summarizing my argument. I'll stand on that.

24 JUDGE RIVERA: I just want to make sure I
25 got it right because - - -

1 MR. ROGERS: That's it. I'll stand on
2 that.

3 CHIEF JUDGE DIFIORE: Thank you, counsel.

4 MR. ROGERS: Thank you.

5 CHIEF JUDGE DIFIORE: Counsel.

6 MS. SADRIEH: As to the - - -

7 JUDGE RIVERA: Why isn't - - - why isn't
8 that summary right? I mean that's his argument but
9 the question is why isn't he correct about that?

10 MS. SADRIEH: Because we are not - - - we
11 are not arguing that there ever was - - - that there
12 was reasonable suspicion. What we are arguing is
13 that the - - - that the police officers did not need
14 reasonable suspicion because whether this is viewed
15 as a search incident to arrest or whether it is
16 viewed as an administrative safety search, in neither
17 case was reasonable suspicion necessary. I mean so
18 it's clear clean legal argument - - -

19 JUDGE RIVERA: As far as that, well, the
20 administrative search you've already conceded is not
21 the equivalent of - - - of other full searches like
22 the strip search or some other more, as - - - as you
23 had actually referred to them, more intrusive
24 searches. So isn't that dependent on the - - - the
25 reasonableness of the concern regarding - - -

1 MS. SADRIEH: Well - - -

2 JUDGE RIVERA: - - - the suspicion of
3 whether or not this person poses a safety risk - - -

4 MS. SADRIEH: Well - - -

5 JUDGE RIVERA: - - - to himself or anyone
6 else?

7 MS. SADRIEH: Actually, I'm not saying that
8 - - - I'm not - - - an administrative search, the
9 whole distinction between an administrative search
10 and an - - - and an investigatory search is that
11 reasonable suspicion and probable cause are not - - -
12 are not part of the equation because the purpose is
13 not to uncover evidence of crime. The - - - there is
14 - - -

15 JUDGE RIVERA: You're saying it's a lower
16 threshold?

17 MS. SADRIEH: There's a different - - -
18 there's a different purpose.

19 JUDGE RIVERA: Or a higher threshold, okay.

20 MS. SADRIEH: In this case, the - - - the
21 purpose was to ensure the safety of the detainee and
22 to ensure the safety of others in the precinct by
23 making sure that the respondent did not have readily
24 accessible weapons. And so the - - - the test for
25 constitutionality is whether balancing - - -

1 JUDGE RIVERA: Let me ask this. Let me ask
2 this if they thought - - - since you say they have
3 reasonable suspicion, think he's sixteen, if they
4 thought he was sixteen, they believed his initial
5 statement, is it still an administrative search?

6 MS. SADRIEH: Well, it - - - it is then - -
7 - it is. It is a search incident to arrest and so -
8 - - I mean there's established preced - - - precedent
9 than a search incident to arrest requires no further
10 justification. But part of the reason for a - - -

11 JUDGE RIVERA: What's the - - - I'm not
12 really understanding the difference in the standard.
13 You're kind of having it both ways, are you not?
14 Whether it's an administrative search of this other
15 search incident to an arrest they get to do the full-
16 blown check of him.

17 MS. SADRIEH: The only - - - the only
18 difference if - - - between whether he's sixteen and
19 I mean - - - the only difference in - - - at all is
20 whether or not he should be considered still under
21 arrest and so the search should be considered
22 incident to arrest or if it is just a search of a
23 detainee for an administrative purpose. And the only
24 reason that that makes the difference is because
25 there's a great deal of case law stating that a

1 search incident to arrest requires no further
2 justification.

3 JUDGE RIVERA: Um-hum.

4 MS. SADRIEH: With a search that is an
5 administrative search that is not incident to arrest,
6 you have to balance the factors, you have to examine
7 how it - - - the - - - whether it is done - - - it's
8 reasonable in its scope, it's related to purpose to
9 establish - - -

10 JUDGE RIVERA: Any of that a mixed question
11 of law and fact?

12 MS. SADRIEH: I - - - no, it is not a mixed
13 question of law and fact.

14 CHIEF JUDGE DIFIORE: Thank you, Ms.
15 Sadrieh.

16 (Court is adjourned)

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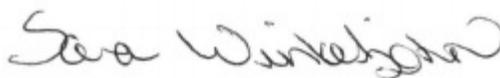
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Jamal S., No. 146 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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