



Counsel's Unconsented-to Admission to Elements Isn't a Harbison Error

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In *State v. Harbison*, 315 N.C. 175 (1985), the North Carolina Supreme Court held that when defense counsel admits the defendant's guilt to the jury without the defendant's consent per se ineffective assistance of counsel occurs. The *Harbison* Court reasoned that when counsel admits guilt without consent, it is essentially the same as entering a guilty plea on the defendant's behalf without the defendant's consent. It concluded: "ineffective assistance of counsel, per se in violation of the Sixth Amendment, has been established in every criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent." *Id.* at 180.

Back in October 2014, I wrote about a Court of Appeals case decided a month earlier—*State v. Wilson*, 236 N.C. App. 472 (2014)—that carved out two exceptions to the *Harbison* rule (that post is [here](#)). *Wilson* held that an unconsented-to admission to an offense that is neither charged nor is a lesser-included offense of a charged offense does not constitute a *Harbison* error. It also held that an unconsented-to admission to an element isn't a *Harbison* error. A new Court of Appeals case—[State v. Cholon](#)—cites *Wilson* and reaffirms that second exception.

In *Cholon*, the defendant was charged with statutory sexual offense and taking indecent liberties with a child. The defendant met the victim through an online service. Although the victim was 15 years old, he indicated in his online profile that he was 18. The two agreed to meet. When that meeting occurred, they engaged in sexual activity that formed the basis for the charges at issue. While they remained in the defendant's parked car, an officer approached. The defendant admitted to the officer that he had engaged in sexual activity with the victim but said he thought the victim was 18 years old. After the defendant was arrested, he made a written statement to similar effect. Slip. op. at 2-3. The case came on for trial and during closing argument to the jury defense counsel conceded that the victim was a minor at the time and that the defendant's oral and written confessions to the police were true. *Id.* at 4-5. Nevertheless, counsel asked the jury to find the defendant not guilty of the charged offenses. I am reading between the lines, but I'm guessing that defense counsel's strategy was to argue for jury nullification; counsel essentially argued that the defendant was a truthful guy who made a mistake about the victim's age and shouldn't be sent to prison for the charged offenses. Whatever the strategy, it didn't work. The jury found the defendant guilty of both charges.

On appeal the defendant argued that a *Harbison* error occurred. Specifically, he asserted that because defense counsel admitted guilt to each of the disputed elements of the charged offenses without his consent he received ineffective assistance of counsel. *Id.* at 5. The court disagreed, concluding that because defense counsel only implicitly conceded some—but not all—of the elements of each charge and urged the jurors to find the defendant not guilty, no *Harbison* error occurred. *Id.* It noted that courts have found a *Harbison* error when defense counsel concedes the defendant's guilt to either the offense charged or a lesser-included offense without the defendant's consent. *Id.* at 7. But, it explained, the courts have rejected *Harbison* claims in cases in which defense counsel did not expressly concede guilt or admitted only certain elements of the charged offense. *Id.* at 8. Here, the court noted, defense counsel neither expressly conceded guilt nor admitted each element of each charged offense. For example, the court noted, defense counsel didn't admit that the defendant was six or more years older than the victim (a required element for the sexual assault charge) or that the defendant willfully committed a lewd or lascivious act (an element of the indecent liberties charge). *Id.* at 9. Quoting *Wilson*, the court held: "Admission by defense counsel of an element of a crime charged, while still maintaining the defendant's innocence, does not necessarily amount to a *Harbison* error." *Id.* at 10.

End result: *Harbison* is a powerful NC-specific ineffective assistance of counsel claim. But don't try to use it when counsel only admitted an element.