

Court of Appeals Holds that Harbison Survives Nixon

Author : Jessica Smith

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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.

Harbison claims differ from the more garden-variety attorney-error ineffective assistance of counsel claims, commonly called *Strickland* claims. Such a claim might allege, for example, that counsel's conduct was deficient by failing to interview a key witness or by failing to object to inadmissible evidence. *Strickland* claims are evaluated under a two-pronged test, requiring the defendant to show both deficient performance and prejudice. See *Strickland v. Washington*, 466 U.S. 668 (1984). A *Harbison* claim thus is easier to prove than a *Strickland* claim; for a *Harbison* claim the defense need only establish an admission of guilt; no showing of prejudice is required.

In 2004, the United States Supreme Court decided *Florida v. Nixon*, 543 U.S. 175 (2004), a capital case. Applying the Sixth Amendment, *Nixon* held that when a defendant alleges ineffective assistance of counsel due to an unconsented-to admission of guilt, the claim should be analyzed under the *Strickland* attorney error standard. As such, it called *Harbison* into question. However, in [State v. Maready](#), ___ N.C. App. ___ (July 6, 2010), the North Carolina Court of Appeals recently held that *Nixon* did not affect the North Carolina *Harbison* rule.

In *Maready*, the defendant faced an array of charges stemming from impaired driving and a death in connection with a vehicle collision. The defendant was convicted of, among other things, second-degree murder and two counts of assault with a deadly weapon. He appealed these convictions asserting a *Harbison* claim based on the following statements made by defense counsel during closing argument:

We do have the two misdemeanor assaults. . . . We don't contest those. They are inclusive in the events that have significant issues associated with them, but we don't contest those. And you can go and make your decisions accordingly. . . . [Defendant] holds absolute – holds responsibility for [the death of the victim]. I just argue it's not murder. It's Involuntary Manslaughter.

Additionally, counsel stated "that . . . [D]efendant's impaired driving proximately caused the victim's death. That's true. [Defendant's] guilty of that and should be found guilty of that." Counsel also stated: "[Defendant's] already admitted to you guilt . . . to . . . Assault with a Deadly Weapon times two[.]" Notwithstanding these statements, the trial court never asked the defendant whether he had agreed to counsel's admissions of guilt as to these charges.

Considering *Nixon*'s effect on the *Harbison* rule, *Maready* found *Nixon* distinguishable on grounds that it was a capital case and the case before it was non-capital. The court also considered itself bound by *Harbison* because post-*Nixon* decisions by the North Carolina Supreme Court and Court of Appeals continued to apply *Harbison*. On these points, the concurring opinion disagreed. Finally, the court stated, in a footnote, that *Nixon* did not constrain the State's ability to set a state constitutional protection above the federal floor. This language suggests that the court views *Harbison* as

grounded in the state constitution, another point on which the concurring opinion disagreed. Having found *Nixon* inapplicable, the court held that a *Harbison* error occurred because the defendant never gave his explicit consent to counsel to admit guilt to involuntary manslaughter or to the two counts of assault with a deadly weapon. The court rejected the notion that the defendant's implicit consent could satisfy the *Harbison* rule.

Maready makes clear that *Harbison* is alive and well in North Carolina. I thus continue to advise judges to ask--before both opening and closing statements--whether counsel plans to admit guilt. If so, the trial judge should determine, on the record, whether the defendant consents to this strategy. Defense counsel may not proceed with this strategy unless the defendant gives explicit consent. If counsel unexpectedly admits guilt during trial, the trial judge should excuse the jury and determine, on the record, whether the defendant consents to the admission. If the defendant does not consent, a mistrial may be required.