
33.6 Admissions of Guilt During Closing Argument

A. Defendant's Consent Required Prior to Admission of Guilt

If trial counsel concludes that the best trial strategy is to concede a defendant's guilt to a criminal charge in order to secure a conviction for a less serious offense (or a sentence of life instead of death), counsel must obtain the defendant's express informed consent before making such a concession. *See State v. Harbison*, 315 N.C. 175 (1985). The decision to consent "must be made exclusively by the defendant," and it must be "made knowingly and voluntarily . . . after full appraisal of the consequences." *Id.* at 180; *see also State v. Thomas*, 327 N.C. 630 (1990) (remanding case to superior court for an evidentiary hearing to determine whether defendant knowingly consented to concessions of guilt made by trial counsel during closing argument); *State v. Perez*, 135 N.C. App. 543 (1999) (due process requires that a defendant's consent to concede guilt be made knowingly and voluntarily after full appraisal of the consequences). The requirement that a defendant give express consent also applies to admissions made during opening statements, discussed *supra* in § 28.6, Admissions of Guilt During Opening Statement. It also appears to apply to concessions made during jury selection. *Cf. State v. Strickland*, 346 N.C. 443 (1997).

Generally, if counsel admits the defendant's guilt without first obtaining consent, it is per se ineffective assistance of counsel in violation of the Sixth Amendment to the U.S. Constitution and article I, sections 19 and 23 of the N.C. Constitution because counsel's admission deprives the defendant of the right to have his or her guilt or innocence determined by the jury. *See Harbison*, 315 N.C. 175, 180 ("When counsel admits his client's guilt without first obtaining the client's consent, the client's rights to a fair trial and to put the State to the burden of proof are completely swept away."); *see also State v. Wiley*, 355 N.C. 592, 619 (2002).

In *Florida v. Nixon*, 543 U.S. 175, 192 (2004), the U.S. Supreme Court held on the facts of the case that, under the U.S. Constitution, counsel's admission during opening statement of the defendant's guilt without his express consent was not per se ineffective assistance of counsel but was subject to the prejudice analysis of *Strickland v. Washington*, 466 U.S. 668 (1984). The Court reasoned, "[I]n a capital case, counsel must consider in conjunction both the guilt and penalty phases in determining how best to proceed. When counsel informs the defendant of the strategy counsel believes to be in the defendant's best interest and the defendant is unresponsive, counsel's strategic choice is not impeded by any blanket rule demanding the defendant's explicit consent." *Nixon*, 543

U.S. 175, 192. Although the N.C. Supreme Court has had opportunities to do so, it has not disavowed the *Harbison* rule in light of the narrow ruling in *Nixon. See State v. Goss*, 361 N.C. 610 (2007); *State v. Campbell*, 359 N.C. 644 (2005); *see also State v. Maready*, 205 N.C. App. 1 (2010) (discussing *Nixon* and holding that North Carolina continues to adhere to the *Harbison* rule).

In *McCoy v. Louisiana*, ___ U.S. ___, 138 S. Ct. 1500 (2018), the U.S. Supreme Court reinforced the right of the defendant to control his or her defense. In *McCoy*, defense counsel conceded the defendant's guilt on multiple occasions throughout the guilt and sentencing phases of trial despite the defendant's repeated and express objections. The U.S. Supreme Court found that under the Sixth Amendment a defendant retains the autonomy to decide that the objective of his or her defense is to assert innocence, much like the decisions "whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and to forego an appeal." 138 S. Ct. at 1508. The Court distinguished *Florida v. Nixon*, where the defendant remained silent and never expressed any objection to defense counsel's strategy of conceding guilt. The defendant in *McCoy* clearly was opposed to that strategy and made this known "before and during trial, both in conference with his lawyer and in open court." 138 S. Ct. at 1509. The error was not subject to the prejudicial error analysis for ineffective assistance of counsel under *Strickland v. Washington* because the issue was the client's autonomy, not counsel's competence. Instead, this violation ranked as structural error; the defendant did not need to show prejudice to obtain relief.

Under *Harbison*, it remains reversible error in North Carolina for an attorney to concede a defendant's guilt without his or her express informed consent. *Harbison* does not require that a defendant object to this strategy.

The rule prohibiting defense counsel from admitting a defendant's guilt to the jury without the defendant's consent applies only to the guilt-innocence phase of a trial. Our courts have stated that it does not apply to sentencing proceedings. *State v. Boyd*, 343 N.C. 699 (1996); *State v. Walls*, 342 N.C. 1 (1995). As discussed in the following practice note, *Harbison* may apply to *Blakely* sentencing factors.

Practice note: *Boyd* and *Walls*, cited above, were decided before the line of U.S. Supreme Court cases culminating in *Blakely v. Washington*, 542 U.S. 296 (2004), in which the Court recognized that circumstances that increase a defendant's sentence beyond the maximum authorized for an offense are the functional equivalent of an element of a greater offense. *See also Ring v. Arizona*, 536 U.S. 584 (2002) (holding that factors that authorize imposition of the death penalty are subject to the same analysis). The N.C. appellate courts have not specifically considered the impact of *Blakely* and like cases on the application of *Harbison* to what previously were characterized as purely sentencing matters, such as the determination of aggravating factors. *Cf. State v. Harris*, 175 N.C. App. 360 (2006) (observing that North Carolina cases finding that defense counsel's concession of aggravating factors were a sufficient admission by the defendant were not applicable after *Blakely*, which requires a valid waiver by the defendant of the right to a jury trial; the court cites *Harbison* in support of the requirement of a valid

waiver), *vacated on other grounds*, 361 N.C. 154 (2006) (remanding for determination whether the failure to submit aggravating factors to the jury was harmless beyond a reasonable doubt). *But cf. State v. Womack*, 211 N.C. App. 309 (2011) (relying on prior cases and rejecting the argument that defense counsel violated *Harbison* by conceding the defendant's prior convictions at the habitual felon phase of the case without the defendant's consent because, among other things, *Harbison* does not apply to proceedings to determine whether the defendant's sentence should be enhanced).

Regardless of how the N.C. appellate courts resolve this issue, as a practical matter defense counsel should ***not*** admit in jury argument a matter that increases the defendant's sentence beyond the statutory maximum for the underlying offense without the client's consent.

B. What Constitutes Admission of Guilt

Admission must be express. There must be an actual admission of guilt to the charged offense or to a lesser included offense for *Harbison* error to occur. *See, e.g., State v. Matthews*, 358 N.C. 102 (2004) (finding per se ineffective assistance of counsel where defense counsel, without permission, conceded defendant's guilt to the lesser included offense of second degree murder).

An express admission of guilt to an offense that is neither charged nor a lesser included offense of the charged offense, will not be found to be erroneous. *See, e.g., State v. Roache*, 358 N.C. 243, 283-84 (2004) (holding that defense counsel's admission that defendant committed a murder not at issue in the case for which defendant was being tried "does not rise to the level of the act condemned by" the *Harbison* court); *State v. Wilson*, 236 N.C. App. 472 (2014) (no error where defense counsel noted in closing that defendant was guilty of assault pointing a gun because this was not a lesser included offense of the charged crime of attempted first degree murder).

It is not impermissible under *Harbison* to argue that the defendant is innocent or not guilty, but if he or she is found guilty of any crime, it should be of a lesser included offense or of a lesser crime for which he or she has not been charged. *See State v. Gainey*, 355 N.C. 73, 93 (2002) (defense counsel did not admit guilt to murder but only that "if he's guilty of anything, he's guilty of accessory after the fact"); *State v. Harvell*, 334 N.C. 356 (1993) (finding no admission of guilt where defense counsel argued defendant was not guilty of first or second murder and that if the evidence tended to show the commission of any crime, it was voluntary manslaughter); *State v. Greene*, 332 N.C. 565, 572 (1992) (no admission of guilt where defense counsel argued that the defendant was innocent of all charges, but if found guilty of any charge it should be of the lesser crime of involuntary manslaughter "because the evidence came closer to proving that crime than any of the other crimes charged"); *see also State v. Hinson*, 341 N.C. 66 (1995) (defense counsel's statements regarding the guilt of a co-defendant did not amount to an admission that the defendant himself had committed any crime).

Admissions of facts or elements. Merely admitting the existence of a fact or an element of an offense is not the equivalent of an admission of guilt. *See State v. Wiley*, 355 N.C. 592 (2002) (placed in context, defense counsel's remarks that there may be some physical evidence linking the defendant to the murder victim's car did not constitute an admission); *State v. Strickland*, 346 N.C. 443 (1997) (statements by defense counsel during jury voir dire that the uncontroverted evidence showed that the defendant was holding a gun when the victim was killed did not amount to a concession of guilt to which defendant had not agreed); *State v. Fisher*, 318 N.C. 512 (1986) (defense counsel's admission of the existence of malice was not an admission of guilt so it was not per se ineffective assistance of counsel); *State v. Maniego*, 163 N.C. App. 676 (2004) (defense counsel's admission of the fact that the defendant was present at the scene of the crime was not an admission of guilt and was consistent with the theory of defense).

Admission of other non-charged offenses. Defense counsel's admission of a defendant's guilt of an offense for which defendant is not on trial is not prohibited by *Harbison*. *See, e.g.*, *State v. Roache*, 358 N.C. 243, 284 (2004) (holding that defense counsel's admission of defendant's guilt of a murder for which he was not being tried did "not rise to the level of the act condemned by this Court in *Harbison*"); *State v. Wilson*, 236 N.C. App. 472 (2014) (finding no *Harbison* error in an attempted murder case where defense counsel conceded defendant's guilt of assault by pointing a gun; the purported admission by defense counsel did not refer to either the crime charged or to a lesser-included offense).

Assertion of defense. Some defenses may constitute an admission of guilt, at least of a lesser offense, and require the defendant's consent. *See State v. Johnson*, 161 N.C. App. 68 (2003) (defense counsel in opening statement stated that defendant was unable to premeditate and deliberate killings because of his intoxication and jury should return verdict of lesser offense; trial judge's inquiry of defendant was adequate to show consent); *see also State v. Berry*, 356 N.C. 490 (2002) (trial judge conducted *Harbison* inquiry to determine whether defendant consented to insanity defense, which necessitated admission of critical aspects of charged offense).

C. Procedural Requirements

Although there is no particular procedure that the trial judge "must invariably follow when confronted with a defendant's concession" (*State v. Berry*, 356 N.C. 490, 514 (2002)), an on-the-record exchange between the trial judge and the defendant is the preferred method of determining whether the defendant knowingly and voluntarily consented to an admission of guilt. *See State v. McDowell*, 329 N.C. 363 (1991); *see also State v. Matthews*, 358 N.C. 102, 108 (2004) (holding that *Harbison* requires more than implicit consent based on an overall trial strategy and the defendant's intelligence). A clear record of consent is required, but the trial judge need not engage in the formal colloquy that is required for a guilty plea under G.S. 15A-1022(a). *State v. Perez*, 135 N.C. App. 543 (1999). The trial judge "must be satisfied that, prior to any admissions of guilt at trial by a defendant's counsel, the defendant must have given knowing and informed consent, and the defendant must be aware of the potential consequences of his decision." *State v. Maready*, 205 N.C. App. 1, 7 (2010) (citations omitted) (finding per se

ineffective assistance of counsel where defense counsel failed to obtain defendant's express consent before admitting defendant's guilt to two counts of assault and to the lesser included offense of involuntary manslaughter). Appellate courts will not presume the defendant's lack of consent from a silent record. *State v. Boyd*, 343 N.C. 699 (1996).

If a defendant consents to the admission of guilt based on a particular defense strategy, the trial judge should determine whether the consent is contingent on the presentation of the defense or whether consent is withdrawn if the defense is later abandoned during trial. When a trial judge is faced with ambiguous statements regarding the departure from or abandonment of a particular defense strategy, the better practice is for him or her "to question the defendant on the record in order to ascertain, clearly, whether or not a particular defense strategy has been abandoned and whether or not the consent to an admission of guilt previously given has been withdrawn." *State v. Peoples*, 237 N.C. App. 100 (2014) (unpublished) (finding no *Harbison* error where defendant never explicitly withdrew his clear consent to concede guilt even though his concession was based on his erroneous belief that the defense of entrapment was available and he was told by the trial judge prior to trial that it was not available under the facts); *see also Berry*, 356 N.C. 490 (holding that trial judge was justified in assuming defendant's *Harbison* waiver remained valid throughout the trial in light of the absence of notice by defendant that his express consent to admit participation in a murder was conditioned on maintaining his insanity defense).

Practice note: If you decide that a concession of guilt is the best strategy in a particular case, it is imperative that you fully discuss the value of such a concession with the defendant. Before admitting guilt to the charge or to a lesser included offense during any part of the trial, present the defendant's written consent to the trial judge if you have obtained one or ask the judge to inquire of the defendant and obtain his or her express consent on the record. *See State v. House*, 340 N.C. 187, 197 (1995) (urging "both the bar and the trial bench to be diligent in making a full record of a defendant's consent when a *Harbison* issue arises at trial").
