



Does McCoy v. Louisiana Matter in North Carolina?

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In *McCoy v. Louisiana*, 584 U.S. ___, 138 S. Ct. 1500 (2018), the US Supreme Court held that a defendant's Sixth Amendment counsel right was violated when trial counsel admitted guilt over the defendant's intransigent objection. In this post, I'll discuss what impact, if any, *McCoy* has on North Carolina law.

In *McCoy*, the defendant was charged with three counts of capital first-degree murder. The defendant pleaded not guilty and consistently maintained his innocence. McCoy asserted that he was out of State at the time of the killings and that corrupt police killed the victims in a drug deal gone bad. 138 S. Ct. at 1506. Defense counsel however concluded that the evidence against the defendant was overwhelming and that absent an admission at the guilt stage that the defendant was the killer, it would be impossible to avoid a death sentence. The defendant was furious when he learned that counsel planned to concede that he committed the murders. The defendant told counsel not to make the concession, and pressed counsel to pursue acquittal. *Id.* Nevertheless, during opening statements at the guilt phase, defense counsel told the jury there was "no way reasonably possible" that they could hear the prosecution's evidence and reach "any other conclusion than Robert McCoy was the cause of these individuals' death." *Id.* The defendant protested to the court, to no avail. Continuing his opening statement, defense counsel told the jury the evidence is "unambiguous," "my client committed three murders." *Id.* at 1507. The defendant testified, maintaining his innocence and pressing an alibi defense. In closing argument, defense counsel reiterated that the defendant was the killer. The jury found the defendant guilty on all three counts of first-degree murder. At the penalty phase, defense counsel again conceded that the defendant committed the crimes, but urged mercy. The jury returned three death verdicts. *Id.*

After the defendant was unsuccessful in his state court appeals, he sought review by the US Supreme Court. The Court granted certiorari on the question of whether it is unconstitutional to allow defense counsel to concede guilt over the defendant's intransigent and unambiguous objection. *Id.* The Court held that a concession on these facts violates the Sixth Amendment. The Court determined that when a defendant expressly asserts that the objective of his defense "is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt." *Id.* at 1509. The Court distinguished *Florida v. Nixon*, 543 U.S. 175 (2004), in which it had considered whether the Constitution bars counsel from conceding a capital defendant's guilt at trial when the defendant, informed by counsel, neither consents nor objects. In *Nixon*, defense counsel had several times explained to the defendant a proposed guilt phase concession strategy, but the defendant was unresponsive. The *Nixon* Court held that when counsel confers with the defendant and the defendant remains silent, neither approving nor protesting counsel's proposed concession strategy, no blanket rule demands the defendant's explicit consent to implementation of that strategy. Instead, *Nixon* held that "if counsel's strategy, given the evidence bearing on the defendant's guilt, satisfies the *Strickland* standard, that is the end of the matter; no tenable claim of ineffective assistance would remain." *Nixon*, 543 U.S. at 192. The *Strickland* standard referred to by *Nixon* requires a two-pronged showing for a defendant to succeed on an ineffective assistance of counsel claim: (1) that counsel's conduct fell below an objective standard of reasonableness; and (2) that the defendant was prejudiced by that conduct.

The *McCoy* Court distinguished *Nixon*, noting in that case the defendant never asserted his defense objective. Here, however, defendant McCoy opposed counsel's assertion of guilt at every opportunity, before and during trial and in conferences with his lawyer and in open court. The Court clarified:

If a client declines to participate in his defense, then an attorney may permissibly guide the defense pursuant to the strategy she believes to be in the defendant's best interest. Presented with express statements of the client's will to maintain innocence, however, counsel may not steer the ship the other way.

McCoy, 138 S. Ct. at 1509. And it held: "counsel may not admit her client's guilt of a charged crime over the client's intransigent objection to that admission." *Id.* at 1510. It went on to find that this type of claim required no showing of prejudice. Rather, the issue was one of structural error. Thus, the defendant must be afforded a new trial without any need to first show prejudice.

What impact does this have on North Carolina law? In this state, we have the *Harbison* rule. As I discuss in my Judges Benchbook chapter [here](#), under *State v. Harbison*, 315 N.C. 175 (1985), it is per se reversible error for counsel to admit the defendant's guilt to the jury without the defendant's consent. The *Harbison* Court reasoned that when counsel does so, 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* does not require a defendant's intransigent objection to counsel's strategy; under *Harbison* per se reversible error occurs whenever there is an unconsented-to admission of guilt. *Harbison* thus appears to set a constitutional floor above the standard articulated in *McCoy*.

When the US Supreme Court decided *Nixon*, there was some question about whether the *Harbison* rule survived that holding. However, as I explained [here](#), in *State v. Maready*, 205 N.C. App. 1 (2010), the North Carolina Court of Appeals subsequently held that *Harbison* remains intact after *Nixon*. And as noted, *Harbison* requires the defendant to show only an unconsented-to admission of guilt, not an admission over a defendant's intransigent objection, as occurred in *McCoy*.

Might things change? Maybe. In *Maready*, Judge Ervin—now Justice Ervin of the North Carolina Supreme Court—filed a separate opinion, concurring in result only, finding that *Nixon* superseded *Harbison* and that when it comes to a defendant's constitutional right to counsel, North Carolina law is correctly read as following federal law. 205 N.C. App. at 21 (2010) (Ervin, J., concurring). Thus, that makes at least one vote at the State Supreme Court against *Maready*'s holding that *Harbison* survives *Nixon*. And of course, if *Harbison* is jettisoned that likely means that *Nixon* and *McCoy* govern. I'll leave for a separate post a full exploration of how such a holding would change the law.