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INTRODUCTION

A prior conviction can affect an individual's life in many ways, especially when the individual becomes involved in a subsequent legal proceeding. The extent to which the prior conviction can have
significant legal effects, such as the loss of a civil right,\(^1\) often depends upon the severity of the previously committed crime. Since legislators frequently distinguish between more and less severe crimes on the basis of the maximum potential term of imprisonment authorized for the prior conviction,\(^2\) courts and lawyers often have to calculate the potential term of imprisonment that the individual faced. This calculation can prove to be complicated because courts may have to consider whether to apply certain sentencing enhancements\(^3\) to the prior conviction. For example, when a defendant is convicted for the first time, courts can consider either the maximum punishment for a first-time offender (i.e., the actual defendant) or the maximum punishment for a defendant with the worst criminal history (i.e., a hypothetical defendant). As the case of \textit{United States v. Simmons}\(^4\) illustrates, the legal principles undergirding this calculation are evolving, and the methods for making the calculation are changing.

In 2006, a North Carolina court convicted Jason Simmons of possession of marijuana with intent to distribute.\(^5\) Given the absence of both aggravating factors and prior convictions, Simmons did not face the possibility of imprisonment.\(^6\) In 2007, Simmons "pled guilty to federal drug trafficking."\(^7\) The district court held that his prior conviction under state law qualified as an offense "punishable by imprisonment for more than one year," subjecting him to a sentencing enhancement under the Controlled Substances Act.\(^8\) As a result of this enhancement, the court doubled his minimum sentence.

\begin{enumerate}
\item See \textit{id.} (distinguishing between crimes that are punishable by a term of imprisonment of more than one year and crimes that are punishable by a term of imprisonment of one year or less).
\item The Supreme Court has distinguished between "sentencing factors" and "elements." \textit{Apprendi v. New Jersey}, 530 U.S. 466, 485 (2000). A sentencing factor describes "a fact that was not found by a jury but that could affect the sentence imposed by the judge." \textit{Id.} In contrast, the jury must find elements of a crime beyond a reasonable doubt. \textit{Id.} at 500 (Thomas, J., concurring). Yet another distinction relates to prior convictions and aggravating factors. While the Supreme Court has noted that prior convictions aggravate an offense, \textit{United States v. Rodriguez}, 553 U.S. 377, 386 (2008), this Comment refers to aggravating factors as those facts other than a prior conviction that can enhance a sentence. Thus, a "sentencing enhancement" refers to either a prior conviction or an aggravating factor.
\item 649 F.3d 237 (4th Cir. 2011) (en banc).
\item \textit{Id.} at 239.
\item \textit{Id.} at 241. Simmons received six to eight months community service. \textit{Id.} The maximum punishment that Simmons could have received was eight months community service. \textit{Id.}
\item \textit{Id.} at 239.
\item \textit{Id.}
\end{enumerate}
and sentenced him to 120 months in prison. In the absence of this enhancement, Simmons likely would have received a sentence between sixty-three and seventy-eight months. When determining whether Simmons’s prior state conviction qualified as an offense “punishable by imprisonment for more than one year,” the district court followed the Fourth Circuit’s then-established precedent as articulated in United States v. Harp and considered whether “any defendant charged with that crime could receive a sentence of more than one year.” It was irrelevant that Simmons could not have received even a single day of imprisonment for his prior state conviction.

Simmons appealed, and two recent United States Supreme Court decisions, United States v. Rodriguez and Carachuri-Rosendo v. Holder, called the Fourth Circuit’s precedent into question. Since these cases involved some consideration of the actual defendants’ situations, they may have implicitly overruled the Fourth Circuit’s method for calculating the maximum potential term of imprisonment established in Harp, especially since the Supreme Court vacated and remanded several Fourth Circuit cases relying on this approach “in light of [Carachuri-Rosendo].” Simmons’s case was among the cases vacated and remanded.

In United States v. Simmons (“Simmons I”), the Fourth Circuit held that these two Supreme Court cases did not affect its method of calculating the maximum potential term of imprisonment. However, on rehearing en banc in United States v. Simmons (“Simmons II”), the Fourth Circuit held that its approach to the calculation had been overruled by the Supreme Court. Thus, the Fourth Circuit now considers the actual defendant’s situation as opposed to a hypothetical defendant. As a result of this change, the court vacated

9. Id.
10. See id.
11. 406 F.3d 242 (4th Cir. 2005).
12. Id. at 246.
13. See id.
15. 130 S. Ct. 2577 (2010).
17. Id.
19. See, e.g., id. at 145–47.
21. Id. at 241.
22. Id. at 250.
Simmons's sentence and remanded his case for a new sentencing hearing.  

While both the Fourth Circuit and the Supreme Court focused on statutory interpretation in their analysis of the proper method for calculating the maximum potential term of imprisonment, portions of the Supreme Court's opinion alluded to the related constitutional requirements of the Fifth and Sixth Amendments. More specifically, in Apprendi v. New Jersey, the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." The Court's reasoning depended to a large extent on the definition of "crime," which required a distinction between sentencing factors and elements.

This distinction also relates to calculating the maximum potential term of imprisonment for a prior conviction because the application of a sentencing enhancement that affects the maximum potential term could make the enhanced offense qualify as a separate and distinct crime. As a result, the maximum potential term of imprisonment could depend significantly upon the sentencing enhancements that applied to the actual defendant because a prior conviction with an enhancement and a prior conviction without an enhancement could constitute convictions for different crimes. While this distinction provides some insight into the proper method for calculating the maximum potential term of imprisonment, it also raises many questions regarding the specifics of the calculation.

This Comment focuses on the recent developments related to determining the maximum potential term of imprisonment for a prior conviction. Part I provides background by considering some of the potential approaches to the issue and by discussing cases that have adopted those approaches. Part II examines Simmons I and Simmons II.

23. Id.


25. See, e.g., id. at 2581 n.3 (citing Almendarez-Torres v. United States, 523 U.S. 224, 227 (1998)); id. at 2582 n.6 (citing Almendarez-Torres, 523 U.S. at 247).


27. Id. at 490.

28. See id. at 499-500 (Thomas, J., concurring) ("This case turns on the seemingly simple question of what constitutes a 'crime.'"); supra note 3.

29. See Carachuri-Rosendo, 130 S. Ct. at 2581 n.3 (distinguishing between "felony simple possession" and "misdemeanor simple possession" on the basis of the application of a recidivist enhancement).
II and analyzes the competing viewpoints in those cases. Finally, Part III considers the implications of these recent developments and discusses the complexities inherent to this calculation that remain unresolved.

I. BACKGROUND

The United States Supreme Court's cases on the right to trial by jury describe the "maximum authorized penalty" for a crime as an "objective indication[] of the seriousness with which society regards the offense." Congress often relies on this objective standard when making certain statutory provisions, such as sentencing enhancements, conditional upon a crime's severity. To determine whether the conditional provision applies, courts often must calculate the maximum potential term of imprisonment for a prior conviction, what this Comment refers to as the "Maximum Potential Term Issue." Congress has passed numerous statutes that require courts to make this calculation, and courts have considered and adopted a variety of approaches to the Maximum Potential Term Issue. This Part considers the potential approaches to the issue and the ways in which courts have addressed it.

30. Blanton v. City of N. Las Vegas, 489 U.S. 538, 541 (1989) (citations omitted); see also id. at 543 (distinguishing between "serious" offenses and "petty" offenses in the context of the right to trial by jury in a criminal case). To avoid confusion with the term "serious," which has a special meaning in the context of the right to trial by jury, this Comment refers to crimes as "more" or "less" severe.

31. See, e.g., Simmons I, 649 F.3d 237, 239 (4th Cir. 2011) (en banc) (considering whether to apply a sentencing enhancement).

32. For example, Congress has chosen to prohibit individuals who have been convicted of certain crimes from possessing firearms. See 18 U.S.C. § 922(g) (2006). Congress also has enacted laws in the immigration context where prior convictions of more severe crimes can trigger conditional provisions. See, e.g., 8 U.S.C. § 1101(a)(43) (2006) (defining an "aggravated felony"); 8 U.S.C. § 1229b(a)(3) (2006) (providing that a permanent resident can apply to the Attorney General for cancellation of removal if, among other things, the permanent resident "has not been convicted of an aggravated felony"). In adopting the Federal Rules of Evidence, Congress made the admissibility of certain prior convictions conditional upon the severity of the crime. See Fed. R. Evid. 609(a)(1)(A). Congress has enacted laws that include conditional provisions with regard to sentencing as well. See, e.g., 18 U.S.C. § 924(e)(2)(B) (2006). These provisions represent some but not all of the instances where Congress has made a provision conditional upon the severity of a crime.
A. Potential Approaches to the Maximum Potential Term Issue

1. Actual Sentence Approach

There are four general ways a court could address the Maximum Potential Term Issue. First, courts could simply consider the actual punishment imposed—the "Actual Sentence Approach." For example, if the defendant was sentenced to more than one year, then the conditional provision, such as a sentencing enhancement, would apply. This approach has the dual benefits of clarity and efficiency because courts simply can look to the defendant's record of conviction to determine whether or not the judge sentenced him to more than one year. Furthermore, since the judge bases the sentence on the specific factual circumstances of the defendant and the crime, this approach more accurately determines whether the underlying conduct should qualify as severe. Congress has enacted provisions that focus on the actual sentence with respect to some deportation standards and some sentencing guidelines, but courts have rejected this approach in other contexts.

2. Actual Defendant Approach

A second approach—the "Actual Defendant Approach"—focuses on the maximum potential sentence that the actual defendant faced for the prior conviction, not the actual sentence that the defendant received. This approach would prove more burdensome for courts to apply because it may require examining the characteristics of the defendant (e.g., criminal history), considering the manner in which the defendant committed the crime (e.g., while

33. For an example of scholarship advocating that Congress amend federal statutes to follow this method, see Ethan Davis, Comment, The Sentence Imposed Versus the Statutory Maximum: Repairing the Armed Career Criminal Act, 118 YALE L.J. 369, 370 (2008).

34. See id. at 374–75. One could divide this approach into two different variations, depending on the sentencing system utilized in the jurisdiction. For example, if the judge sentenced the defendant in an indeterminant system to nine to fifteen months, and if the defendant only served ten, then one could argue both that the hypothetical provision applied and that it did not. One side would focus on the actual time served while the other would focus on the maximum term authorized.

35. See id. at 372–73.

36. See id. at 373.

37. See Dickerson v. New Banner Inst., 460 U.S. 103, 113 (1983); see also United States v. Essig, 10 F.3d 968, 972–73 (3d Cir. 1993) (stating in the context of 18 U.S.C. § 922(g)(1) that "it is the potential sentence that controls and not the one actually imposed").
possessing a firearm), and applying the relevant jurisdiction's statutes. The Fourth Circuit followed this approach in Simmons II.

3. Hypothetical Defendant with All Enhancements Approach

Under a third approach—the “Hypothetical Defendant with All Enhancements Approach”—courts could calculate the maximum possible sentence for a hypothetical defendant and take into account the worst possible criminal history and the presence of the most aggravating factors. While still potentially involving the consideration of another jurisdiction’s law, this approach has the benefit of not requiring a court to consider the actual defendant’s criminal record or the manner in which the defendant committed the crime. Thus, once a court has ruled that the commission of a certain crime triggers a conditional provision, courts could apply the provision easily and consistently to everyone who committed that crime.

The Fourth Circuit took this approach in United States v. Jones and in Harp, which previously represented the Fourth Circuit’s position on this issue. In Jones, the defendant was charged with violating the federal law prohibiting convicted felons from possessing firearms, and he “moved to dismiss his indictment contending that his predicate crime was not punishable by imprisonment for a term exceeding one year.” The defendant based this contention on the fact that he personally could not have received a sentence of greater than twelve months for the predicate crime, essentially arguing that the court should adopt the Actual Defendant Approach. The court, however, noted that a defendant with the worst criminal history and more aggravating factors than mitigating factors could receive a

38. See Davis, supra note 33, at 372–75. Although courts often consider the law of other jurisdictions in their opinions, this practice introduces speculation into a criminal proceeding that may have significant consequences for the defendant. However, courts often cannot avoid undertaking this task. See, e.g., United States v. Pruitt, 545 F.3d 416, 419 (6th Cir. 2008) (applying North Carolina law to determine whether the defendant’s prior conviction qualified as a conditional trigger under federal law). When Congress and state legislatures enact laws that depend on the outcome (or potential outcome) of a previous case in any jurisdiction, this problem occurs frequently.

40. 195 F.3d 205 (4th Cir. 1999).
42. Id.
43. Id. (“Jones argue[d] that the district court erred in holding that his prior state felon-in-possession conviction was ‘a crime punishable by imprisonment for a term exceeding one year,’ because under North Carolina’s sentencing scheme, his maximum sentence did not exceed twelve months.”).
maximum term of imprisonment of thirty months for the predicate crime under North Carolina law.44

The Jones court began its analysis of the statute by citing Dickerson v. New Banner Institute,45 the United States Supreme Court’s opinion that rejected the Actual Sentence Approach.46 In that case, the Supreme Court emphasized that “[i]t was plainly irrelevant to Congress whether the individual in question actually receives a prison term; the statute imposes disabilities on one convicted of a ‘crime punishable by imprisonment for a term exceeding one year.’ ”47 Although the Fourth Circuit in Jones did not explicitly distinguish between the Actual Sentence Approach and the Actual Defendant Approach, it approvingly quoted the district court’s analysis of the statute48 to emphasize that all characteristics of the defendant (i.e., criminal history) and the manner in which the defendant committed the crime (i.e., with or without aggravating circumstances) were irrelevant because the statute related to the crime, not the defendant.49 Accordingly, the Fourth Circuit adopted the Hypothetical Defendant with All Enhancements Approach.50

Harp also addressed the Maximum Potential Term Issue discussed in Jones, but it did so in the context of a federal sentencing enhancement instead of a challenge to unlawful possession of a firearm by a convicted felon.51 The defendant disputed whether one of his prior state convictions qualified as a crime “punishable by imprisonment for a term exceeding one year.”52 If it did, he was subject to a sentencing enhancement.53 He argued that the facts

44. See id. at 207 (“To Jones, the fact that the maximum imprisonment time for [the crime at issue] is 30 months is irrelevant.”).
46. See Jones, 195 F.3d at 207 (citing Dickerson, 460 U.S. at 113).
47. Dickerson, 460 U.S. at 113 (quoting 18 U.S.C. § 922(g) (2006)).
48. Jones, 195 F.3d at 207 (“[I]n § 922(g)(1), ‘punishable’ is an adjective used to describe ‘crime.’ As such, it is more closely linked to the conduct, the crime, than it is to the individual convicted of the conduct. Congress could have written § 922(g)(1) differently had it intended to focus on the individual in particular rather than the crime for which the individual was convicted. Instead of the phrase, ‘individual convicted . . . of a crime punishable by imprisonment for a term exceeding one year,’ Congress could have used the phrase, ‘individual punished by imprisonment for a term exceeding one year’ or even ‘individual sentenced for imprisonment for a term exceeding one year.’ ” (internal citations omitted)).
49. See id. (“[T]he offense statutory maximum is] the statutory maximum for the crime, regardless of the criminal record status of the defendant.”).
50. See id.
52. Id. (quoting U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(b) (2002)).
53. Id.
underlying his prior conviction did not support a finding of aggravating circumstances and that since the maximum potential non-aggravated sentence was twelve months, the prior conviction did not qualify. Finding the defendant's focus on aggravating factors unpersuasive, the court reaffirmed the approach it used in Jones: "[T]o determine whether a conviction is for a crime punishable by a prison term exceeding one year, Jones dictates that we consider the maximum aggravated sentence that could be imposed for that crime upon a defendant with the worst possible criminal history."

4. No Enhancements Approach

Finally, a fourth approach—the "No Enhancements Approach"—would consider the maximum possible sentence for a hypothetical defendant without taking into account any criminal history or aggravating factors. Justice Souter appears to have supported this approach in his Rodriquez dissent. Essentially, this approach would consider the sentence that a first-time offender could receive without committing the crime in an aggravated manner. Courts could just look to the maximum punishment authorized for a first-time offender without any upward departures for aggravating circumstances.

54. Id. at 246.
55. Id. (citing Jones, 195 F.3d at 206–08) (maintaining that a crime qualified under the statute "if any defendant charged with that crime could receive a sentence of more than one year").
56. For an example of scholarship noting the simplicity of this approach, see Krystle Lamprecht, Comment, Formal, Categorical, but Incomplete: The Need for a New Standard in Evaluating Prior Convictions Under the Armed Career Criminal Act, 98 J. CRIM. L. & CRIMINOLOGY 1407, 1433 (2008) ("The simplest, but ultimately imperfect, standard for ACCA's sentencing requirement would be to evaluate sentences for prior convictions in terms of the maximum sentence available for that conviction under state law, without any additional sentencing enhancements.").
57. See United States v. Rodriquez, 553 U.S. 377, 404 (2008) (Souter, J., dissenting) ("It does not defy common English or common sense, after all, to look at a statute with one penalty range for the basic crime and a higher one for a repeat offender and say that the former sets the maximum penalty for the 'offense'; but neither is it foolish to see the 'offense' as defined by its penalty, however that is computed. What I have said so far suggests that I think the basic-crime view of 'offense' is the better one, but I will concede that the competing positions are pretty close to evenly matched.").
58. See id. at 393–94 (considering the different ways a court could interpret the term "serious drug offense").
59. See id. (contemplating whether a judge should consider sentencing enhancements when determining the maximum potential term of imprisonment).
5. Hybrid Approaches

In his *Rodriquez* dissent, Justice Souter noted the complexities inherent in the Maximum Potential Term Issue. He recognized the possibility of taking into account aggravating factors and/or a prior criminal record and the possibility of considering the actual defendant or a hypothetical defendant, which greatly increases the number of potential approaches. In *United States v. Pruitt*, the Sixth Circuit took just such a hybrid approach when it considered whether the defendant’s prior North Carolina conviction qualified to enhance his sentence because it was a crime “punishable by death or imprisonment for a term exceeding one year.” The court rejected the Fourth Circuit’s *Harp* and *Jones* approach of calculating the maximum potential term of imprisonment for a defendant with both the worst aggravating factors and the worst criminal history.

Instead, the Sixth Circuit held that the proper calculation should take into account the actual defendant’s prior record level, but it seemed to agree with the Fourth Circuit’s *Harp* and *Jones* approach on aggravating factors. It held that, regardless of the manner in which the defendant committed the crime and regardless of whether the jury actually found the factors beyond a reasonable doubt (or the defendant admitted to them), the proper calculation should include

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60. See id. at 396 n.2.

61. Id. (“Even adopting the ‘alternative’ of accounting for an offender’s circumstances and record does not resolve the ambiguity, for this rubric actually comprises multiple possibilities under its generic umbrella. Most simply, it might be thought to refer to the actual offender’s sentencing range as applied by the state court. At the other extreme, it might mean the maximum for a purely hypothetical ‘worst’ offender who incurs all possible add-ons. Or perhaps it means a fictional version of the actual offender, say, one qualifying for some statutory add-ons but not for any guidelines rules (as the Court would have it); or maybe one who qualifies for both the statutory and the guidelines departures for which the actual offender was eligible, even though not all of those departures were applied by the state court. This menagerie of options would be multiplied, if a court directly confronted the choice whether to count enhancements for offender-based factors other than recidivism, and if so, which.”).

62. 545 F.3d 416 (6th Cir. 2008).

63. Id. at 417 (citing U.S. SENTENCING GUIDELINES MANUAL § 4B1.2 cmt. n.1 (2002)).

64. See id. at 417–18 (“In determining whether Pruitt’s prior convictions qualified as predicates, the district court did not consider Pruitt’s prior record level, but rather considered the maximum sentence allowable for a hypothetical defendant with the worst prior record level. Because this was procedural error, Pruitt’s sentence must be vacated and his case remanded for resentencing.”).

65. See id. at 418–19.

66. See id. at 421.
the maximum aggravated sentence. Thus, at least with respect to North Carolina’s sentencing system, the Sixth Circuit appeared to take a hybrid approach by calculating the maximum term of imprisonment based upon the actual defendant’s prior record level and hypothetical aggravating circumstances.

B. Supreme Court Decisions Relating to the Maximum Potential Term Issue

While the Supreme Court has not expressly stated that a certain approach should apply in all circumstances, some relatively recent cases shed light on the Maximum Potential Term Issue. The Supreme Court has considered what constitutes a “crime” or “offense” in many cases. The definition depends significantly upon the distinction between sentencing factors and elements. The Court has endeavored to make this distinction both in the context of statutory interpretation and with respect to constitutional requirements. Some cases focused on the contents of an indictment, while others focused on which facts the prosecution must submit to a jury and prove beyond a reasonable doubt.

These cases have important implications for the Maximum Potential Term Issue. If an aggravating factor qualifies as an element, then a prior conviction for the aggravated offense may be separate

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67. Id. ("But whether Pruitt was actually sentenced to the aggravated range or could have been sentenced to the agavated range is not pertinent to the determination of whether his prior convictions were 'punishable' by a term exceeding one year."). But see id. at 427 (Merritt, J., dissenting) ("Because aggravators were not present in the two prior state convictions and it would be impermissible for a North Carolina state judge to find such aggravators were Pruitt sentenced for the same crimes today, it is contrary to law to find that an 'aggravated sentence' should serve as the 'maximum punishment authorized' for Pruitt's state convictions." (citing Blakely v. Washington, 542 U.S. 296 (2004))).


69. See, e.g., Carachuri-Rosendo v. Holder, 130 S. Ct. 2577, 2581 n.3 (2010) (distinguishing between “felony simple possession” and “misdemeanor simple possession” on the basis of the application of a recidivist enhancement).

70. See, e.g., id. at 2580–83 (interpreting the Controlled Substances Act and the Immigration and Nationality Act).

71. See Apprendi, 530 U.S. at 469 ("The question presented is whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt.").


73. See Apprendi, 530 U.S. at 469.
and distinct from a prior conviction for the non-aggravated offense.\textsuperscript{74} Thus, the presence or absence of an aggravating factor can make the difference between a conditional provision applying or not applying to the defendant. As a result, it is important to consider the implications of these cases on the Maximum Potential Term Issue.

In \emph{Almendarez-Torres v. United States},\textsuperscript{75} the Supreme Court considered whether a recidivist enhancement constituted an element of a crime.\textsuperscript{76} If so, then the recidivist enhancement would establish a separate offense, and the Government would have to charge the prior conviction in the indictment.\textsuperscript{77} The five-Justice majority stated that while Congress had the power to establish which facts constituted elements and which facts constituted sentencing factors, the Constitution did place certain limits on this power.\textsuperscript{78} Focusing on the intent of Congress as manifested in the structure and language of the statute, the Court held that the recidivist enhancement was not an element; therefore, it did not establish a separate offense.\textsuperscript{79} After reviewing the implications of some of its prior related cases, the majority then rejected the petitioner's argument that the Constitution required treating the prior conviction as an element.\textsuperscript{80}

In contrast, the four-Justice dissent invoked the doctrine of "constitutional doubt" to avoid the issue of whether the Constitution requires treating the prior conviction as an element.\textsuperscript{81} In so doing, the dissent stated: "I think it beyond question that there was, until today's unnecessary resolution of the point, 'serious doubt' whether the Constitution permits a defendant's sentencing exposure to be increased tenfold on the basis of a fact that is not charged, tried to a jury, and found beyond a reasonable doubt."\textsuperscript{82} The dissent then

\begin{footnotesize}
\textsuperscript{74} See \emph{Almendarez-Torres}, 523 U.S. at 226.
\textsuperscript{75} 523 U.S. 224 (1998).
\textsuperscript{76} \textit{id.} at 226 ("The question before us is whether [the recidivist enhancement] defines a separate crime or simply authorizes an enhanced penalty.").
\textsuperscript{77} \textit{id.}
\textsuperscript{78} \textit{id.} at 228 (citing \textit{McMillan v. Pennsylvania}, 477 U.S. 79, 84–91 (1986)).
\textsuperscript{79} \textit{See id.} at 235 ("In sum, we believe that Congress intended to set forth a sentencing factor . . . and not a separate criminal offense.").
\textsuperscript{80} \textit{id.} at 239–47 (failing to "find sufficient support" for petitioner's claim "that the Constitution requires Congress to treat recidivism as an element of the offense—irrespective of Congress' contrary intent").
\textsuperscript{81} \textit{id.} at 249–50 (Scalia, J., dissenting) ("[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." (quoting \textit{United States ex rel. Att'y Gen. v. Del. & Hudson Co.}, 213 U.S. 366, 408 (1909) (internal quotation marks omitted))).
\textsuperscript{82} \textit{id.} at 260.
\end{footnotesize}
interpreted the statute as establishing a separate offense with the
recidivist enhancement as an element.83

When considering a federal statute a year later in Jones v. United
States,84 the Supreme Court stated that

under the Due Process Clause of the Fifth Amendment and the
notice and jury trial guarantees of the Sixth Amendment, any
fact (other than prior conviction) that increases the maximum
penalty for a crime must be charged in an indictment, submitted
to a jury, and proven beyond a reasonable doubt.85

A year after Jones, the Supreme Court applied this requirement to
the states through the Fourteenth Amendment in Apprendi.86 In
another five-to-four decision, the Court invalidated a sentencing
enhancement that was based upon the commission of a hate crime
that the judge found by a preponderance of the evidence in
accordance with New Jersey law.87 The Court again distinguished
between an element of the offense and a sentencing factor and
rejected New Jersey’s assertion that the biased purpose sentencing
enhancement did not qualify as an element.88 Correspondingly, the
Court also rejected the State’s claim that its legislature had not
created a separate offense.89

Although the Court did not overrule the exception for prior
convictions established in Almendarez-Torres, it noted that the issue
of prior convictions was not before it and expressed doubt as to that
decision’s continued validity, stating that “it is arguable that
Almendarez-Torres was incorrectly decided” and “a logical
application of our reasoning today should apply if the recidivist issue
were contested.”90 Further undermining the validity of the prior
conviction exception established in Almendarez-Torres, Justice
Thomas, who joined the five-Justice majority in that case, changed
course, stating in his concurring opinion in Apprendi that a prior
conviction constituted an element of the crime when it increased the
maximum potential term of imprisonment.91 Although there

83. Id. at 270.
85. Id. at 243 n.6.
87. Id. at 491–92.
88. Id. at 491–93; id. at 493 (“The defendant’s intent in committing a crime is perhaps
as close as one might hope to come to a core criminal offense ‘element.’”).
89. Id. at 495–96.
90. Id. at 489–90.
91. Id. at 501 (Thomas, J., concurring). Justice Thomas explicitly recognized the basis
for his mistake when he stated that “one of the chief errors of Almendarez-Torres—an
apparently were five Justices on the Court who disagreed with the prior conviction exception at the time of \textit{Apprendi}, the Court has not overruled its holding in \textit{Almendarez-Torres}.

The Court continued to develop the implications of \textit{Apprendi} and its predecessors in the following years. In \textit{Blakely v. Washington}, the Court applied the rule from \textit{Apprendi} to invalidate a sentence above the standard statutory range because the judge, not the jury, determined that the defendant had committed the crime "with deliberate cruelty." Then, in \textit{United States v. Booker}, the Supreme Court again emphasized the constitutional requirement that the jury find any fact beyond a reasonable doubt that increases the defendant's sentence above the statutory maximum under the federal sentencing system.

It is important, however, to note the scope of these rulings. If the jury's verdict or the defendant's admissions necessarily entail a certain fact, then the judge can rely on that fact to enhance a sentence. Along these lines, the "statutory maximum" is the

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93. \textit{id.} at 303. Notably, the defendant in \textit{Harp} cited \textit{Blakely} to argue that the Hypothetical Defendant with All Enhancements Approach violated his constitutional rights because it involved a sentencing enhancement for aggravating factors to which he had not admitted and that the jury had not found beyond a reasonable doubt. \textit{See United States v. Harp}, 406 F.3d 242, 246 (4th Cir. 2005). The Fourth Circuit, however, read \textit{Blakely} narrowly, claiming that it only applied to the "process by which the elements of [a] crime and other relevant facts must be determined." \textit{id.} at 247 (quoting United States v. McAllister, 272 F.3d 228, 232 (4th Cir. 2001) (internal quotation marks omitted)). The court then stated that "North Carolina courts have already concluded that the state sentencing regime can accommodate the process that \textit{Blakely} demands," \textit{id.} (citing State v. Harris, 166 N.C. App. 386, 394, 602 S.E.2d 697, 702 (2004)), provided that "facts supporting the enhancement are charged in an indictment and found by a jury beyond a reasonable doubt." \textit{id.} (citing State v. Lucas, 353 N.C. 568, 597–98, 548 S.E.2d 712, 731–32 (2001)). Thus, the court appeared to reason that since North Carolina courts can comply with \textit{Blakely} when applying a sentencing enhancement, courts should apply both criminal history and aggravating factor enhancements to the fullest extent possible when calculating the maximum term of imprisonment for a prior offense.

To a certain extent, the court's distinction between calculating the severity of a crime and determining the length of a defendant's sentence makes sense. After all, the Sixth Amendment protects individuals from sentencing enhancements that do not have a proper basis; however, it does not prevent Congress from passing a statute that utilizes sentencing enhancements to determine the severity of a crime. \textit{See infra} Part III.C.

95. \textit{id.} at 232.
96. \textit{See Blakely}, 542 U.S. at 303 ("[T]he 'statutory maximum' for \textit{Apprendi} purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."); \textit{see also Ring v. Arizona}, 536 U.S. 584, 602
maximum permissible sentence for a crime based solely upon those facts that the jury finds beyond a reasonable doubt or that the defendant admits. Therefore, the Apprendi limitation would not apply when the law provides a permissible range of sentences and the judge imposes a sentence toward the higher end because, for example, the defendant refused to accept responsibility, did not express remorse, or committed the crime in a brutal manner—facts that neither the jury found beyond a reasonable doubt nor the defendant admitted.

On the other hand, the Apprendi limitation would apply if the law provided a permissible range of sentences and further provided a sentencing enhancement that applied only if the defendant committed the crime in a cruel manner and the judge, not the jury, found that the sentencing enhancement applied. In Blakely, the Supreme Court distinguished between these two examples on the basis that the former example does not violate a defendant’s “legal right” to a sentence within the permissible range for the crime, while the latter example does violate such a right by taking the defendant’s punishment outside of the range for which the jury found the defendant guilty beyond a reasonable doubt. Thus, both the statutory language and the type of sentencing system can play crucial roles in determining whether a judge can impose a sentence that involves an upward departure.

(2002) (“A defendant may not be ‘expose[d] . . . to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone,’ ” (quoting Apprendi, 530 U.S. at 483)).

97. See Blakely, 542 U.S. at 303.

98. See Apprendi v. New Jersey, 530 U.S. 466, 481–82 (2000); see also State v. Stover, 104 P.3d 969, 972–73 (Idaho 2005) (interpreting Apprendi, Blakely, and Booker in the context of Idaho’s sentencing system and finding that the Apprendi rule did not apply to indeterminate sentencing systems).


100. Id. (“Indeterminate sentencing . . . increases judicial discretion, to be sure, but not at the expense of the jury’s traditional function of finding the facts essential to lawful imposition of the penalty. Of course indeterminate schemes involve judicial factfinding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal right to a lesser sentence—and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned. In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is entitled to no more than a 10-year sentence—and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury.”)).
Although the Supreme Court only briefly mentioned the effect of these cases on the Maximum Potential Term Issue, the Court may have had these cases in mind when making its two recent rulings in *Rodriquez* and *Carachuri-Rosendo*. Both *Rodriquez* and *Carachuri-Rosendo* relate to the Maximum Potential Term Issue more directly than *Almendarez-Torres*, *Apprendi*, and other related cases, but they do not address all of the underlying questions or complexities.

In *Rodriquez*, the defendant had three prior convictions under state law for delivery of a controlled substance. The state statute provided for a maximum term of imprisonment of five years for the first offense and ten years for any subsequent offense of the same provision. If the potential ten-year sentence for either the second or third offense constituted "the maximum term of imprisonment prescribed by law," then the defendant faced a mandatory minimum of fifteen years under the Armed Career Criminal Act (the "ACCA"). These facts led the Court to make three important conclusions regarding the Maximum Potential Term Issue.

First, the Court held that the proper calculation of the maximum term of imprisonment should take recidivist enhancements into account. The Court reasoned that the plain meaning of the ACCA required applying the recidivist provisions for two reasons. If the maximum term did not include recidivist enhancements, then a repeat offender could receive a term of imprisonment greater than the maximum "prescribed by law," a result that the Court found "hard to accept." Furthermore, judges and attorneys take recidivist enhancements into account when informing defendants of the maximum terms of imprisonment they are facing.

Next, the Court noted that when determining the maximum potential term of imprisonment for a prior conviction, courts should not follow the maximum punishment in an advisory guideline but the maximum punishment allowed under state law. The Court reasoned that the law allows upward departures from the guidelines and cited statutes using similar language that supported its conclusion. It was this part of the Court's holding that inspired the Sixth Circuit in *Pruitt*

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102. See id. at 381 (citing WASH. REV. CODE §§ 69.50.401(a)(1)(ii)-(iv), 69.50.408(a) (1994)).
103. Id. at 381–82.
104. Id. at 382–84.
105. Id. at 383.
106. Id. at 383–84.
107. Id. at 390.
108. Id. at 390–92.
to maintain that courts should always take into account potential aggravating factors that result in upward departures from presumptive sentencing ranges. 109

Finally, despite finding for the Government in Rodriguez, the Court's opinion provided an indication that it would support consideration of the actual defendant's situation. 110 Most importantly, the Court stated that in "cases in which the records that may properly be consulted do not show that the defendant faced the possibility of a recidivist enhancement, it may well be that the Government will be precluded from establishing that a conviction was for a qualifying offense." 111 Similarly, the Sixth Circuit in Pruitt stated that this language "clearly conveys [the Supreme Court's] understanding that the recidivism enhancement can be accounted for in determining the 'maximum term of imprisonment' under the ACCA only if the particular defendant was subject to the enhancement." 112 Thus, Rodriguez appears to stand for three important propositions that relate to the Maximum Potential Term Issue: (1) courts should take recidivist enhancements into account; (2) guidelines do not cap the maximum term of imprisonment; and (3) courts should consider the actual defendant's situation when applying recidivist enhancements.

It is also important to note an argument that the dissent found compelling but that the majority rejected in conclusory fashion. The defendant argued that "offense" means the elements of the crime only, not potential sentencing enhancements. 113 Justice Souter found this argument plausible in his dissent, emphasizing that "offense" could refer to just the statutory crime and its elements, in which case only the punishment for a first-time offender would apply. 114 He also found plausible the majority's interpretation of "offense," which it characterized as referring to "a specific occurrence" and therefore included consideration of the defendant's criminal history and potential aggravating factors. 115 While Justice Souter preferred the defendant's argument, he conceded that the two interpretations were "pretty close to evenly matched." 116 Applying the rule of lenity, 117 he

111. Id.
112. Pruitt, 545 F.3d at 423 (emphasis added).
114. See id. at 393–94 (Souter, J., dissenting).
115. Id. at 394.
116. Id. at 404.
117. "This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an
ultimately sided with the defendant. The defendant’s argument and Justice Souter’s analysis are significant because the distinction between elements and sentencing factors figured prominently in Apprendi and related cases.

In Carachuri-Rosendo, the immigrant-petitioner committed two misdemeanor drug offenses under Texas law. As a result, he faced removal from the United States. If the second offense did not qualify as an “aggravated felony,” however, then he could seek cancellation of removal from the United States Attorney General. The Court held that the second conviction did not qualify as an aggravated felony, so the petitioner could apply for cancellation of removal.

The Carachuri-Rosendo Court reasoned that the state prosecutor had failed to charge the petitioner as a recidivist in the second prosecution, thereby denying him his right to notice and his ability to challenge the conviction for the purposes of subsequent immigration proceedings. The Court further reasoned that although a recidivist charge could have made the second offense punishable by more than one year under federal law, immigration courts cannot rely on this fact because it is outside of the record. As a result, the Court appeared to require that courts consider the actual defendant’s situation and that they safeguard his procedural rights regarding the recidivist enhancement. These requirements, however, may only have arisen due to the unique immigration context of the case.

The Carachuri-Rosendo Court clarified the principle in Lopez v. Gonzales that to qualify as an “aggravated felony” for immigration law purposes, a state drug conviction must be punishable as a felony under federal law.” In other words, the underlying conduct that supported the state conviction would have to support a hypothetical conviction under federal law as well. Thus, in determining whether Carachuri-Rosendo’s state conviction was “ punishable as a felony
under federal law," the Court focused on a federal statute requiring the prosecutor "to charge a defendant as a recidivist in the criminal information" before seeking a recidivist enhancement.\textsuperscript{129} Since the state prosecutor did not honor this procedural requirement, the Court reasoned, the state conviction was not punishable as a felony under federal law.\textsuperscript{130}

Like the dissent in Rodriquez and the Apprendi line of cases, the Supreme Court in Carachuri-Rosendo recognized a distinction between two types of "offenses": simple possession and recidivist simple possession.\textsuperscript{131} Notably, the Court stated that a judge must have found that the prior conviction occurred by a preponderance of the evidence for the offense to qualify as recidivist simple possession.\textsuperscript{132} This distinction has important implications for the Maximum Potential Term Issue because it suggests that including a recidivist enhancement changes both the type of crime as well as the potential punishment. Therefore, if the prosecution does not charge the defendant as a recidivist, then the defendant is convicted of a lesser crime that may not qualify for certain conditional provisions. In this case, the right to apply for cancellation of removal was the relevant conditional provision.

Justice Scalia's concurrence in Carachuri-Rosendo addressed the issue differently, however. He made a distinction between elements and sentencing factors, stating that a "defendant is not 'convicted' of sentencing factors, but only the elements of the crime charged in the indictment."\textsuperscript{133} Since Carachuri-Rosendo was only convicted of the elements of simple possession, he was not convicted of a crime that qualified as a felony under federal law, which would require both those elements and a recidivist finding to enhance the punishment to the felony level.\textsuperscript{134} Under Justice Scalia's approach, it appears that Carachuri-Rosendo would not have been convicted of an aggravated felony, even if the state prosecutor had charged him as a recidivist and honored his procedural rights.\textsuperscript{135}

\textsuperscript{129} Id. at 2587. Although the defendant argued that he also must have notice and "an opportunity to defend against that charge," the Court did not decide this issue because it was unnecessary to its ruling. Id. at 2586.

\textsuperscript{130} Id. at 2589–90.

\textsuperscript{131} Id. at 2581 n.3.

\textsuperscript{132} Id.

\textsuperscript{133} Id. at 2591.

\textsuperscript{134} Id.

\textsuperscript{135} For a discussion of the implications of Justice Scalia's concurring opinion in Carachuri-Rosendo, see infra Part III.A.
II. UNITED STATES V. SIMMONS

A. The Fourth Circuit's Response to Rodriquez and Carachuri-Rosendo in Simmons I and Simmons II

After the Supreme Court vacated and remanded Simmons's case "in light of Carachuri-Rosendo," the Fourth Circuit considered the applicability of Carachuri-Rosendo and Rodriquez in Simmons I. Simmons contested the sentencing enhancement imposed as a result of his prior North Carolina conviction. The Fourth Circuit held that

136. Simmons v. United States, 130 S. Ct. 3455 (2010). The Supreme Court vacated and remanded a total of twenty-six cases "in light of Carachuri-Rosendo," eight of which were criminal cases remanded to the Fourth Circuit: Brandon v. United States, 131 S. Ct. 508 (2010); Blackwood v. United States, 131 S. Ct. 161 (2010); White v. United States, 131 S. Ct. 84 (2010); Summers v. United States, 131 S. Ct. 80 (2010); Smith v. United States, 130 S. Ct. 3466 (2010); Williams v. United States, 130 S. Ct. 3464 (2010); Simmons v. United States, 130 S. Ct. 3455 (2010); Watson v. United States, 130 S. Ct. 3455 (2010). The Court remanded six criminal cases to the Fifth Circuit: Pulido-Islas v. United States, 131 S. Ct. 596 (2010); Carrizosa-Flores v. United States, 131 S. Ct. 114 (2010); Mares-Calderon v. United States, 131 S. Ct. 80 (2010); Reyes-Hobbs v. United States, 130 S. Ct. 3467 (2010); Rodriguez v. United States, 130 S. Ct. 3457 (2010); Garza-Gonzalez v. United States, 130 S. Ct. 3456 (2010). Not including Carachuri-Rosendo, the Court remanded three immigration cases to the Fifth Circuit: Alexis v. Holder, 130 S. Ct. 3462 (2010); Young v. Holder, 130 S. Ct. 3455 (2010); Cardona-Lopez v. Holder, 130 S. Ct. 3452 (2010). The Court remanded eight immigration cases to the Seventh Circuit: Beckford v. Holder, 130 S. Ct. 3463 (2010); Lopez-Mendoza v. Holder, 130 S. Ct. 3463 (2010); Ramirez-Solis v. Holder, 130 S. Ct. 3463 (2010); Rodriguez-Diaz v. Holder, 130 S. Ct. 3463 (2010); Alvarez v. Holder, 130 S. Ct. 3461 (2010); Garbutt v. Holder, 130 S. Ct. 3460 (2010); Escobar v. Holder, 130 S. Ct. 3451 (2010); Fernandez v. Holder, 130 S. Ct. 3451 (2010). The Court also remanded one criminal case to the Eighth Circuit: Haitiwanger v. United States, 131 S. Ct. 81 (2010). Thus, the Court remanded a total of fifteen criminal cases and eleven immigration cases, not including Carachuri-Rosendo. The Court remanded only criminal cases to the Fourth and Eighth Circuits, while remanding only immigration cases to the Seventh Circuit. The Court remanded both criminal and immigration cases only to the Fifth Circuit. While these numbers could indicate the Supreme Court's questioning of the precedents in these circuits, they also could reflect the fact that only attorneys in these circuits raised the relevant issues on appeal.

137. Simmons I, 635 F.3d 140, 141 (4th Cir. 2011), vacated, 130 S. Ct. 3455, remanded to Simmons II, 649 F.3d 237 (4th Cir. 2011) (en banc). The Fourth Circuit stated in Simmons I that Rodriquez did not overrule Harp. See id. at 142. The Fourth Circuit considered the applicability of Rodriquez in Simmons's first appeal. United States v. Simmons, 340 F. App’x 141, 144 (4th Cir. 2009) (per curiam). The court, however, provided little more than a conclusory analysis of how Rodriquez affected its precedents, stating that it actually supported rather than undermined its precedents. Id. ("If anything, the Supreme Court’s analysis in Rodriquez is in harmony with the ratio decidendi of our prior holdings in Harp and Jones, which require us to consider the maximum aggravated sentence that could be imposed for that crime upon a defendant with the worst possible criminal history.") (quoting United States v. Harp, 406 F.3d 242, 246 (4th Cir. 2005))).

138. Simmons I, 635 F.3d at 141.
Rodriguez and Carachuri-Rosendo did not undermine its precedent in Harp.\textsuperscript{139}

The court provided several reasons for its holding. First, the court began by noting the procedural posture of the case, stating "when the Supreme Court grants certiorari, vacates an opinion, and remands for further consideration, it makes no determination on the merits of the underlying opinion."\textsuperscript{140} To emphasize that it was free to disregard the ruling in Carachuri-Rosendo, the court added that "such an order indicates that intervening case law may affect the outcome of the litigation and that the intermediary appellate court should have the opportunity to fully consider the issue in light of the additional precedent."\textsuperscript{141} Second, the court recognized the distinction between an immigration proceeding and criminal sentencing, although it did not find this distinction dispositive.\textsuperscript{142} Third, the court found that the plain meaning of the statute in Carachuri-Rosendo differed "in critical respects" from the plain meaning of the sentencing statute it was considering.\textsuperscript{143} It found this difference dispositive.\textsuperscript{144} The court distinguished Carachuri-Rosendo's conviction as "a[n] aggravated felony"\textsuperscript{145} from Simmons's conviction for an "offense ... punishable by more than one year of incarceration."\textsuperscript{146} It went on to describe the former as "necessarily defendant-specific" because it related to how the state prosecutor charged Carachuri-Rosendo and the latter as "offense-specific" because it related to the punishment for the offense.\textsuperscript{147} In so doing, the court appeared to accept the Government's argument that "there is a difference between the hypothetical disfavored in Carachuri-Rosendo—whether the defendant could have been prosecuted, but was not, for a particular offense—and the analysis engaged in here—whether the offense for which the defendant was actually convicted could have provided a particular term of imprisonment."\textsuperscript{148}

\begin{itemize}
\item \textsuperscript{139} Id. at 142, 147 n.6.
\item \textsuperscript{140} Id. at 144.
\item \textsuperscript{141} Id. (internal quotation marks omitted). The court went on to state that “[a]fter reviewing the issue anew, we are free to enter the same judgment if we conclude that the new precedent does not require a different outcome, just as we may conclude that the intervening precedent will result in a different outcome.” Id. at 144–45 (internal quotation marks omitted).
\item \textsuperscript{142} Id. at 145.
\item \textsuperscript{143} Id.
\item \textsuperscript{144} Id.
\item \textsuperscript{145} Id. (internal quotation marks omitted).
\item \textsuperscript{146} Id. (emphasis omitted) (internal quotation marks omitted).
\item \textsuperscript{147} Id.
\item \textsuperscript{148} Id. at 144.
\end{itemize}
On rehearing en banc in *Simmons II*, the Fourth Circuit held that *Rodriquez* and *Carachuri-Rosendo* did overrule *Harp*. The court emphasized that *Carachuri-Rosendo* had rejected the Government’s argument that the statute in question “created only one ‘offense,’ and that the existence of a prior conviction was merely a ‘predicate for an enhanced sentence, not an element of the offense.” The court went on to say that *Carachuri-Rosendo* “specifically rejected this argument,” even though the statute did not explicitly establish separate offenses. Thus, the court concluded that “repetition transforms the underlying criminal conduct into an aggravated, different ‘offense.’”

The court then addressed the showings required to enhance a prior conviction through the defendant’s criminal history and through aggravating factors. To emphasize the need to consider the actual defendant’s criminal history, the court quoted *Carachuri-Rosendo’s* characterization of the holding in *Rodriquez*, stating “that a recidivist finding could set the ‘maximum term of imprisonment,’ but only when the finding is a part of the record of conviction.” Thus, without a recidivist finding in the record, the Government can only rely on the maximum punishment authorized for a first-time offender.

The Fourth Circuit also considered whether aggravating factors that enhance sentences affect the maximum potential term of imprisonment of the prior offense. Abandoning its holding in *Harp*, the court stated that *Carachuri-Rosendo* also prevented it from considering “hypothetical aggravating factors” when determining the maximum potential term of punishment. The court emphasized the significant procedural protections afforded to North Carolina defendants, like Simmons, when the prosecutor seeks to enhance a

149. See *Simmons II*, 649 F.3d 237, 247 (4th Cir. 2011) (en banc) (“*Carachuri* and *Rodriquez* clearly foreclose reliance on *Harp*.”).


151. *Id.*

152. *Id.* at 247.

153. *Id.* at 243 (quoting Carachuri-Rosendo v. Holder, 130 S. Ct. 2577, 2587 n.12 (2010)).

154. See *id.*

155. *Id.* at 244.

156. *Id.* The Fourth Circuit also recognized that the Sixth Circuit in *United States v. Pruitt*, 545 F.3d 416 (6th Cir. 2008), held that aggravating factors outside of the record could increase the potential maximum punishment. *Simmons II*, 649 F.3d at 244–45 n.4. The Fourth Circuit emphasized, however, that the Sixth Circuit’s holding in *Pruitt* occurred prior to the Supreme Court’s decision in *Carachuri-Rosendo*. *Id.*
sentence based upon aggravating factors. Finding these procedural
protections sufficiently similar to those protections at issue in
_Carachuri-Rosendo_, the court stated that "Carachuri also forbids us
from considering hypothetical aggravating factors when calculating
Simmons's maximum punishment."°

Thus, the Fourth Circuit adopted the Actual Defendant
Approach and now considers the actual defendant's situation for both
prior convictions and aggravating factors. Given that "Simmons's
[prior] 1996 North Carolina conviction was for only non-aggravated,
first-time marijuana possession," the subsequent federal sentencing
enhancement did not apply. As a result, the Fourth Circuit vacated
his sentence and remanded his case for a new sentencing hearing.

The dissent in _Simmons II_ largely reiterated the arguments in
_Simmons I_. First, the dissent maintained that the plain meaning of the
relevant statutory language, "an offense that is punishable by
imprisonment for more than one year," is "offense-based," not
"defendant-based." The dissent argued that had Congress intended
to adopt the Actual Defendant Approach, it would have written "an
offense for which the defendant is actually subject to punishment by
imprisonment for more than one year."

Second, the dissent relied on the fact that the _Carachuri-Rosendo_
Court had "to perform the requisite state-to-federal offense
'extrapolation' analysis," under which the state conviction had to
qualify as a felony under federal law. The dissent elaborated on this
point, stating that the current inquiry "does not raise the question
(from _Carachuri_) of what hypothetical offense never prosecuted by a
different sovereign the defendant could have been, but was not,
charged with, given the specific characteristics underlying his state
conviction."

Having considered the relevant cases on the Maximum Potential
Term Issue, this Comment now turns to an analysis of the differing
views.

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157. _Id._ at 245.
158. _Id._ at 244.
159. _See id._ at 247.
160. _Id._ at 250.
161. _Id._ at 251 (Agee, J., dissenting) (internal quotation marks omitted).
162. _Id._ at 252 (internal quotation marks omitted).
163. _Id._ at 253.
164. _Id._ at 254.
B. Analysis of the Fourth Circuit's Decisions in Simmons I and Simmons II

This Section considers whether the holding in Simmons II that Rodriguez and Carachuri-Rosendo overruled Harp was justified. In so doing, this Section draws on related concepts from Almendarez-Torres and Apprendi. The analysis focuses on Simmons I and Simmons II and proceeds by considering the three main arguments in Simmons I and the Simmons II dissent: (1) the procedural posture of the case does not require overruling Harp; (2) the immigration context of Carachuri-Rosendo makes it inapplicable to a criminal case; and (3) the plain language of the statute does not require consideration of the actual defendant's situation.

Simmons I began its analysis of how Rodriguez and Carachuri-Rosendo affect the Fourth Circuit's precedents on the Maximum Potential Term Issue by noting that the Supreme Court only vacated and remanded the case presently before the court.165 The Simmons II dissent also noted the procedural posture of the case.166 While emphasizing that they could hold that Carachuri-Rosendo does not affect Fourth Circuit precedent, the dissenters still had to establish that they should make such a holding.

The responses of the Fifth, Seventh, and Eighth Circuits suggest that Carachuri-Rosendo does affect the prior precedents of the Fourth Circuit.167 The Simmons II majority noted that the Eighth Circuit had "reversed course" and recognized that Carachuri-Rosendo required consideration of the actual defendant, specifically whether a recidivist finding was part of the record of conviction.168 Similarly, the Fifth Circuit held that Carachuri-Rosendo does affect its precedents on the Maximum Potential Term Issue, and the Government in some cases has conceded as much.169 The Seventh Circuit also recognized that Carachuri-Rosendo overruled its precedent, although the Supreme Court only remanded immigration

165. Simmons I, 635 F.3d 140, 141 (4th Cir. 2011), vacated, 130 S. Ct. 3455, remanded to Simmons II, 649 F.3d 237 (4th Cir. 2011) (en banc).
166. Simmons II, 649 F.3d at 252 (Agee, J., dissenting).
167. For a list of the cases that the Supreme Court remanded in light of Carachuri-Rosendo, see cases cited supra note 136.
168. Simmons II, 649 F.3d at 244 (citing United States v. Haltiwanger, 637 F.3d 881, 884 (8th Cir. 2011)).
169. See, e.g., United States v. Ayestas Zelaya, 395 F. App’x 140, 140–41 (5th Cir. 2010).
cases, not criminal cases, to the Seventh Circuit. The Simmons II majority summarized how these cases and the Government's responses to Carachuri-Rosendo undermine the dissent's approach to the Maximum Potential Term Issue: "[T]he only other appellate courts to have considered the question have held that Supreme Court precedent requires rejection of enhancements similar to the one here. Tellingly, in neither case did the Government seek rehearing en banc." The opinions of other circuits and the litigation strategies of parties in similar cases suggest that Carachuri-Rosendo should require the Fourth Circuit to overrule Harp, but they do not settle the matter. Thus, consideration of the other arguments in Simmons I and the Simmons II dissent remains necessary.

The second argument of the Simmons II dissent attempted to distinguish Carachuri-Rosendo, which involved an immigration proceeding, from the case before it, which involved criminal sentencing. While the dissent recognized that this distinction is not dispositive, it emphasized differences between the statutes in question. The dissent correctly pointed out that the analysis in Carachuri-Rosendo involved the additional inquiry of determining whether the "state conviction could have been an offense that would be punishable as a federal felony." The dissent further suggested that this additional inquiry required the Supreme Court to consider the defendant's specific situation, a requirement that is not necessary outside of the immigration context. Thus, Carachuri-Rosendo and Harp can be distinguished along a number of factors, and this calls into question the extent to which the context of Carachuri-Rosendo undermines the Hypothetical Defendant with All Enhancements Approach in Harp.

First, the Supreme Court has held that courts should interpret a statute consistently when it applies in both criminal and noncriminal contexts. Although the exact provisions at issue in Simmons and

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170. See, e.g., Garbutt v. Holder, 395 F. App'x 289, 289–90 (7th Cir. 2010); see also supra note 136 (citing cases remanded in light of Carachuri-Rosendo and noting the number of criminal and immigration cases remanded in each circuit).
171. Simmons II, 649 F.3d at 245.
172. See id. at 244–50 (recognizing the decisions of other courts and the litigation strategy of the parties in those cases but going on to consider the Government's attempts to distinguish Carachuri-Rosendo).
173. Id. at 252–53 (Agee, J., dissenting).
174. Id. at 253–54.
175. Id. at 253.
176. Id. at 253–54.
177. Leocal v. Ashcroft, 543 U.S. 1, 12 n.8 (2004) ("[W]e must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context.").
Carachuri-Rosendo differed, they both required a determination of the maximum potential term of imprisonment for a prior conviction, appeared in the Controlled Substances Act, and addressed whether a state conviction qualified as a felony. The differences in the two provisions could justify different approaches, but the Court prefers to treat similar issues in the same manner when the context does not justify treating them differently. Thus, the significant similarities in the inquiries in these two cases undermine arguments in the Simmons II dissent that attempt to distinguish Carachuri-Rosendo.

Second, a prior Fourth Circuit case addressed facts similar to Carachuri-Rosendo, but it did so in the criminal context. In United States v. Williams, the Fourth Circuit considered whether to apply a recidivist enhancement to the defendant’s prior New Jersey conviction for purposes of determining the maximum potential term of imprisonment for that conviction. Even though the recidivist enhancement could have applied to the actual defendant, the court declined to apply it. The court based its decision upon a state statute similar to the federal procedural safeguards statute in Carachuri-Rosendo. The court emphasized the importance of this statute when it stated: “To subject Williams to an enhancement now, based upon a sentence that he could have received only after the exercise of procedural safeguards, would compromise not only Williams’s statutory rights, but his due process rights as well.”

This case suggests that the Carachuri-Rosendo Actual Defendant Approach would apply in Simmons’s case because it occurred in the criminal sentencing context, not the immigration context. As a result, the state-to-federal extrapolation analysis on which the Simmons II dissent relied in distinguishing Carachuri-Rosendo was inapplicable. Furthermore, it went beyond the Actual Defendant Approach because the defendant actually was subject to the enhancement. The court considered the defendant’s actual circumstances more

178. Compare Simmons II, 649 F.3d at 239 (considering a sentencing enhancement under the Controlled Substances Act to determine whether a state conviction qualified as a felony), with Carachuri-Rosendo v. Holder, 130 S. Ct. 2577, 2580–83 (2010) (considering the meaning of “drug trafficking crime” under the Controlled Substances Act to determine whether a state conviction qualified as a federal felony for immigration purposes).
179. See Leocal, 543 U.S. at 12 n.8 (supporting consistent interpretation both in the criminal and noncriminal contexts).
180. 326 F.3d 535 (4th Cir. 2003).
181. Id. at 539.
182. Id. at 539.
183. See id. at 539–40 (describing the state procedural safeguards).
184. Id. at 540.
thoroughly by also inquiring about the statutorily mandated procedural safeguards. Although a subsequent Fourth Circuit case suggested that this holding was consistent with Harp, the court’s consideration of the procedural safeguards and how they applied to the actual defendant in this criminal context undermines Simmons I and the Simmons II dissent.

Third, in addition to this prior Fourth Circuit case, the Supreme Court cited several important criminal cases when analyzing the proper approach to the Maximum Potential Term Issue in Carachuri-Rosendo. The Court stated that in Rodriguez it “held that a recidivist finding could set the ‘maximum term of imprisonment,’ but only when the finding is a part of the record of conviction.” The Rodriguez holding undermines the Simmons II dissent’s distinction because Rodriguez did involve criminal sentencing and because consultation of the record of conviction necessarily entails consideration of the actual defendant’s situation. The Court in Carachuri-Rosendo also cited Almendarez-Torres for several important points. The Supreme Court’s citation to these significant criminal cases in an immigration proceeding suggests that the different contexts do not justify different approaches to the Maximum Potential Term Issue.

Fourth, it is not clear why the state-to-federal extrapolation inquiry would require focusing on the actual defendant, while other inquiries relating to the Maximum Potential Term Issue would not. If a state crime had the same elements as a federal crime, then consideration of the actual defendant’s situation would not be necessary. A court could just take the elements of the state conviction, match them to the elements of the federal crime, and

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185. See id. (requiring that the prosecution honor the defendant’s procedural rights for the prior conviction).
186. See United States v. Williams, 508 F.3d 724, 728–30 (4th Cir. 2007) (emphasizing that the potential punishment and not the actual punishment controlled).
189. See id. at 387–89 (discussing the ways in which a court can consult the record of conviction to determine whether the “conviction was for a qualifying offense”).
190. Carachuri-Rosendo, 130 S. Ct. at 2581 n.3 (explaining “that the Constitution does not require treating recidivism as an element of the offense” (citing Almendarez-Torres v. United States, 523 U.S. 224, 247 (1998)); id. at 2582 n.6 (noting that the Constitution does not require honoring the statutory procedural safeguards at issue in the case); id. at 2586 (emphasizing that a court has the power to make a recidivist finding).
determine the maximum potential term of imprisonment for the federal crime. In Carachuri-Rosendo, the Court employed this simple analysis, but it added an important additional step because it created an additional “quasi-element” out of the prior conviction. This quasi-element required that the prosecutor respect the defendant’s statutory procedural rights and that the judge find the existence of a prior conviction by a preponderance of the evidence. In so doing, it stated that federal law created a separate offense, which it deemed “recidivist simple possession.” Since federal law required demonstration of this quasi-element as a prerequisite to felony punishment, and since the record of Carachuri-Rosendo’s state conviction did not contain a valid recidivist finding, the prior conviction could not qualify as a felony under federal law. Moreover, given that the Supreme Court made this quasi-element part of the offense, it is also specific to the offense. If this quasi-element constitutes part of the offense under federal law, then its absence would preclude felony punishment for a defendant convicted in federal court. Thus, the state-to-federal extrapolation did not require focusing on the actual defendant.

Furthermore, by removing the extra layer of the state-to-federal extrapolation and considering merely a federal conviction, it becomes apparent that the Supreme Court would require consideration of the actual defendant’s situation outside the immigration context. In other words, if a defendant had a prior conviction that subjected him to felony punishment under federal law but the prosecutor failed to respect his statutory procedural rights or the judge failed to find the prior conviction by a preponderance of the evidence, then the prior conviction would not qualify as a felony; rather, it would only qualify as a prior conviction for misdemeanor simple possession. The Court made the mandatory nature of this result in the federal criminal context clear when it stated, “for federal law purposes, a simple possession offense is not ‘punishable’ as a felony unless a federal prosecutor first elects to charge a defendant as a recidivist in the criminal information.”

Accordingly, when addressing the Maximum Potential Term Issue in the context of a federal conviction, not a state-to-federal analysis, the Court would go beyond the Actual Defendant

191. Id. at 2581 n.3.
192. Id.
193. Id. at 2589–90.
194. Id. at 2581 n.3, 2589–90.
195. Id. at 2587.
Approach, as the Fourth Circuit did in Williams. For a prior conviction to qualify as "punishable" by a sufficient term of imprisonment, the defendant could not have been merely subject to the enhancement; instead, the prosecutor would have had to comply with the statutory procedural safeguards as well.

Nevertheless, Simmons's prior conviction did not occur in federal court, and the Carachuri-Rosendo Court's creation of the separate offense did depend to some extent on the effect of the federal procedural protection statute. The Simmons II majority, however, highlighted that North Carolina's procedural safeguards are required for sentencing enhancements. These prerequisites to an enhanced sentence likely would operate in the same manner as the federal statute in Carachuri-Rosendo: they would create a separate offense, and their absence would prevent an enhanced punishment. Accordingly, even without the application of the federal statute, the Simmons II majority correctly considered Simmons's actual situation when determining his maximum potential term of imprisonment.

Moreover, the Court noted the prevalence of these procedural safeguards in state criminal codes across the country and emphasized their importance in allowing prosecutors the discretion to charge defendants as recidivists. This recognition further supports the Court's requirement that prosecutors and judges consider the actual defendant's situation for prior state convictions in both immigration and criminal proceedings. In sum, Simmons I and the Simmons II dissent's reliance on the different contexts does not seem to justify disregarding the actual defendant when addressing the Maximum Potential Term Issue.

In addition to their procedural and contextual arguments, Simmons I and the Simmons II dissent argued that the plain meaning of the statute supported their refusal to consider the actual

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196. See United States v. Williams, 326 F.3d 535, 539–40 (4th Cir. 2003) (requiring the prosecution to have honored the defendant's statutory procedural safeguards before applying a sentencing enhancement to a prior conviction).
197. Carachuri-Rosendo, 130 S. Ct. at 2587 (emphasizing that a federal offense is not punishable by an enhanced sentence unless the prosecution has honored the defendant's statutory procedural rights).
201. Carachuri-Rosendo, 130 S. Ct. at 2588. Given that the Court appeared to require a judge to find the conviction by a preponderance of the evidence, id. at 2581 n.3, the outcome likely would remain the same in states that lacked similar procedural safeguards.
defendant. The approach that a court takes to this issue depends largely upon its conception of the words "offense" and "crime." As Justice Souter's dissent in Rodriquez noted, "[i]t all turns on the meaning of the word 'offense.'" Similarly, in his concurring opinion in Apprendi, Justice Thomas also highlighted the importance of these terms, stating: "This case turns on the seemingly simple question of what constitutes a 'crime.'" Accordingly, Apprendi's conception of a crime may shed some light on this aspect of the Maximum Potential Term Issue.

In the cases discussed thus far, there have been at least two competing interpretations of what constitutes an "offense" or a "crime." First, a court could view an offense as constituting its basic elements and any sentencing enhancements. This conception of offense includes potential sentencing enhancements as part of the definition of the offense. The majority in Carachuri-Rosendo took this view of offense when it stated, "we therefore view [the statute's] felony simple possession provision as separate and distinct from the misdemeanor simple possession offense that [the statute] also prescribes." Accordingly, for the Court in Carachuri-Rosendo, an offense constituted the elements as reflected in the defendant's conduct and a quasi-element for the prior conviction. Under this view, a first-time offender and a repeat offender commit different crimes, even if their underlying conduct was the same. As the majority in Simmons II noted, "repetition transforms the underlying criminal conduct into an aggravated, different offense."

This view of offense would tend to support the Actual Defendant Approach because it would require a court to consider whether the defendant actually was subject to a recidivist enhancement. If the defendant was not subject to an enhancement, then he was convicted of a lesser crime with a lesser maximum potential term of imprisonment. As the Simmons II majority noted, the state statute "creates separate offenses that in turn yield separate maximum punishments." Thus, the Supreme Court's distinction between

205. Simmons II, 649 F.3d at 246-47.
206. See id. at 246.
208. See id. (interpreting the statute as requiring this treatment but noting that the Constitution did not require treating prior convictions as elements).
209. Simmons II, 649 F.3d at 247 (internal quotation marks omitted).
210. Id.
simple possession and recidivist simple possession in *Carachuri-Rosendo* undermines the Hypothetical Defendant with All Enhancements Approach established in *Harp* and supported in the *Simmons II* dissent. Under *Harp*, a court cannot consider whether a particular criminal statute creates separate offenses depending on the defendant's actual circumstances.

Second, a court could view an offense as constituting its basic elements.\(^\text{211}\) This conception of offense does not include potential sentencing enhancements in the definition.\(^\text{212}\) Under this view, a first-time offender and a repeat offender both commit the same offense, despite the fact that a repeat offender is subject to an increased sentence.\(^\text{213}\) The dissent in *Rodriquez* preferred this definition of offense, labeling it the "basic-crime view of offense."\(^\text{214}\) Under this view, determining the maximum potential term of imprisonment should not take into account any recidivist enhancements because it should focus only on the defendant's conduct.\(^\text{215}\) The dissent in *Simmons II* appeared to support this view of an offense when it stated that a "defendant is convicted of the same offense ... regardless of his criminal history or the specific characteristics of that offense."\(^\text{216}\)

While the *Simmons II* dissent may agree with the *Rodriquez* dissent regarding the definition of offense, the two views differ significantly because the dissent in *Simmons II* would apply all sentencing enhancements when determining the maximum potential term of imprisonment.\(^\text{217}\) In contrast, *Rodriquez* argued that courts should not consider sentencing enhancements when making the calculation.\(^\text{218}\) In other words, they agreed about the definition of offense, but they disagreed about the extent to which offenses are "punishable."

This view of offense could support either of two approaches to the Maximum Potential Term Issue. *Rodriquez* argued for the No Enhancements Approach, which would find the same maximum potential term of imprisonment for everyone who committed the

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\(^{212}\) Id.

\(^{213}\) See id.

\(^{214}\) Id. at 404 (Souter, J., dissenting) (internal quotation marks omitted).

\(^{215}\) Id. at 384 (majority opinion).


\(^{217}\) See id. at 252 (calculating Simmons's maximum potential term of imprisonment for his prior conviction based upon the statutory maximum).

\(^{218}\) See *Rodriquez*, 553 U.S. at 384; id. at 393–94 (Souter, J., dissenting) (considering the maximum punishment for a first-time offender as one way to interpret the statute); id. at 404 (stating that the competing interpretations are "close to evenly matched" but preferring the maximum punishment for a first-time offender interpretation).
crime—the maximum potential term for a first-time offender.\textsuperscript{219} The \textit{Rodriquez} dissent found this approach slightly more convincing than the approach the majority adopted,\textsuperscript{220} which is discussed more thoroughly in Part III.C.

This basic definition of offense, however, also could support the Hypothetical Defendant with All Enhancements Approach. In support of this approach, the \textit{Simmons II} dissent argued that the relevant state statute only constituted a single offense and that “criminal history and offense characteristics become relevant only at sentencing.”\textsuperscript{221} Along these lines, defendants whose underlying conduct is the same commit the same crime. Like the No Enhancements Approach, courts would consider the same maximum potential term of imprisonment for everyone who committed the crime. That maximum potential term, however, would include all sentencing enhancements, regardless of whether the actual defendant faced the possibility of any enhancements.

Thus, the relevant cases suggest two general ways of defining an offense or a crime: either including sentencing enhancements in the definition or not. The issue increases in complexity significantly, however, when one considers the distinction between prior convictions and aggravating factors discussed in \textit{Apprendi}.\textsuperscript{222} The Sixth Circuit in \textit{Pruitt} interpreted \textit{Rodriquez} as distinguishing between these two sentencing enhancements.\textsuperscript{223} According to the Sixth Circuit, the \textit{Rodriquez} majority supported a hybrid approach to the Maximum Potential Term Issue, requiring consideration of the actual defendant's prior convictions and assuming enhancements for aggravating factors.\textsuperscript{224} Since the \textit{Simmons II} dissent only adopted one way of defining “offense” and one way of defining “punishable,” and since it failed to recognize the potential distinction between recidivist enhancements and aggravating factor enhancements, it did not adopt a comprehensive understanding of the Maximum Potential Term Issue. Given \textit{Carachuri-Rosendo}'s recognition of recidivist offenses\textsuperscript{225} and \textit{Rodriquez}'s statement about the necessity of the record

\begin{itemize}
\item \textsuperscript{219} Id. at 384 (majority opinion).
\item \textsuperscript{220} Id. at 404 (Souter, J., dissenting).
\item \textsuperscript{221} \textit{Simmons II}, 649 F.3d at 256–57 (Agee, J., dissenting).
\item \textsuperscript{222} \textit{Apprendi} v. New Jersey, 530 U.S. 466, 487–90 (2000).
\item \textsuperscript{223} United States v. Pruitt, 545 F.3d 416, 420–21 (2008).
\item \textsuperscript{224} For a discussion of this topic in greater detail, see infra Part III.C.
\item \textsuperscript{225} Carachuri-Rosendo v. Holder, 130 S. Ct. 2577, 2581 n.3 (2010).
\end{itemize}
containing evidence of the prior conviction, the Simmons II dissent's plain language argument relying on a hypothetical prior conviction is unsound.

Although the Supreme Court does not appear to have resolved the influence of aggravating factors on the Maximum Potential Term Issue, this ambiguity does not undermine the Simmons II majority's result. For Simmons's prior North Carolina conviction to qualify as a predicate offense, he would have needed to be subject to enhancements for both prior convictions and aggravating factors. At least for prior convictions, the Court appears to have mandated consideration of the actual defendant's situation. As a result, the Simmons II majority ruled correctly in vacating his sentence, even if it potentially did not establish an accurate and comprehensive rule for determining the maximum potential term of imprisonment for a prior conviction.

In summary, other appellate courts have found that Rodriguez and Carachuri-Rosendo do require consideration of the actual defendant's situation, especially when it comes to inclusion of a recidivist finding as part of the record of conviction. That the Government in some of these cases has either conceded this point or failed to appeal it further undermines the approach in Simmons I and the Simmons II dissent. Moreover, attempts to distinguish Simmons's case based upon its relation to criminal sentencing and not an immigration proceeding do not establish that consideration of the actual defendant is improper. Finally, the plain language arguments that the Simmons I court and the Simmons II dissent offered do not suggest that the Hypothetical Defendant with All Enhancements approach is entirely correct; accordingly, the Fourth Circuit's conclusion in Simmons II is correct.

III. IMPLICATIONS OF THESE RECENT DEVELOPMENTS AND UNRESOLVED ISSUES

Rodriguez and Carachuri-Rosendo offer guidance to courts and lawyers confronted with the Maximum Potential Term Issue. Unfortunately, the cases ultimately leave some important issues unresolved. This Part considers some of these unresolved issues.

226. See United States v. Rodriguez, 553 U.S. 377, 389 (2008) (explaining that courts will often have automatic access to records pertaining to a past conviction for sentencing purposes).
228. See supra notes 167–72 and accompanying text.
A. Implications of Justice Scalia’s Concurring Opinion in Carachuri-Rosendo

Justice Scalia’s concurring opinion in Carachuri-Rosendo demonstrates that Almendarez-Torres and Apprendi continue to shape the development of criminal law. Justice Scalia cites Almendarez-Torres for the propositions that “a defendant is not ‘convicted’ of sentencing factors” and that “the elements of [a] crime [do] not include recidivism.” As a result, he did not apply the recidivist enhancement in Carachuri-Rosendo, and the prior conviction could not qualify as an aggravated felony. Justice Scalia’s focus on the elements of the underlying conduct and his disregard of sentencing factors suggest that the maximum potential term of imprisonment for a first-time offender (i.e., the No Enhancements Approach) should apply. However, Justice Scalia agreed with the majority in Rodriquez that recidivist enhancements can increase the maximum term of imprisonment, which suggests that he may only take this view in the immigration context when determining whether a state conviction could qualify as a federal felony.

The Simmons II dissent seemed to agree with Justice Scalia when it stated that “[o]nly after a defendant is convicted, at sentencing, does criminal history come into play.” As discussed above, however, the Simmons II dissent would have applied all enhancements when considering the extent to which the prior conviction is punishable. In contrast, Justice Scalia’s reliance on Almendarez-Torres, a precursor to Apprendi, suggests that he would apply aggravating factor enhancements but not recidivist enhancements. This mixed application accurately reflects the rule in

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229. Carachuri-Rosendo, 130 S. Ct. at 2590 (Scalia, J., concurring).
230. Id. at 2590–91.
231. This approach would differ from the Simmons II majority as well because it would never consider a recidivist enhancement when calculating the maximum potential term of imprisonment. Thus, even if the record of conviction contained a recidivist finding, the maximum would only be the maximum that a first-time offender would face. The defendant in Rodriquez made this argument, but the majority rejected it. Rodriquez, 553 U.S. at 385.
232. Id. at 382–84.
234. Id. at 252.
Apprendi that aggravating factors that increase the maximum potential term of imprisonment qualify as elements of the offense.236

In addition to demonstrating the continual influence of Almendarez-Torres and Apprendi, Justice Scalia’s concurring opinion also reflects an important departure from the position he took in both of those cases. His dissent in Almendarez-Torres questioned whether the Constitution required treating a prior conviction as an element.237 Similarly, in Apprendi, he joined Justice Thomas’s concurring opinion, which maintained that a prior conviction that enhanced the maximum potential sentence qualified as an element and established a separate offense.238

In Carachuri-Rosendo, Justice Scalia could have relied on his positions in these prior cases to emphasize that the prosecutor failed to charge the defendant as a recidivist and to provide the procedural safeguards of jury trial and proof beyond a reasonable doubt. Absent these constitutionally mandated procedural safeguards for elements of an offense, Justice Scalia then could have suggested that the defendant was not convicted of a state offense that corresponded to a federal felony because the prior conviction element was lacking. Instead, Justice Scalia firmly embraced the reasoning of Almendarez-Torres and treated the prior conviction as a sentencing factor.239 In other words, when determining whether Carachuri-Rosendo was convicted of an aggravated felony, Justice Scalia relied on the Almendarez-Torres majority’s conception of a prior conviction as a sentencing factor rather than his dissenting opinion’s conception of a prior conviction as an element. Justice Scalia’s concurring opinion in Carachuri-Rosendo thus provides a clear indication that he intends to respect the precedent of Almendarez-Torres going forward and that he likely expects his fellow Justices to follow suit.

B. Potential Effects of Different Language in Federal Statutes Invoking the Maximum Potential Term Issue

Until now, this Comment has disregarded some variations in the statutory language in the relevant cases. While all of these statutes invoke the Maximum Potential Term Issue, and while for the sake of


238. Apprendi, 530 U.S. at 501 (Thomas, J., concurring).

clarity one would hope that the Supreme Court or Congress would adopt a uniform and comprehensive approach to the issue in the future, these variations require attention. In Rodriquez, the inquiry concerned the defendant’s prior convictions for “serious drug offense[s],” defined in relevant part as offenses where a “maximum term of imprisonment of ten years or more is prescribed by law.” In Carachuri-Rosendo, the statute addressed a “drugs trafficking crime,” defined as “any felony punishable under . . . the Controlled Substances Act”; additional statutes provided that the relevant issue concerned whether Carachuri-Rosendo had “been convicted of a[n] aggravated felony,” defined in relevant part as a crime for which the “maximum term of imprisonment authorized” was “more than one year.” In Simmons II, the statute provided a sentence enhancement for when the defendant, among other things, had “a prior conviction for . . . [an] offense that is punishable by imprisonment for more than one year.” These three examples differ in certain respects, but they all invoke the Maximum Potential Term Issue.

Notably, the three portions of these statutes that suggest the potential punishment controls differ. One states “prescribed by law”; another uses the word “authorized”; and the third reads “punishable.” The differences only create more questions: do these different formulations of the Maximum Potential Term Issue justify different results? Did Congress intend as much by using different words? Should courts infer a different intent based upon these differences? Full consideration of the statutory history underlying these variations and others in the United States Code could provide some clarity; however, such a comprehensive review of legislative history is outside the scope of this Comment. Nevertheless, future cases and additional legal scholarship could address these differences.

C. Aggravating Factors Versus Prior Convictions and Constitutional Requirements Versus Statutory Interpretation

Apprendi treats aggravating factors and prior convictions differently. Assuming an aggravating factor increases the maximum
potential term of imprisonment, it qualifies as an element, and the prosecution must include it in the indictment, submit it to the jury, and prove it beyond a reasonable doubt.\textsuperscript{246} In contrast, a prior conviction does not qualify as an element, and the judge need only find it by a preponderance of the evidence to subject a defendant to an increased maximum potential term of imprisonment.\textsuperscript{247} The Court based these requirements on the Fifth and Sixth Amendments to the Constitution.\textsuperscript{248}

Although the Court has made clear these constitutional requirements for enhancing a sentence, the statutory requirements for determining the maximum potential term of imprisonment for a prior conviction remain unresolved. Based upon \textit{Rodriquez} and \textit{Carachuri-Rosendo}, the Court appears to require that the record reflect a finding that the actual defendant was subject to a recidivist enhancement. In \textit{Rodriquez}, the Court stated: “[I]n those cases in which the records that may properly be consulted do not show that the defendant faced the possibility of a recidivist enhancement, it may well be that the Government will be precluded from establishing that a conviction was for a qualifying offense.”\textsuperscript{249} In \textit{Carachuri-Rosendo}, the Court described its holding in \textit{Rodriquez}: “We held that a recidivist finding could set the ‘maximum term of imprisonment,’ but only when the finding is a part of the record of conviction.”\textsuperscript{250} The \textit{Carachuri-Rosendo} Court also stated that although “the Constitution does not require treating recidivism as an element of the offense . . . the fact of a prior conviction must still be found—if only by a judge

\begin{itemize}
  \item \textsuperscript{246} Apprendi v. New Jersey, 530 U.S. 466, 476 (2000) (quoting Jones v. United States, 526 U.S. 227, 243 n.6 (1999)).
  \item \textsuperscript{247} Almendarez-Torres v. United States, 523 U.S. 224, 248 (1997) (“[W]e express no view on whether some heightened standard of proof might apply to sentencing determinations that bear significantly on the severity of sentence.”). The Court’s reservation of judgment on whether a higher burden than preponderance of the evidence could apply to significant enhancements suggests that due process requires at least a preponderance of the evidence for a recidivist enhancement. See United States v. Watts, 519 U.S. 148, 156 (1997) (stating that “we have held that application of the preponderance standard at sentencing generally satisfies due process” and recognizing that some courts have considered whether the Due Process Clause requires a clear and convincing evidence standard for significant enhancements). The fact that Justices Thomas and Scalia expressed their support for requiring all the procedural safeguards associated with traditional elements provides support for this proposition. See Apprendi, 530 U.S. at 500–01 (Thomas, J., concurring).
  \item \textsuperscript{248} See \textit{Apprendi}, 530 U.S. at 500 (“In order for an accusation of a crime (whether by indictment or some other form) to be proper under the common law, and thus proper under the codification of the common-law rights in the Fifth and Sixth Amendments, it must allege all elements of that crime.”).
  \item \textsuperscript{249} United States v. Rodriquez, 553 U.S. 377, 389 (2008).
  \item \textsuperscript{250} Carachuri-Rosendo v. Holder, 130 S. Ct. 2577, 2587 n.12 (2010).
\end{itemize}
and if only by a preponderance of the evidence—before a defendant is subject to [the enhanced punishment].”

These statements suggest that despite the Court’s focus on statutory interpretation, it either applied the constitutional requirements necessary to enhance a sentence based upon a prior conviction (i.e., a judge’s finding by a preponderance of the evidence), or it interpreted the statute as requiring as much. These statements of the Court in the context of the Maximum Potential Term Issue suggest that the Court requires more than the Actual Defendant Approach when it comes to prior convictions.

Whether or not the Constitution or statutory interpretation provides the basis for applying these requirements for prior convictions in the context of the Maximum Potential Term Issue, it remains unclear whether the Court would do the same for aggravating factors. In other words, would the Court require that an aggravating factor that would enhance a prior conviction receive the heightened constitutional protections in Apprendi (i.e., notice, jury trial, and proof beyond a reasonable doubt)? If so, what would these requirements entail in the context of the Maximum Potential Term Issue? Just like with recidivist enhancements, this approach would provide defendants with procedural protections beyond the Actual Defendant Approach. The prosecutor could not rely on an aggravating factor to set the maximum potential term of imprisonment simply because the record reflects the qualifying fact but does not reflect all of these procedural safeguards. For example, if the indictment charged the defendant with committing a crime while possessing a weapon but the defendant pled guilty to a non-aggravated version of the offense or the prosecutor subsequently failed to submit such a factor to the jury, then courts could only rely on the non-aggravated version’s maximum potential term of imprisonment.

Applying these requirements would make the Court’s treatment of offenses in the constitutional Apprendi context consistent with the context of the Maximum Potential Term Issue, but the Court’s jurisprudence remains inconsistent. For example, in Pruitt, the Sixth Circuit held that Rodriguez required considering the actual defendant’s situation for prior convictions, but not for aggravating factors. The Sixth Circuit based this distinction on two aspects of

251. Id. at 2581 n.3.
252. Apprendi, 530 U.S. at 476.
the Supreme Court's decision in *Rodriquez*: (1) the requirement that courts consult the record to determine whether the defendant was subject to a recidivist enhancement, and (2) the fact that a guidelines system did not cap the maximum potential term of imprisonment.254

When considering aggravating factors, however, the Court in *Rodriquez* made a puzzling and apparently contradictory statement: "We conclude, however, that the phrase ‘maximum term of imprisonment . . . prescribed by law’ for the ‘offense’ was not meant to apply to the top sentence in a guidelines range."255 In so doing, the Court rejected the defendant's argument that "mandatory guidelines systems that cap sentences can decrease the ‘maximum term’ of imprisonment," which is merely "the term to which the state court could actually have sentenced the defendant."256 The Court apparently intended for this rule to apply beyond the context of recidivist enhancements because the prior conviction would not have qualified if it did not apply to aggravating factors as well.257 Although this rule may have made sense if the Court limited it to advisory guidelines that would not require notice, jury trial, and proof beyond a reasonable doubt for the enhancement, the Court appeared to endorse its application in the context of mandatory guidelines as well.258

This portion of the Court's holding in *Rodriquez* undermines the application of *Apprendi*'s constitutional requirements in the context of the Maximum Potential Term Issue. While the prior conviction at issue in *Rodriquez* occurred before *Apprendi* and *Blakely*,259 the Court made no attempt to limit its rule to cases decided before these important precedents. It is also worth noting that Justices Thomas and Scalia, both of whom previously supported considering both recidivist enhancements and aggravating factors as elements in *Apprendi*, joined the majority in *Rodriquez*.260 Their failure to offer any indication that they believed the constitutional requirements of *Apprendi* applied in the context of the Maximum Potential Term Issue further undermines the likelihood that the Supreme Court

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254. *Id.* at 422–23.
256. *Id.*
257. Brief for Respondent at 44–45, United States v. Rodriquez, 553 U.S. 377 (2008) (No. 06-1646). The defendant also argued that "there is a strong argument that the guidelines themselves define the ‘offense’ for purposes both of state law and of the ACCA." *Id.*
259. *Id.* at 390–92.
260. *Id.* at 379.
would do so in the future. The Court, however, could hold in a subsequent case that this proposition only amounted to dicta that did not control the outcome of future cases because the Court noted that the defendant had conceded any argument to the contrary. This concession of the issue was perplexing for two reasons: (1) the Court cited the Government's brief for the concession, not the defendant's; and (2) the defendant specifically stated that he had not conceded the point in his brief. The validity of the concession aside, the Court could use this portion of Rodriguez as a means of avoiding this apparently inconsistent precedent.

If the Sixth Circuit is correct about the Supreme Court's treatment of aggravating factors, the Court's opinion in Rodriguez inverts the degree of procedural protections for prior convictions and aggravating factors. Thus, when it comes to the Apprendi constitutional context, aggravating factors receive the status of elements, affording defendants the protections of notice, jury trial, and proof beyond a reasonable doubt, while recidivist enhancements remain sentencing factors only requiring a judge's finding by a preponderance of the evidence.

In contrast, in the statutory interpretation context of the Maximum Potential Term Issue, the Court provides prior convictions these same constitutional protections, but aggravating factor enhancements receive no protections at all. This result seems odd because an aggravating factor creates a separate offense in the constitutional context and, therefore, a defendant subject to the enhancement is not convicted of the same offense as a defendant who is not subject to the enhancement, in which case different maximum potential terms of imprisonment would apply. In the Maximum Potential Term Issue context, however, the Court in Carachuri-Rosendo indicated that recidivist enhancements can result in the creation of separate and distinct offenses with different corresponding maximum potential terms of imprisonment.

261. Id. at 390.
262. Brief for Respondent, supra note 257, at 45 n.22.
263. The circuit court's distinction between a statute that it claimed "clearly focuse[d] on the circumstances of the particular juvenile and not on the offense" supports the premise that the Supreme Court assumes aggravating factors and does not consider the actual defendant in this context. Rodriguez, 553 U.S. at 392–93.
264. Rodriguez made this argument with respect to guidelines, see Brief for Respondent, supra note 257, at 38–46, but the Court rejected it. Rodriguez, 553 U.S. at 390–93. The dissent in Pruitt also recognized this argument. See United States v. Pruitt, 545 F.3d 416, 427 (6th Cir. 2008) (Merritt, J., dissenting).
Despite this apparent theoretical inconsistency, it is counterintuitive that the Constitution actually requires that *Apprendi* principles apply to the Maximum Potential Term Issue. To evaluate this proposition, one only need consider whether Congress has the constitutional power to enact a statute that adopted the Hypothetical Defendant with All Enhancements Approach (e.g., a statute that applied a conditional provision to “anyone convicted of a crime for which any person convicted of the same crime could receive a term of imprisonment of one year or more”). The Supreme Court’s erosion of statutory interpretation in this way will perhaps prompt Congress to respond by passing such a statute and testing the Court’s view of its constitutionality.

On the other hand, perhaps Congress or the Court will recognize the virtues of applying *Apprendi* to the Maximum Potential Term Issue. One would expect a more accurate basis for the application of conditional provisions because the prior court would have respected the increased individualized consideration associated with *Apprendi*’s procedural safeguards. One would also expect increased fairness because the defendants learn about their own potential sentences, not the sentence that a hypothetical defendant with the worst criminal history and the most aggravating factors could receive. In contrast, the hypothetical defendant approach in *Harp* does have the administrative benefit of subjecting all defendants convicted of a crime to the same conditional provisions. Accordingly, once courts have settled what crimes trigger which provisions, the law becomes clear and does not require individualized consideration. While such policy considerations generally are best left to the legislature, until Congress makes its intent clear, the courts will continue to face cases that require further definition of the contours of the Maximum Potential Term Issue.

CONCLUSION

The Maximum Potential Term Issue has significant consequences in a wide variety of contexts. One can hardly overstate the complexity of the issue when considering the abstract constitutional issues, the myriad federal statutes in various forms, and the diversity of state sentencing systems. As the Supreme Court develops constitutional

265. *See* Davis, supra note 33, at 372–73 (arguing for the actual sentence imposed as the measure because more individualized consideration would more accurately reflect the culpability of the defendant).

266. *Cf.* id. (noting the administrative convenience of adopting an approach based upon the sentence imposed).
law in the criminal context, its decisions will have significant effects on the Maximum Potential Term Issue. Future cases and additional legal scholarship likely will have to consider the implications of different federal statutes operating in the context of varied sentencing systems. To avoid further complicating the issue, Congress or the Supreme Court could attempt to develop a uniform approach that does not vary by statute and by state. In an effort to aid this development, this Comment has sought to provide relevant background and to frame pertinent issues. In the future, through cases like Carachuri-Rosendo, the Supreme Court will hopefully shed additional light on the Maximum Potential Term Issue.

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