

**No. 19-6696**

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**IN THE  
SUPREME COURT OF THE UNITED STATES**

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**BARBARA MYERS-MCNEIL,**

**Petitioner,**

**v.**

**STATE OF NORTH CAROLINA,**

**Respondent.**

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**ON PETITION FOR WRIT OF CERTIORARI  
TO THE SUPREME COURT OF NORTH CAROLINA**

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**BRIEF IN OPPOSITION**

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**QUESTION PRESENTED**

Is this case the proper vehicle to determine whether a law enforcement officer has reasonable suspicion under the Fourth Amendment to initiate an investigatory stop of a vehicle after obtaining information that the registered owner's license was suspended and there was no indication that someone other than the registered owner was driving that vehicle.

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**INTRODUCTION**

“[T]his Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim was either addressed by or properly presented to the state court that rendered the decision [this Court has] been asked to review.” *Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (quotation omitted). The question in this case was not properly presented to the state courts in accordance with the requirements of North Carolina law.

In this case, Petitioner Barbara Myers-McNeil claims that the North Carolina appellate courts wrongly held that the initial stop of her vehicle was justified by

reasonable suspicion because officers obtained information that the registered owner had a suspended license. While that claim was originally included in her motion to suppress, Petitioner explicitly abandoned that argument when she conceded below in the trial court and the North Carolina Court of Appeals that law enforcement had reasonable suspicion for the initial stop of her vehicle. The sole issue litigated in the state courts was whether the stop was unlawfully extended in violation of *Rodriquez v. United States*, 575 U.S. 348 (2015). Petitioner did not present the issue she now seeks to raise until she filed her amended petition for discretionary review in the state Supreme Court. The issue had not been properly preserved for appellate review. The petition was denied without an opinion. For these reasons, the case is a poor vehicle to address the question presented.

The State of North Carolina respectfully requests this Court deny the petition for certiorari.

## **STATEMENT**

On May 18, 2016, Raleigh Police Officers Henry and Lane were on duty in a marked patrol vehicle when Petitioner drove past their stationary position at an intersection downtown. Tr. 6-7, 10.<sup>1</sup> Officer Henry ran the license plate through DCI to obtain basic information about the vehicle and determined the registered owner

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<sup>1</sup> When this brief cites to “R.,” it refers to the Record on Appeal in the North Carolina Court of Appeals, No. COA17-1404 and “R.Add.” refers to the Addendum to the Record on Appeal. When the brief cites to “Tr.,” it refers to the transcript of the trial court proceedings held on August 16-17, 2017.

had a suspended driver's license. Tr. 7, 9-10. The registered owner appeared to be a male by his name. Tr. 11, 20. Officer Henry was unable to see who was occupying the vehicle at that time. Tr. 10. An investigatory stop was conducted based on suspicion of driving while license revoked. Tr. 7. Officer Henry approached the driver's side window and observed a female, fumbling through a wallet or small clutch. Tr. 12-13. She did not acknowledge his presence. Tr. 13.

Officer Henry tapped on the window and it was rolled down approximately two inches. Tr. 13, 15. Officer Henry asked Petitioner for her driver's license and she was unable to produce it. Tr. 15. Officer Henry noticed an odor of alcohol emanating from the vehicle and that Petitioner had a slight slur to her speech. Tr. 16. Officer Henry began an impaired driving investigation. Tr. 17. Petitioner was charged by citation with driving while impaired. Tr. 4; R. 3. Petitioner was convicted in district court and appealed to superior court for trial *de novo*.

Petitioner filed a pretrial motion to suppress all evidence of the stop alleging it was obtained in violation of her rights under the Fourth and Fourteenth Amendments. R.Add. 1-2; Tr. 4. The motion challenged whether law enforcement had reasonable suspicion to stop Petitioner's vehicle and for the extension of the stop. R.Add. 1-2. The motion was heard during the August 14, 2017 Criminal Session of Superior Court, Wake County. Tr. 1. Petitioner abandoned her first argument and explicitly conceded that law enforcement had reasonable suspicion to stop her vehicle. Tr. 25. She argued for suppression of evidence only on the basis that Officer Henry

had unlawfully extended the stop in violation of *Rodriquez v. United States*, 575 U.S. 348 (2015). Tr. 26. She contended that the purpose or “mission” of the stop was immediately effectuated when law enforcement verified the driver was female and not the male owner with a revoked license. Tr. 27. Petitioner argued that any evidence of impaired driving that was obtained thereafter was unlawful. Tr. 28. The trial court orally denied petitioner’s motion to suppress. Tr. 29. The case proceeded to trial and the jury found petitioner guilty as charged. Tr. 90.

Petitioner appealed to the North Carolina Court of Appeals. On appeal, Petitioner again conceded that law enforcement had reasonable suspicion to initially stop her vehicle and solely argued that the trial court erred in denying her motion to suppress because the stop was unlawfully extended after Officer Henry verified the male owner was not driving the vehicle. Pet. App. B at 4.

The North Carolina Court of Appeals rejected Petitioner’s argument, holding Officer Henry’s mission was not solely limited to verifying whether the male owner was driving the vehicle; rather, it included ordinary inquiries incident to any traffic stop, such as informing her the basis of the stop, requesting identification, and ensuring the vehicle’s registration and proof of insurance had not expired. Pet. App. B at 4. The court further held that because Officer Henry developed reasonable suspicion of a new offense while he was in the process of completing his original mission, the trial court properly denied her motion to suppress. Pet. App. B at 5.

Petitioner originally appealed to the North Carolina Supreme Court under a state rule that allows appeals for cases involving a substantial constitutional question. N.C. Gen. Stat. § 7A-30(1). She also filed a petition for discretionary review. *See id.* § 7A-31(b). In her combined notice and petition, Petitioner presented the state Supreme Court with a single issue for review: whether the North Carolina Court of Appeals erred by holding that a traffic stop can be prolonged for queries unrelated to the mission of the stop after the mission has been accomplished and reasonable suspicion for the stop has dissipated. Notice of Appeal and Petition for Discretionary Review at 14-15, *State v. McNeil*, No. 453P18 (N.C. Dec. 27, 2018).<sup>2</sup>

In 2019, after this Court granted certiorari in *Kansas v. Glover*, 139 S. Ct. 1445 (2019), Petitioner moved to amend her petition to the state Supreme Court to present two issues for discretionary review: (1) whether the North Carolina Court of Appeals erred by holding an officer can extend a traffic stop beyond its initial mission when reasonable suspicion has dissipated; and (2) whether the judgments below incorrectly denied her motion to suppress because, despite North Carolina precedent to the contrary, learning a car is registered to a person whose driver's license is suspended is insufficient to provide reasonable suspicion for an investigatory stop. Amended

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<sup>2</sup> This document is available through the North Carolina electronic filing website at: [https://www.ncappellatecourts.org/show-file.php?document\\_id=239695](https://www.ncappellatecourts.org/show-file.php?document_id=239695)

Petition for Discretionary Review at 18, *State v. McNeil*, No. 453P18 (N.C. Apr. 17, 2019).<sup>3</sup>

The North Carolina Supreme Court dismissed the notice of appeal for lack of a substantial constitutional question and dismissed as moot the original petition for discretionary review. *State v. McNeil*, 831 S.E.2d 88 (N.C. 2019). The state Supreme Court also denied Petitioner's amended petition for discretionary review. Pet. App. A at 1.

#### **REASONS FOR DENYING THE PETITION**

**This case is not an appropriate vehicle for resolving the question presented because it was not properly raised or ruled upon by the state courts.**

It is well established that this Court “will not review a final judgment of a state court unless ‘the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system.’” *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987) (quotation omitted). Indeed, this Court “has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions . . . .” *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) (citations omitted); *see also Edelman v. California*, 344 U.S. 357, 358 (1953) (holding “this Court is without power to decide whether constitutional rights have been violated when the federal questions are not

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<sup>3</sup> This document is available through the North Carolina electronic filing website at: [https://www.ncappellatecourts.org/show-file.php?document\\_id=245825](https://www.ncappellatecourts.org/show-file.php?document_id=245825)

seasonably raised in accordance with the requirements of state law.” (citations omitted)). This is so because “due regard for the appropriate relationship of this Court to state courts demands that those courts be given an opportunity to consider the constitutionality of the actions of state officials, and, equally important, proposed changes in existing remedies for unconstitutional actions.” *Illinois v. Gates*, 462 U.S. 213, 221 (1983) (internal quotation omitted).

The question Petitioner seeks for this Court to review was not properly presented to the state courts in the first instance. In North Carolina, constitutional issues must first be raised in the trial court in order to be preserved for appellate review. *State v. Wilkerson*, 683 S.E.2d 174, 198 (N.C. 2009), *cert. denied*, 559 U.S. 1074 (2010). The state Supreme Court will not address alleged constitutional error for the first time on appeal. *State v. Chapman*, 611 S.E.2d 794, 822 (N.C. 2005); *see also State v. Cumber*, 185 S.E.2d 141, 144 (N.C. 1971) (disapproving the defendant’s attempt to “smuggle” in new questions of constitutional dimension that had not been raised below).

Petitioner has consistently maintained that law enforcement violated her constitutional rights under the Fourth Amendment; however, it was for a different reason than she advances now. Petitioner conceded below in the trial court and the North Carolina Court of Appeals that law enforcement had reasonable suspicion to initially stop her vehicle. Tr. 25; Pet. App. B at 4. The sole issue litigated in the state courts was whether the stop was unlawfully extended in violation of this Court’s

decision in *Rodriquez*. Petitioner did not challenge the initial stop of her vehicle until she filed an amended petition for discretionary review in our state Supreme Court. It denied the petition without an opinion. Pet. App. A at 1.

When “the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.” *Duarte*, 481 U.S. at 550 (quotations omitted). Because Petitioner is attempting to advance an argument in this Court that was not properly presented to or decided by the lower state courts, the petition should be denied.

### **CONCLUSION**

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted, this the 10th day of February, 2020.

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### **CERTIFICATE OF COMPLIANCE WITH RULE 33**

I, Kimberly N. Callahan, Assistant Attorney General for the State of North Carolina and a member of the bar of this Court, hereby certify that the State of North Carolina's brief in opposition is in compliance with Rule 33 in that it is printed in twelve-point Century Schoolbook font and it neither exceeds 40 pages, nor does the body to the brief, including footnotes and citations, contain more than 9,000 words as indicated by Microsoft Word, the program used to prepare the brief.

This the 10th day of February, 2020.

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