

# South Carolina Law Review

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Volume 65  
Issue 4 *SURVEY OF SOUTH CAROLINA LAW*  
and *FOURTH CIRCUIT SURVEY*

Article 13

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Summer 2014

## Distinguishing between Procedural and Substantive Rules for Purposes of Retroactivity on Collateral Review

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### Recommended Citation

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Available at: <https://scholarcommons.sc.edu/sclr/vol65/iss4/13>

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**BLURRED LINES:  
DISTINGUISHING BETWEEN PROCEDURAL AND SUBSTANTIVE RULES  
FOR PURPOSES OF RETROACTIVITY ON COLLATERAL REVIEW**

Ryan C. Grover \*

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I. INTRODUCTION	

For prisoners seeking relief from their convictions and sentences on collateral review, the question of whether a new rule announced by the U.S. Supreme Court is substantive or procedural is vital. If the rule is substantive, it will be available to provide the prisoner relief.<sup>1</sup> If it is procedural, it is unlikely to be available to provide relief, unless the rule falls within very narrow exceptions.<sup>2</sup> As a result, the classification of a new rule as substantive or procedural can impact who remains imprisoned and who goes free.<sup>3</sup>

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1. See *Schiro v. Summerlin*, 542 U.S. 348, 351 (2004).

2. See *id.* at 352.

3. See Lyn S. Entzeroth, *Reflections on Fifteen Years of the Teague v. Lane Retroactivity Paradigm: A Study of the Persistence, the Pervasiveness, and the Perversity of the Court's Doctrine*, 35 N.M. L. REV. 161, 161–62 (2005) (using a hypothetical example to demonstrate how identical cases, one pending on direct review and one pending on collateral review, can result in wildly different outcomes) (citations omitted); see also Aaron-Andrew P. Bruhl, *Deciding When to Decide: How Appellate Procedure Distributes the Costs of Legal Change*, 96 CORNELL L. REV. 203, 232–33 (2011) (discussing the importance of attorneys keeping their clients' cases on direct review while awaiting a decision in *United States v. Booker*, 543 U.S. 220, 226–27 (2005), to ensure its application to their cases).

The Supreme Court's jurisprudence on retroactivity is a relatively new phenomenon in American law.<sup>4</sup> That jurisprudence has embraced a binary approach to retroactivity, and new rules fall within one of two categories: procedural rules or substantive rules.<sup>5</sup> Despite the Supreme Court's embrace of this dichotomy, however, the rules announced in its opinions and lower courts' opinions do not always fit neatly within either category. Rather, the rules announced in these cases may appear to fall within both categories, as procedural rules can have substantive applications and substantive rules require some procedural operation to take effect.<sup>6</sup> While this confusion provides fodder for law review articles and student notes,<sup>7</sup> the ambiguity leaves lower courts with difficult decisions regarding how to categorize new rules and whether to apply those rules retroactively on collateral review.

The Supreme Court's 2010 decision in *Carachuri-Rosendo v. Holder*<sup>8</sup> and the U.S. Court of Appeals for the Fourth Circuit's application of the *Carachuri* rule in *United States v. Simmons*<sup>9</sup> represent the kinds of cases whose rules do not fit neatly within either category. Neither case indicated whether the rule announced was procedural or substantive, nor whether the rule would apply retroactively on collateral review.<sup>10</sup> As a result, the Fourth Circuit was quickly forced to address those unanswered questions in *United States v. Powell*<sup>11</sup> and *Miller v. United States*.<sup>12</sup> Given the Supreme Court's retroactivity jurisprudence, the only way to answer the retroactivity question is to place the cases within one of the two categories: substantive or procedural. In *Powell*, which determined *Carachuri*'s retroactivity,<sup>13</sup> and *Miller*, which determined *Simmons*'s retroactivity,<sup>14</sup> the Fourth Circuit reached opposite conclusions.<sup>15</sup> In doing so, the Fourth Circuit provided little guidance as to whether it will likely conclude

4. See generally Kermit Roosevelt III, *A Little Theory is a Dangerous Thing: The Myth of Adjudicative Retroactivity*, 31 CONN. L. REV. 1075 (1999) (outlining the history of retroactivity jurisprudence).

5. See *Schriro*, 542 U.S. at 351–52 (citations omitted) (discussing the jurisprudence regarding new substantive rules and new rules of procedure).

6. See Ethan Isaac Jacobs, Note, *Is Ring Retroactive?*, 103 COLUM. L. REV. 1805, 1828 (2003) (“Relatively little has been written about the distinction between substantive and procedural law in general.”).

7. See, e.g., *id.* at 1825 (arguing that *United States v. Ring*, 536 U.S. 584, 609 (2002), is substantive and therefore retroactive on collateral review); Nicholas J. Eichenseer, Comment, *Reasonable Doubt in the Rear-View Mirror: The Case for Blakely-Booker Retroactivity in the Federal System*, 2005 WIS. L. REV. 1137, 1138 (2005) (arguing that *Blakely v. Washington*, 542 U.S. 296 (2004), and *United States v. Booker*, 543 U.S. 220 (2005), provided substantive rules that were retroactively applicable on collateral review).

8. 560 U.S. 563 (2010).

9. 649 F.3d 237 (4th Cir. 2011).

10. See generally *Carachuri*, 130 S. Ct. at 2577; *Simmons*, 649 F.3d at 237.

11. 691 F.3d 554 (4th Cir. 2012).

12. 735 F.3d 141 (4th Cir. 2013).

13. *Powell*, 691 F.3d at 556.

14. *Miller*, 735 F.3d at 145.

15. See *Powell*, 691 F.3d at 559–60; *Miller*, 735 F.3d at 147.

that new rules are substantive or procedural for purposes of collateral review. Despite the confusion resulting from the opinions' blurring the line between procedural and substantive rules, Judge King's dissent in *Powell* and the court's opinion in *Miller* demonstrate that new rules with both substantive and procedural applications can fit within the existing framework.<sup>16</sup> However, given the Supreme Court's recent order for the Fourth Circuit to revisit its decision in *Newbold v. United States*,<sup>17</sup> the Fourth Circuit may be clarifying its own jurisprudence soon.

## II. BACKGROUND

### A. *The Retroactivity Standard*

The standard for whether a new rule announced by the Supreme Court is retroactively applicable on collateral review appears straightforward. New rules are "applie[d] to all criminal cases still pending on direct review."<sup>18</sup> Thus, all new rules apply prospectively.<sup>19</sup> However, for convictions that are already final—in other words, for those who are seeking relief on collateral review—the new rule "applies only in limited circumstances."<sup>20</sup> According to the Court, "New *substantive* rules generally apply retroactively."<sup>21</sup> To be considered *substantive*, the rule must "alter[] the range of conduct or the class of persons that the law punishes."<sup>22</sup> A *procedural rule* is one that "merely regulates the *manner of determining* the defendant's culpability."<sup>23</sup> Although new procedural rules do not generally apply retroactively, an exception exists for "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding."<sup>24</sup>

16. See *Powell*, 691 F.3d at 560–66 (King, J., dissenting) (citations omitted); *Miller*, 735 F.3d at 142–47 (citations omitted).

17. No. 12-10871, 134 S. Ct. 897 (Mem.) (Jan. 13, 2014) (remanding the case to the Fourth Circuit to rehear the case from *United States v. Newbold*, 490 F. App'x 614 (4th Cir. 2012)).

18. *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004) (citing *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987)).

19. See *id.*

20. *Id.*

21. *Id.*

22. *United States v. Powell*, 691 F.3d 554, 558 (4th Cir. 2012) (quoting *Schriro*, 542 U.S. at 353).

23. *Id.* (quoting *Schriro*, 542 U.S. at 353 (internal quotations omitted)).

24. *Id.* (quoting *Saffle v. Parks*, 494 U.S. 484, 495 (1990) (internal quotation marks omitted)). Very few cases have met this high standard. The Fourth Circuit has noted that the Supreme Court "has repeatedly implied that the only procedural rules deserving of retroactive application are those that are comparable in importance to *Gideon v. Wainwright*, which incorporated the Sixth Amendment right to counsel against the States." *Id.* (internal citations omitted) (citing *Gideon*, 372 U.S. 335 (1963)). As one commenter has put it, "The rule is easily paraphrased: nothing is as important as *Gideon*, so nothing is retroactive." Justin F. Marceau, *Gideon's Shadow*, 122 YALE L.J. 2482, 2488 (2013).

### B. *The Supreme Court Decision*

In *Carachuri-Rosendo v. Holder*, the Supreme Court addressed what qualifies as an *aggravated felony* for purposes of the Immigration and Naturalization Act (INA).<sup>25</sup> The defendant was a lawful permanent resident who faced deportation after committing two misdemeanor drug possession crimes in Texas.<sup>26</sup> He sought cancellation of his removal or waiver of inadmissibility under the INA, which allows the Attorney General to provide such relief as long as the applicant has not been convicted of an aggravated felony.<sup>27</sup> To be convicted of an aggravated felony, the defendant would have to have been convicted of a drug trafficking crime, which would be a felony punishable under the Controlled Substances Act (CSA).<sup>28</sup> A felony requires punishment for more than one year.<sup>29</sup> The CSA provides that a recidivist offender charged with simple possession could be sentenced to more than one year, but a nonrecidivist offender could not be sentenced to more than one year.<sup>30</sup> The Court explained that it is not the conduct of the offender that determines what constitutes an *aggravated felony*; rather, the Court said it must “look to the conviction itself . . . not to what might have or could have been charged.”<sup>31</sup> As a result, although “the conduct prohibited by state law must be punishable as a felony under federal law,” “the defendant must *also* have been *actually convicted* of a crime that is itself punishable as a felony under federal law.”<sup>32</sup> In this case, because the defendant was not charged and convicted of his second simple possession as a recidivist offense, his crimes were not punishable as a felony under federal law and he was eligible for discretionary relief under the INA.<sup>33</sup>

### C. *The Fourth Circuit Applies Carachuri*

After deciding *Carachuri*, the Supreme Court vacated the Fourth Circuit’s original decision in *United States v. Simmons*.<sup>34</sup> In *Simmons*, the Fourth Circuit applied *Carachuri* to hold that a district court must look to a defendant’s actual conviction—rather than a hypothetical conviction—for the maximum crime with which a defendant could have been charged in determining whether a defendant had committed a felony offense punishable by imprisonment for more than one

25. *Carachuri*, 130 S. Ct. at 2580.

26. *Id.*

27. *Id.* at 2580–81 (citing 8 U.S.C. § 1229b(a)(3) (2012)).

28. *Id.* at 2581 (citing Controlled Substance Act, 21 U.S.C. § 801 (2012)).

29. *Id.* (quoting 18 U.S.C. § 3559(a) (2012)).

30. *Id.* (citing 21 U.S.C. § 844(a) (2102)).

31. *Id.* at 2586.

32. *Id.* at 2589.

33. *Id.* at 2589–90.

34. See *United States v. Simmons*, 649 F.3d 237, 239–40 (4th Cir. 2011) (en banc) (citing *Carachuri*, 130 S. Ct. at 2577). For the procedural history prior to the Fourth Circuit’s en banc opinion in *Simmons*, see *id.*

year under the CSA.<sup>35</sup> In that case, the defendant pleaded guilty to a charge of possession with intent to distribute at least 100 kilograms of marijuana, but at his sentencing, he objected to the Government's use of a 1996 North Carolina conviction for possession with intent to distribute marijuana to increase his mandatory minimum sentence.<sup>36</sup> The statute increased the mandatory minimum sentence from five years to ten years if the individual committed the crime "after a prior conviction for a felony drug offense ha[d] become final."<sup>37</sup> The defendant's North Carolina charge could not have resulted in a term of imprisonment greater than one year under North Carolina law.<sup>38</sup> The court explained that, under the North Carolina Structured Sentencing Act, an individual could have received more than one year of imprisonment if (1) the state proved or the defendant pleaded to aggravating factors warranting a higher sentence, and (2) the state showed that the defendant had at least fourteen criminal history points that would have increased the defendant's prior record level to five.<sup>39</sup> However, North Carolina did not meet these two criteria for the defendant's prior conviction.<sup>40</sup> Prior Fourth Circuit precedent allowed the court to look at the "maximum aggravated sentence that could be imposed for that crime upon a defendant with the worst possible criminal history,"<sup>41</sup> and the court previously determined that the defendant's offense was punishable for a term of greater than one year.<sup>42</sup> The Supreme Court, however, vacated Simmons's judgment and ordered the case to be reconsidered.<sup>43</sup>

Reviewing the Supreme Court's *Carachuri* opinion, the Fourth Circuit concluded that its prior reasoning was no longer good law.<sup>44</sup> The court explained that "[t]he conviction itself" must serve as [its] "starting place."<sup>45</sup> Because the North Carolina state court did not make a recidivist finding that would allow the defendant to receive a higher sentence, the Government had no finding on which it could seek the enhanced sentence.<sup>46</sup> The court also explained that the North Carolina Structured Sentencing Act mandated the defendant's sentence and prevented the state court judge from imposing a higher sentence, and the defendant could not have been sentenced to a term greater than one year.<sup>47</sup> Further, the court stated that "*Carachuri* also forbids [the court]

35. *Id.* at 248–50 (citations omitted).

36. *Id.* at 239.

37. *Id.* (quoting 21 U.S.C. § 841(b)(1)(B)(vii) (2012)).

38. *Id.* at 239–40 (quoting *United States v. Simmons*, 340 F. App'x 141, 143 (4th Cir. 2009)).

39. *Id.* at 240–41 (citing N.C. GEN. STAT. §§ 15A-1340.16(a), -1340.14(c)(5), -1340.17(c)(d) (2012)).

40. *Id.* at 241.

41. *Id.* (quoting *United States v. Harp*, 406 F.3d 242, 246 (4th Cir. 2005)).

42. *Id.* (referring to *Simmons*, 340 F. App'x at 141).

43. *Id.*

44. *Id.*

45. *Id.* at 243 (quoting *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 576 (2010)).

46. *Id.* (citing *Carachuri*, 560 U.S. at 577 n.12).

47. *Id.* at 244 (citing *United States v. Rodriguez*, 533 U.S. 337, 390 (2008)).

from considering hypothetical aggravating factors when calculating” a defendant’s maximum punishment.<sup>48</sup> Thus, just as the Court in *Carachuri* said that it could not look to the conduct of the defendant but could look only to the conviction for purposes of the INA, the Fourth Circuit explained that it must look to the defendant’s conviction itself.<sup>49</sup> Additionally, the Fourth Circuit read *Carachuri* as “ma[king] clear that when a state statute provides a harsher punishment applicable only to recidivists, it creates different ‘offenses’ for the purpose of federal sentencing enhancements.”<sup>50</sup> Therefore, the same conduct could constitute different offenses, depending on whether a recidivist finding was made to support the conviction.<sup>51</sup> Because the defendant’s 1996 North Carolina conviction did not include a recidivist finding, “his ‘offense’ was not ‘punishable’ by a term of imprisonment exceeding one year, which is reserved for repeat offenders.”<sup>52</sup>

### III. *POWELL* AND *MILLER*: THE FOURTH CIRCUIT DECIDES RETROACTIVITY

#### A. *United States v. Powell*

In *United States v. Powell*, the Fourth Circuit held that *Carachuri* announced a new procedural rule and, therefore, did not apply retroactively to cases on collateral review.<sup>53</sup> In *Powell*, the defendant’s federal conviction was for conspiracy to possess with intent to distribute at least five kilograms of cocaine and at least fifty grams of crack cocaine.<sup>54</sup> He received a sentence of 240 months’ imprisonment as a result of an enhanced mandatory minimum sentence imposed because of the defendant’s previous drug conviction in North Carolina, which had resulted in a term of six to eight months’ imprisonment.<sup>55</sup> The defendant filed a motion under 28 U.S.C. § 2255, asking the court to vacate his sentence pursuant to the Supreme Court’s holding in *Carachuri*.<sup>56</sup> Because six years had passed since his sentencing, the defendant’s motion would have been barred by § 2255’s statute of limitations.<sup>57</sup> However, § 2255(f)(3) allows a defendant to seek relief within one year of a newly recognized right by the Supreme Court if the Supreme Court has made the right retroactively applicable to cases on collateral review.<sup>58</sup> Thus, for *Carachuri* to be available as an avenue

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48. *Id.* at 244.

49. *Id.* (quoting *Carachuri*, 560 U.S. at 576).

50. *Id.* at 246.

51. *Id.* (citing *Carachuri*, 560 U.S. at 567–68 n.3).

52. *Id.* at 247.

53. *United States v. Powell*, 691 F.3d 554, 560 (4th Cir. 2012).

54. *Id.* at 555.

55. *Id.* at 555–56.

56. *Id.*

57. *See id.* (noting that *Powell*’s motion was untimely).

58. *Id.* at 557 (quoting 28 U.S.C. § 2255(f)(3)) (2012).

for relief for the defendant, the Fourth Circuit had to conclude that *Carachuri* was retroactive on collateral review.<sup>59</sup>

Applying the standard for retroactivity, the majority stated that “*Carachuri* is best understood as articulating a procedural rule rather than a substantive one.”<sup>60</sup> The majority framed *Carachuri* as “prescrib[ing] the *manner* in which to construe” the statutory condition that the defendant must have been “convicted of any aggravated felony.”<sup>61</sup> To satisfy that condition, “a court must look to the defendant’s *record of conviction*, not to a *hypothetical conviction* which could have been prosecuted in the circumstances.”<sup>62</sup> For the majority, this holding “altered neither ‘the range of conduct’ nor the ‘class of persons’ that could be punished under any criminal statute.”<sup>63</sup> The range of conduct remained the same: simple possession.<sup>64</sup> The class of persons remained the same: recidivist possessors could receive a sentence of up to two years’ imprisonment, while nonrecidivist drug possessors could receive no more than a year.<sup>65</sup> Accordingly, the majority explained that “[t]he only novelty introduced by *Carachuri* [was] the procedure for determining whether a defendant’s prior conviction qualifies as an aggravated felony.”<sup>66</sup> This resulted in a requirement that the record of conviction must include a finding that the defendant was, in fact, a recidivist.<sup>67</sup> Accordingly, *Carachuri* “relates to the *manner of determining* the potential punishment for an offense based on the facts disclosed by the judicial record” and constitutes “a quintessential procedural rule.”<sup>68</sup> To further support its analysis, the majority explained that *Simmons* “extracted the interpretive principles and procedural requirements outlined in *Carachuri* from the statutory context in which they initially arose and applied them.”<sup>69</sup> For the majority, *Simmons* thus serves as an example of the court applying a procedural rule.<sup>70</sup> As a result, the court held that *Carachuri* announced a procedural rule that does not apply retroactively on collateral review.<sup>71</sup>

Judge King, who concurred in the judgment in part, dissented in part because he “strongly disagree[d] with the majority’s analysis.”<sup>72</sup> Judge King argued that *Carachuri* could be applied in a way that would meet the criteria for retroactivity.<sup>73</sup> In addition to the example of 21 U.S.C. § 841(b), which was the

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59. *See id.* at 556.

60. *Id.* at 558.

61. *Id.* (quoting 8 U.S.C. § 1229b(a)(3) (2012)) (internal quotation marks omitted).

62. *Id.*

63. *Id.* at 559.

64. *Id.* at 559 (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)).

65. *See id.*

66. *See id.*

67. *Id.*

68. *Id.* (citing *Schriro*, 542 U.S. at 353) (internal quotation marks omitted).

69. *Id.*

70. *See id.*

71. *Id.* at 559–60.

72. *Id.* at 560 (King, J., concurring in part and dissenting in part).

73. *Id.* (citing *Schriro*, 542 U.S. at 351).



statute at issue in *Simmons*,<sup>74</sup> Judge King applied *Carachuri* to 18 U.S.C. § 922(g)(1), the statute that prevents felons from possessing a firearm.<sup>75</sup> Judge King explained that, under these statutes, “*Carachuri* revealed that many defendants . . . were convicted of an act that the law does not make criminal or [received] a punishment that the law cannot impose upon them.”<sup>76</sup> Judge King reframed *Carachuri* in terms of its application in statutory interpretation, stating that *Carachuri* “narrowe[d] the definition of a convicted felon under § 922(g)(1) . . . to only those prior offenders who actually face” a sentence of more than a year.<sup>77</sup> For Judge King, viewing the Supreme Court’s decision in terms of its effect on statutory interpretation was entirely consistent with Fourth Circuit precedent, and he noted that the Fourth Circuit had previously found a case retroactive that narrowed the interpretation of *use* in 18 U.S.C. § 924(c)(1)(A).<sup>78</sup>

Returning to 21 U.S.C. § 841(b), the statute under which the defendant was sentenced, Judge King explained that *Carachuri* limited the possible maximum statutory sentence for all defendants who were sentenced under § 841(b), other than those sentenced under § 841(b)(1)(A).<sup>79</sup> Judge King then turned to the Seventh and Tenth Circuits for support, arguing that a rule that limits the exposure to a longer sentence than the defendant would have faced without the rule is substantive, warranting retroactive application.<sup>80</sup> Under this analysis, the defendant would not have been eligible for relief because he faced the same maximum sentence with the enhancement at issue in the case as without it.<sup>81</sup>

Turning to the majority’s analysis and conclusion that the rule from *Carachuri* is purely procedural, Judge King classified the opinion as “patently wrong.”<sup>82</sup> Judge King recognized that *Carachuri* contains a “procedural aspect” that the Fourth Circuit had previously applied in *Simmons*.<sup>83</sup> However, Judge King saw *Carachuri*’s “consequent narrowing of the pool of prior offenders subject to, inter alia, enhanced penalties . . . and even criminal liability” as an additional “innovation.”<sup>84</sup> Judge King framed *Carachuri* as “alter[ing] both the range of permissible methods . . . and the range of conduct.”<sup>85</sup> As a result, Judge King concluded that *Carachuri* formulated a “substantive rule eligible for retroactive application.”<sup>86</sup> Judge King’s only concern was that, in announcing

74. See *United States v. Simmons*, 649 F.3d 237, 239 (4th Cir. 2011).

75. See *Powell*, 691 F.3d at 560.

76. *Id.* (quoting *Schriro*, 542 U.S. at 352) (internal quotation marks omitted).

77. *Id.* at 561 (citing *United States v. Thomas*, 627 F.3d 534, 538 (4th Cir. 2010)).

78. *Id.* (citing *Thomas*, 627 F.3d at 538 (holding a rule that narrowed the scope of the word *use* to be substantive and applicable retroactively)).

79. *Id.* at 562.

80. *Id.* at 562–63 (citing *Welch v. United States*, 604 F.3d 408, 415 (7th Cir. 2010); *United States v. Shipp*, 589 F.3d 1084, 1090, 1091 (10th Cir. 2009)).

81. *Id.* at 563.

82. *Id.* at 564.

83. *Id.*

84. *Id.*

85. *Id.* at 565 (emphasis added).

86. *Id.*

*Carachuri* as retroactive, individuals with meritorious claims would have missed the deadline for submitting an application under § 2255, and he looked forward to the Fourth Circuit's opportunity to recharacterize *Carachuri* as retroactive in the future.<sup>87</sup>

### B. *Miller v. United States*

Initially, in light of *Powell*, the Fourth Circuit decided cases as if *Simmons* does not operate retroactively on collateral review.<sup>88</sup> In *Miller v. United States*, however, the Fourth Circuit reversed course and held that, although *Carachuri* is not a substantive rule, *Simmons* is a substantive rule and operates retroactively.<sup>89</sup>

The defendant in *Miller* was convicted in 2008 of one count of possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1).<sup>90</sup> Pursuant to § 922(g)(1), a person who “has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year” may not possess a firearm.<sup>91</sup> Prior to his § 922(g)(1) conviction, the defendant had been convicted in North Carolina state court for felony possession of cocaine and for threatening a court officer.<sup>92</sup> The defendant's criminal history provided him with a maximum sentence of eight months' imprisonment for each crime under the North Carolina Structured Sentencing Act.<sup>93</sup> Under pre-*Simmons* Fourth Circuit precedent, however, both convictions were considered “punishable by imprisonment for a term exceeding one year” because a hypothetical defendant could have received a sentence for greater than one year.<sup>94</sup> Both the defendant and the Government agreed that *Simmons* impacted what constitutes such a crime under § 922(g)(1), but the question facing the court was whether the defendant would be eligible for relief under *Simmons* because its rule was not in effect at the time he had exhausted his appeals.<sup>95</sup>

Miller argued, and the court agreed, that *Simmons* announced a new substantive rule and, as a result, *Simmons* applies retroactively.<sup>96</sup> According to the court, *Simmons* requires courts to examine “how much prison time the defendant was exposed to given his own criminal history at the time he was

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87. *See id.* at 565–66.

88. *See, e.g.,* *United States v. Peters*, 520 F. App'x 234, 234 (4th Cir. 2013) (“Under *Powell*, the rulings in *Carachuri-Rosendo* and *Simmons* are not applicable to Peters' § 2255 motion.”); *United States v. Newbold*, 490 F. App'x 614, 615 (4th Cir. 2012), *vacated*, 134 S. Ct. 897 (2014) (“Under *Powell*, *Carachuri-Rosendo* and *Simmons* do not afford Newbold habeas relief.”); *United States v. Moton*, 496 F. App'x 330, 331 (4th Cir. 2012) (concluding that *Powell* precluded retroactive application of *Simmons*).

89. 735 F.3d 141, 147 (4th Cir. 2013).

90. *Id.* at 142.

91. 18 U.S.C. § 922(g)(1) (2012).

92. *Miller*, 735 F.3d at 143.

93. *Id.* (citing N.C. GEN. STAT. § 15A-1340.17(c), (d) (2012)).

94. *Id.* (citing 18 U.S.C. § 922(g)(1)).

95. *Id.*

96. *Id.* (citing *United States v. Simmons*, 649 F.3d 237 (4th Cir. 2011)).

sentenced and any aggravating factors that were actually alleged against him.”<sup>97</sup> Thus, under *Simmons*, if criminal defendants could not have received a sentence of more than a year, defendants who were convicted of violating § 922(g)(1) “are actually innocent of the . . . offense of which they were convicted.”<sup>98</sup>

Although *Simmons* was applying *Carachuri*, the court was careful to explain that it was not *Carachuri* that announced the new substantive rule.<sup>99</sup> Rather, *Simmons*, in applying *Carachuri*, announced the new substantive rule.<sup>100</sup> The court concluded that *Simmons* announce a new substantive rule because it “narrowed the scope of § 922(g)(1) by establishing that it does not reach defendants whose prior convictions could not have resulted in a sentence of more than one year in prison” and “altered the class of persons that the law punishes.”<sup>101</sup> According to the court, this reading of *Simmons* conforms to recent Supreme Court precedent announcing new substantive rules.<sup>102</sup>

The court was also careful to explain why *Powell* did not dictate the outcome of *Miller*, noting that Powell sought relief under 28 U.S.C. § 2255.<sup>103</sup> Section 2255(f) contains a statute of limitations provision that limits when § 2255 motions can be filed.<sup>104</sup> Powell sought relief under *Carachuri*, and to determine whether his § 2255 motion was timely, the court had to determine whether *Carachuri* announced a new substantive rule, which would have shifted his one-year time frame.<sup>105</sup> When the court determined *Carachuri*’s retroactivity, it concluded that *Carachuri* is procedural because *Carachuri* “looks only at whether a certain procedure was followed.”<sup>106</sup> Because *Powell* examined only *Carachuri*’s retroactivity, it had no impact on whether *Simmons* announced a substantive rule.<sup>107</sup> Thus, *Simmons* applied *Carachuri*’s procedure, resulting in a “narrow[ing] [of] the class of offenders and range of conduct that can be subject to punishment.”<sup>108</sup>

97. *Id.* at 146.

98. *Id.*

99. *Id.* Indeed, although it goes unsaid, the panel could not have determined *Carachuri* to announce a new substantive rule because doing so would have contradicted *Powell*. As a published opinion of the Fourth Circuit, *Powell* could only have been overturned by a published en banc opinion of the court. See *Doe v. Charleston Area Med. Ctr., Inc.*, 529 F.2d 638, 642 (4th Cir. 1975) (stating that a decision of the same court of appeals “is binding, not only upon the district court, but also upon another panel of [the same] court—unless and until it is reconsidered en banc”).

100. *Miller*, 735 F.3d at 146.

101. *Id.* (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)) (internal quotation marks omitted).

102. *Id.* (citing *Watson v. United States*, 552 U.S. 74, 83 (2007); *Bousley v. United States*, 523 U.S. 614, 620–21 (1998); *Bailey v. United States*, 516 U.S. 137, 143–44 (1995)).

103. *Id.* (citing *United States v. Powell*, 691 F.3d 554, 555 (4th Cir. 2012)).

104. *Id.* at 146–47 (citing 28 U.S.C. § 2255(f) (2012)).

105. See *id.* (citing 18 U.S.C. § 2255(f)(3)).

106. *Id.* at 147.

107. See *id.* (citing *Powell*, 691 F.3d at 557).

108. *Id.* Judge King wrote a short concurrence to restate his belief that *Carachuri* was also retroactive on review. See *id.* (King, J., concurring).

## IV. ANALYSIS

When read together, the Fourth Circuit's opinions in *Miller* and *Powell* provide inconsistent guidance for distinguishing procedural and substantive rules. Both the majority in *Powell* and the court's opinion in *Miller* applied a rule that requires lower courts to consider the actual record of conviction to determine whether recidivist enhancements could be triggered under a statute.<sup>109</sup> However, the two Fourth Circuit opinions reached opposite conclusions as to whether those rules qualify as substantive or procedural rules.<sup>110</sup> While the court in *Miller* characterized *Powell* in a way that minimizes the inconsistency between the two opinions, the court's distinction of *Powell* rested largely on its procedural context without distinguishing the court's rationale.<sup>111</sup> Nevertheless, the Fourth Circuit panel in *Miller* may not have been able to distinguish *Powell* without coming dangerously close to overruling it, which the panel would not have been able to do.<sup>112</sup> Although the court's opinion in *Miller* reads *Simmons* as a substantive rule, the court's analysis suggests this classification is much less clear.<sup>113</sup>

At various points throughout the *Miller* opinion, the court appears to characterize *Simmons* in procedural terms similar to those used by the majority's characterization of *Carachuri* in *Powell*. For example, in *Miller*, the court characterized *Simmons* as holding "that a prior conviction under North Carolina law is punishable by more than one year of imprisonment only if the defendant's conviction, based on his individual offense characteristics and criminal history, allowed for such a sentence."<sup>114</sup> The court later added that "[t]he *Simmons* decision changed the way this Court determines whether prior convictions for certain lower-level North Carolina felonies are punishable by more than one year in prison"<sup>115</sup> and "*Simmons* requires the court to look at how much prison time the defendant was exposed to given his own criminal history at the time he was sentenced and any aggravating factors that were actually alleged against him."<sup>116</sup> This analysis of *Simmons* echoes the *Powell* court's reading of *Carachuri*. The majority's opinion in *Powell* described *Carachuri* as holding "that in determining whether the condition is satisfied, a court must look to the defendant's *record of conviction*, not to a *hypothetical conviction* which could

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109. *See id.* at 144 (citing *United States v. Simmons*, 649 U.S. 237, 244 (4th Cir. 2011)); *Powell*, 691 F.3d at 559.

110. *See Miller*, 735 F.3d at 447; *Powell*, 691 F.3d at 559–60.

111. *See supra* notes 103–07 and accompanying text.

112. *See Doe v. Charleston Area Med. Ctr., Inc.*, 529 F.2d 638, 642 (4th Cir. 1975) (stating that a decision of the same court of appeals "is binding, not only upon the district court, but also upon another panel of [the same] court—unless and until it is reconsidered en banc").

113. *See Miller*, 735 F.3d at 447.

114. *Id.* at 144 (citing *Simmons*, 649 F.3d at 244).

115. *Id.* at 145 (emphasis added).

116. *Id.* at 146.

have been prosecuted in the circumstances.”<sup>117</sup> As a result, the court explained that “[t]he only novelty introduced by *Carachuri* is the procedure for determining whether a defendant’s prior conviction qualifies as an aggravated felony.”<sup>118</sup> Thus, both opinions recognize that the significance of the rules they were interpreting rested in part on a change in how courts determine what qualifies as a felony.

In *Powell*, however, the court was content to simply characterize *Carachuri* as procedural.<sup>119</sup> The problem with this analysis, as Judge King pointed out, is that “the *Carachuri* rule has numerous applications, including usages that narrow the scope of a criminal statute by interpreting its terms, and thereby alter[ ] the range of conduct or the class of persons that the law punishes.”<sup>120</sup> Judge King effectively characterized *Carachuri* as containing both a “procedural aspect” and “substantive applications demanding to be retroactive.”<sup>121</sup> In other words, Judge King’s reasoning suggests that *Carachuri* blurred the line between procedural and substantive rules.

The Fourth Circuit’s opinion in *Miller* blurs this line again. Although the opinion acknowledged *Simmons*’s procedural impact,<sup>122</sup> the court also characterized *Simmons* as substantive in holding “that a defendant’s prior conviction for which he could not have received more than a year in prison under North Carolina’s mandatory Structured Sentencing Act . . . was not ‘punishable’ by more than one year in prison and is not a felony offense for purposes of federal law.”<sup>123</sup> Thus, the court read *Simmons* as having a *procedural aspect* by its effect on the procedure used to determine whether someone is convicted of a felony and sentenced to more than a year; however, the court also read *Simmons* to limit the scope of the federal statute.<sup>124</sup> Nevertheless, because the majority opinion in *Powell* did not address its substantive implications, the court in *Miller* did not have to distinguish why *Powell*’s rationale dictated the outcome in *Simmons*. The court in *Miller* was thus free to hold that *Simmons* is a substantive rule and, therefore, retroactive in application.

## V. CONCLUSION

The inconsistency between the Fourth Circuit’s opinions in *Powell* and *Miller* raises the following questions: When the line between a procedural and substantive rule is blurred such that the same court can reach opposite

117. *United States v. Powell*, 691 F.3d 554, 558 (4th Cir. 2012).

118. *Id.* at 559.

119. *Id.* at 559–60.

120. *Id.* at 560 (King, J., dissenting in part and concurring in the judgment in part) (internal quotation marks omitted).

121. *Id.* at 564.

122. *Miller v. United States*, 735 F.3d 141, 146 (4th Cir. 2013).

123. *Id.* at 144–45 (citing *United States v. Simmons*, 649 F.3d 237, 243 (4th Cir. 2011); N.C. GEN. STAT. § 15A-1340.17 (2013)).

124. *Id.* at 146.

conclusions when faced with similar issues, can the existing framework hold? And if the framework holds, where is the line between substantive and procedural rules drawn when the line is blurred? Fortunately, the Fourth Circuit's opinion in *Miller* and Judge King's dissent in *Powell* demonstrate that, although the line may be blurred, the framework remains salvageable. Judge King explicitly argued in *Powell* that a rule with procedural import and a substantive impact should ultimately be found to be substantive. Thus, when a rule that alters a procedure employed by a judge serves to alter the class or narrow the conduct, that rule should be deemed substantive and retroactive on collateral review. This approach is essentially the one taken by the Fourth Circuit in *Miller*. Although the court did not explicitly adopt Judge King's rationale,<sup>125</sup> it acknowledged that *Simmons* had a procedural impact but that this procedural impact narrowed the class of conduct.<sup>126</sup> Thus, the court's approach in *Miller* better recognizes the capacity for blurred lines, while still preserving the existing framework, and provides a way forward for the Fourth Circuit in future cases.

The Fourth Circuit may soon provide additional guidance in distinguishing between substantive and procedural rules. On January 13, 2014, the Supreme Court granted Joseph K. Newbold's petition for a writ of certiorari and vacated the Fourth Circuit's previous order denying his § 2255 motion. Newbold had challenged whether "his predicate convictions . . . qualified him as an armed career criminal under the Armed Career Criminal Act."<sup>127</sup> The court denied him relief, reasoning that "[u]nder *Powell*, *Carachuri-Rosendo* and *Simmons* do not afford Newbold habeas relief."<sup>128</sup> The Supreme Court, however, vacated his judgment and remanded his case to the Fourth Circuit "for further consideration in light of . . . *Miller v. United States*."<sup>129</sup> Accordingly, this blurred line may soon be brought into focus.

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125. Judge King was part of the panel that decided *Miller*, but the opinion does not cite to Judge King's dissent. *See id.* at 142.

126. *See id.* at 145–46 (stating that because *Simmons* narrowed the scope of the statute, its effect is substantive).

127. *United States v. Newbold*, 490 F. App'x 614, 615 (4th Cir. 2012) (citing 18 U.S.C. § 924(e) 2012)).

128. *Id.*

129. *Newbold v. United States*, 134 S. Ct. 897 (Mem.) (2014).

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