12/20/21
MP

No. 21-931

In The
Supreme Court of the United States

AMEENAH SALAAM,

Petitioner,

v.

JEFFERY ALLEN MCAULEY,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of The State Of California For The Third Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Superior Court of California, County of Sacramento violate the United States Constitution, Amendment XIV right to due process of Ms. Salaam when it ordered a change in physical custody, when no petition for change of custody was properly filed and before the court?

RELATED CASES

Salaam v. McAuley, Supreme Court of the State of California (2021)
Case No. S270250

Salaam v. McAuley, The Court of Appeals of the State of California, Third Appellate (2021)
Case No. C090504

Salaam v. McAuley, Superior Court of California, County of Sacramento (2019)
Case No. 12FL07094

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PETITION FOR A WRIT OF CERTIORARI

Ameenah Salaam petitions for a writ of certiorari to review the judgement of the Court of Appeals of the State of California for the Third Appellate District in this case.

OPINIONS BELOW

The Superior Court of California, County of Sacramento's decision and orders are reproduced at App. 26-69. The Court of Appeals of the State of California, Third Appellate District's opinion of the petitioner's appeal is reproduced at App. 1-25. The Supreme Court of the State of California's denial, *en banc*, of the petitioner's petition for review is reproduced at App. 70-71.

JURISDICTION

The Court of Appeals of the State of California, Third Appellate District entered an opinion on June 28, 2021. App. 1-25. The Supreme Court of the State of California denied a timely petition for review, *en banc,* on September 22, 2021. App. 70-71. The Court has jurisdiction under 28 U.S.C. § 1257, having timely filed this petition for a writ of certiorari within ninety days after entry of the order denying discretional review.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

STATUTES:

28 U.S.C. § 1257(a):

> (a)Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment XIV (1):

> (1) All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Constitution Article I § 7:
(a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; provided, that nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation. In enforcing this subdivision or any other provision of this Constitution, no court of this State may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution.

Except as may be precluded by the Constitution of the United States, every existing judgment, decree, writ, or other order of a court of this State, whenever rendered, which includes provisions regarding pupil school assignment or pupil transportation, or

which requires a plan including any such provisions shall, upon application to a court having jurisdiction by any interested person, be modified to conform to the provisions of this subdivision as amended, as applied to the facts which exist at the time of such modification.

In all actions or proceedings arising under or seeking application of the amendments to this subdivision proposed by the Legislature at its 1979–80 Regular Session, all courts, wherein such actions or proceedings are or may hereafter be pending, shall give such actions or proceedings first precedence over all other civil actions therein.

Nothing herein shall prohibit the governing board of a school district from voluntarily continuing or commencing a school integration plan after the effective date of this subdivision as amended.

In amending this subdivision, the Legislature and people of the State of California find and declare that this amendment is necessary to serve compelling public interests, including those of making the most effective use of the limited financial resources now and prospectively available to support public education, maximizing the educational opportunities and protecting the health and safety of all public school pupils, enhancing the ability of parents to participate in the educational process, preserving harmony and tranquility in this State and its public schools, preventing the waste of scarce fuel resources, and protecting the environment.

(b) A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens. Privileges or immunities granted by the Legislature may be altered or revoked.

INTRODUCTION AND STATEMENT OF THE CASE

The petitioner, Ms. Salaam and the respondent, Mr. McAuley were married on July 11, 2011. They had one son, A., during the marriage in 2012. After the separation in 2011, and divorce judgment in 2014, Ms. Salaam was given physical custody, they shared legal custody and Mr. McAuley had visitation.

In November 2017, Ms. Salaam petitioned the courts for a move away from California to Virginia for a work transition to Washington, DC. The petition to move away was approved, in December 2017, and Ms. Salaam was granted sole physical and sole legal custody and Mr. McAuley would have visitation during holidays and times when school was not in session.

After his return from the summer visit of 2018, Ms. Salaam became aware of allegation from her son that the respondent had touched him inappropriately. Ms. Salaam tried to get several agencies in both Maryland and Sacramento to open an investigation but was delayed because of jurisdictional issues. Ms. Salaam informed Mr. McAuley of her concerns in November 2018 and suggested the 2018 Christmas break visit not take place. Mr. McAuley filed on December 18, 2018, an exparte petition for emergency orders which requested physical custody remain with Ms. Salaam,

legal custody be changed to joint legal custody, visitations be restored, and Ms. Salaam pay for the upcoming spring break visit. There was no request for a change in physical custody.

The result of the exparte emergency hearing was there would be no visitation, a referral to mediation and return for a hearing on February 5, 2019.

At the February 5, 2019, hearing the court ordered Ms. Salaam, physical custody, joint legal custody, and Ms. Salaam to pay costs for spring visitation. Ms. Salaam requested a trial regarding the changes pursuant to the petition because she had not received a notice of the petition and was still concerned about allegations that were not investigated. The trial was set for June 13, 2019. After the February 5, 2019, hearing, Mr. McAuley, a party in the proceeding, mailed the December 18, 2018, petition to an address he googled and believed it to be Ms. Salaam's.

During the time between the February 5, 2019, hearing and the trial date, Mr. McAuley filed four separate emergency petitions for orders to show cause for contempt with varying requests for a change in custody, sanctions, attorneys fees and costs.

The trial was held on June 13, 2019, and July 10-11, 2019. On the first day of trial Mr. McAuley's counsel, Attorney Mittelstadt requested to include in the trial all previous orders to show cause for contempt, which requested custody be changed to Mr. McAuley. The Court uncovered that Attorney Mittelstadt failed to file the orders, get the orders signed by a Judge, never properly served Ms. Salaam, or provided an arraignment for the quasi-criminal contempt proceeding. After a review of the

file by and some discussion, Mr. McAuley dismissed all outstanding orders to show cause for contempt. App. 181-182 With this dismissal the only petition before the courts for trial were the December 18, 2018, Request for orders. On July 12, 2019, the decision and orders were pronounced on the record and subsequently filed and served on the parties on August 2, 2019. The orders granted Mr. McAuley sole physical custody of A., joint legal custody with Mr. McAuley having final say, visitation was awarded to Ms. Salaam at her sole expense; however, no visitation would be permitted until Ms. Salaam posted a $5,000 bond, registered the new orders in Maryland, and purchased Mr. McAuley an open airline ticket.

On September 19, 2019, Ms. Salaam filed an appeal of the orders entered on August 2, 2019. The Court of Appeals affirmed the trial courts order in an opinion entered on June 28, 2021. The opinion of the court of appeals states "The court found mother's conduct to be "unacceptable" and "detrimental to A. Considering all the facts and circumstances, and bearing in mind the importance of preserving parental relationships, the trial court concluded that it was in the best interest of A. to modify the custody arrangement and give father joint legal and sole physical custody of A., with mother having visitation/parenting time on specified holidays and school breaks." In addition, the opinion states, "Although mother is correct that father's *initial* request for order only sought to enforce father's visitation rights, father's later requests for orders explicitly requested that he be granted sole physical custody of A." App. 15 The trial court's order was affirmed.

Ms. Salaam filed a petition for review on August 6, 2021, in the Supreme Court of the State of California the petition for review was denied on September 22, 2021. App. 129-165, App. 71

REASONS FOR GRANTING THE PETITION

The reasons for granting the petition are:

I. The Court of Appeals Decision is of national importance and review is needed to avoid erroneous deprivation of the right to due process under the Fourteenth Amendment of the Constitution in a child custody proceeding:

(a) It is clear from the assertion in the Court of Appeals opinion, that this case hinges on whether there were other orders noticed and properly before the Court that requested a change in physical custody. Only this. would permit the Court to change physical custody of A. The Court of Appeals states, "Although mother is correct that father's *initial* request for order only sought to enforce father's visitation rights, father's later requests for orders explicitly requested that he be granted sole physical custody of A. And mother had actual notice father was requesting a change in custody well before trial." App. 15

To determine if this pivotal statement is factually supported, we need to examine the transcript of the trial and the record on appeal. Below are excerpts from the trial transcript that discuss the subject of the trial according to the Court and the disposition of all orders.

First, the Court states, "Let me tell you what I have. I have a notation here that ***this trial relates to an OSC re: contempt filed on April 8, 2019.*** App. 167. This was at the beginning of the trial". The OSC re: contempt referenced here is clearly dismissed in order to move forward with the trial.

Second, the Court provides an explanation of the process for filing an OSC re: contempt and closes the explanation by saying, "And the reason I took the time to list the requirements that need to be satisfied before an OSC re: contempt is even authorized to then be served, that process, in this Court's judgment, may not have been followed either. ***So there's some deficiencies procedurally."*** App. 175

Third, the Court states, "So in order to move this along, the Court is ***not going to address for trial*** purposes the contempt issue. We'll take some time at the break over the noon recess to Shepardize where we are on the contempt issue. It also is clear to the Court, based on my review at least at this point, that Ms. Salaam hasn't even been arraigned, to be advised of the charges, to enter a plea, and if she can't afford a lawyer and she wants to go to trial, that she has a right to a lawyer to be appointed to represent her. So with that understanding, ***the Court will not proceed on the issue of contempt today***, and we will clarify that later." App. 176

Fourth, the transcript goes on to describe that after review over the recess, the Court, ask counsel for Mr. McAuley about order to show cause number three and Mr. McAuley's counsel advised, "Yes, Your Honor. I've spoken to Mr. McAuley, and ***we will dismiss the order to show cause number three without prejudice.***" App. 181

Fifth, the Court, then stated, "All right. Just a moment. All right. ***Any response to the motion moving to dismiss the order to show cause and affidavit for contempt number three filed on April 8, 2019, without prejudice?*** To this Ms. Salaam replied, "I'm fine with that, Your Honor." App. 181

Sixth, the Court states on the record,

> "***The Court finds facts sufficient to grant the request to dismiss the order to show cause and affidavit for contempt number three filed on April 8, 2019, without prejudice.*** As the Court has further noted, in any event, Ms. Salaam was never arraigned on that one order to show cause re contempt that was authorized by Commissioner Haukedalen to move forward, and so ***it would be defective as far as today's proceedings is concerned.***
>
> With the dismissal of the order to show cause and affidavit for contempt number three filed April 8, 2019 - - and if I misspoke and said 2018, it was 2019 - - there is no pending order to show cause that the Court would note.
>
> ***Ms. Mittelstadt, the court could not find order to show cause number one or order to show cause number four.*** I think in an abundance of caution, you can confer with your client just briefly, ***that any outstanding authorized orders to show cause are moving to be dismissed without prejudice so there's nothing hanging out there that would violate Ms. Salaam's constitutional rights.***" App. 181-182 Mr. McAuley's counsel, replied, "That's fine, Your honor." App. 182

Lastly, prior to continuing with the trial, the Court, stated an order on the record, " OSC re contempt number three is dismissed. The motion is granted. ***And any other orders to show cause re: contempt in this matter are dismissed without prejudice.*** That will be the order, and will continue with the trial." App 181-182

Based on the transcript and the record on appeal, it is, clear that OSC re: contempt number three filed on April 8, 2019, was dismissed and the order goes further to dismiss without prejudice "***any other orders*** to show cause re: contempt in this matter." The Court of Appeals opinion does not specify any particular orders properly petitioned and before the court that request a change in custody. Given these facts, an order to change physical custody of A. violates Ms. Salaam's due process rights under the United States Constitution, Amendment XIV and California Constitution, Article I § 7. This order should be reviewed.

In *Keisling v. Keisling*, 92 S.W. 3d 374 (Tenn 2002), allegations of sexual abuse existed and a petition was filed to modify visitation only. Here the question on appeal was whether the trial court erred in transferring child custody from one parent to the other when no petition requesting a change of custody had been filed at the time of the ruling. The opinion states, "Where the private interest is the custody of one's children, parents have a fundamental constitutional interest in the care and custody of their children under both the United States and Tennessee constitutions."

It further states Ms. Keisling was not served with any pleading notifying her that she could lose custody of her children as a result of the proceeding.

We hold that the risk of erroneous deprivations of custody of one's children is substantial when no pleadings are filed informing the parent that a change in custody is being contemplated by the court." "Without such notice, Ms. Keisling could assume that only the issues raised in her pleading were being tried. Ms. Keisling's right to due process was violated because there were no pleadings giving notice that custody would be addressed at the hearing. Accordingly, the trial court erred in granting custody to Mr. Keisling. This case was remanded to the trial court to affect an expeditious return of the children to the physical custody of Ms. Keisling in a manner least disruptive to their welfare.

Similarly, in this case, Ms. Salaam not served with any pleading notifying her that she could lose custody of her son as a result of the June 13, 2019, trial. To the contrary, the December 18, 2019, petition, that precipitated the trial affirmed custody should remain with Ms. Salaam and the dismissal of *all* other authorized orders at the beginning of the trial fully reassured Ms. Salaam that the only issue being contemplated were contained in the December 18, 2019 petition, which was limited to a change to joint legal custody and reinstatement of visitation. The change in physical custody was a clear violation of Ms. Salaam's right to due process under both the United States Constitution, Amendment XIV and the California Constitution Article 1, Section 7. The Sacramento County Superior Court of California and the State of California Court of appeals has decided an important constitutional question of due process in a way that conflicts with relevant well-established

decisions of other State Courts, thus necessitating a call for an exercise of this Court's supervisory power.

II. In addition to *Keisling v. Keisling,* 92 S.W.3d 374 (Tenn 2002) referenced above, the Court of Appeals decisions in this case conflicts with all the State cases listed below where no petition was filed thereby, violating rights of due process when a change is custody was ordered:

(a) In *Ligon v. Williams,* 264 Ill. App. 3d 701,637 N.E.2d 633 (Ill. App. Ct. 1994) at 707, it states "A party cannot be granted relief in the absence of corresponding pleadings; if a justiciable issue is not presented to the court through proper pleadings, the court cannot *sua sponte* adjudicate an issue. Orders that are entered in the absence of a justiciable question properly presented to the court by the parties are void since they result from court action exceeding its jurisdiction."

The opinion reads, "In conclusion, based upon the foregoing, the trial court erred in entering the custody order and in denying plaintiff's petition to vacate the void order. Consequently, the trial court's custody order is vacated and custody of Tiffany must be returned to plaintiff."

(b) *In re Custody of Ayala,* 344 Ill. App. 3d 574, 800 N.E.2d 524 (Ill. App. Ct. 2003), the court found on appeal that the trial court exceeded its jurisdiction when it modified custody when no pleading had been filed requesting such relief.

(c) In *Ross v. Ross,* 447 P.3d 104, 2019 UT App. 104 (Utah Ct. App. 2019) states that, "In this case, we must consider whether, under applicable statutes and rules, a district court may order and change in

custody in favor of a relocating parent in the absence of a petition to modify. Father asserts that the district court is not authorized to take such action and after examination of relevant provisions, we agree. This case concluded that because Mother did not file a petition to modify, the district court erred in ordering a change in custody in favor of Mother without one. Accordingly, we vacate the district court's custody order and remand this case for further proceedings consistent with this opinion.

(d) *In re Marriage of Fox*, 191 Ill. App. 3d 514, 548 N.E.2d 71 (Ill. App. Ct. 1989), has been often referenced as "instructive" in many other cases. In *Fox*, the respondent filed a petition for rule to show cause why the petitioner should be held in contempt for interfering with his visitation rights. After a hearing on the petition, the trial court found that the petitioner had repeatedly interfered with the respondent's visitation with his children and a modification of the custody order was necessary for the best interests of the children. The court determined on appeal that the trial court's order was void because the trial court's jurisdiction to determine custody was not properly invoked. *Fox,* 191 Ill. App. 3d at 521-22. The court stated that the justiciable matter before the trial court was an alleged violation of the visitation provisions of the judgment of dissolution, not child custody. *Fox,* 191 Ill. App. 3d at 521. This case resembles Ms. Salaam's case with the exception that the petition filed by Mr. McAuley's request for relief was a change in legal custody and visitation with an affirmation of physical custody remaining with "Mother". All other orders requesting a change in custody had been dismissed at the beginning of the trial. Similarly, the

trial court's jurisdiction to determine custody was not properly invoked in Ms. Salaam's case.

(e) Finally, in *In re Marriage of Suriano,* 386 Ill. App. 3d 490, 902 N.E. 2d 116 (Ill. App. Ct. 2008) The parties entered into a joint parenting agreement on April 17, 1998, and an agreed order on September 8, 2006. Pursuant to the joint parenting agreement, the parties agreed to joint custody of the children with the children's primary residence to be with petitioner. Paragraph I(J) of the agreed order provided in part that "neither party shall make any unilateral decision regarding the health, education, religious training, activities or welfare of either of the minor children. On March 1, 2007, respondent filed his fifth petition for rule to show cause to hold petitioner in contempt for violating paragraph I(J) of the agreed order. The court held a hearing on the petition, where the only witnesses that testified were petitioner and respondent. The court issued its decision on May 20, 2008, finding that there was no basis for granting the rule to show cause. However, the court further stated that it would not amend the joint parenting agreement because it was "going to terminate it *sua sponte*," and then it awarded custody of the children to petitioner. The court noted that the parties were unable to cooperate and that "there should never ever have been joint parenting." When counsel for respondent objected, the court explained: "I have the right to do it in the best interest of these children..... And I have the right to do it in the best interest of the children." The Court of appeals stated, We also find that the court's order violated respondent's due process rights. Due process of law requires that a party be accorded notice and an opportunity to be heard. *Ayala,* 344 Ill. App. 3d at

586. Parties who have properly appeared in an action are entitled to notice of any impending motions or hearings. *Ayala,* 344 Ill. App. 3d at 586 Respondent did not receive notice that the circuit court might consider or determine child custody at the conclusion of the hearing on his petition for rule to show cause. As in *Ayala,* the only matters before the court related to respondent's allegations that petitioner was making unilateral decisions regarding the children's care and activities. In the prayer for relief, respondent requested that the joint parenting agreement be amended such that petitioner could not make any unilateral decisions regarding the children's care and activities and that respondent receive sufficient notice of any upcoming decisions regarding the children's care and activities. The Court of Appeals stated, "We cannot construe this request to amend the joint parenting agreement as a request to modify custody or terminate the joint parenting agreement. Therefore, the court's order also violated respondent's due process rights. Accordingly, we vacate the circuit court's May 20, 2008, order terminating the joint parenting agreement and awarding custody of the children to petitioner".

As in Ms. Salaam's case, the trial court construed a request by Mr. McAuley to only modify legal custody and reinstate visitation as a request to modify physical custody despite the expressed petition for the child to remain with "Mother". Similarly, as in *In re Marriage of Suriano*, 386 Ill. App. 3d 490, 902 N.E. 2d 116 (Ill. App. Ct. 2008), Ms. Salaam's due process rights were violated and accordingly the Superior Court's August 2, 2019,

orders awarding custody of the child to Mr. McAuley needs to be vacated.

The cases above are similar to Ms. Salaam's case where no petition for a change in custody was requested by either party. More importantly in this case only petition filed by the father reaffirmed that physical custody should remain with mother. In these well-established decisions of other State Courts, the conclusion was the lower court violated due process and erred for changing custody without a petition that provided due process of the request to change custody. In all cases the decision was to reverse or vacate the lower court's order. This decision which is an extreme departure from similar decision necessitates a call for an exercise of this Court's supervisory power.

III. This instant case of the denial of due process under the United States Constitution, Amendment XIV in a child custody case has never been decided by the Supreme Court.

Similar cases have been consistently decided at the state court of appeals level; however, a case denying due process under the United States Constitution, Amendment XIV resulting in an erroneous deprivation of the custody of a child has never been decided by the Supreme Court. The facts and impact of this case calls for the review of this Court.

CONCLUSION

For the foregoing reasons, the Court should grant the writ of certiorari.

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