indicated to the Court that imposition of a sentence less than the maximum was in no sense an "acquittal" of the higher sentence. Appeal resulted in no further trial or other proceedings to which a defendant might be subjected, only the imposition of a new sentence. An increase in a sentence would not constitute multiple punishment, the Court continued, inasmuch as it would be within the allowable sentence and the defendant could have no legitimate expectation of finality in the sentence as first given because the statutory scheme alerted him to the possibility of increase. Similarly upheld as within the allowable range of punishment contemplated by the legislature was a remedy for invalid multiple punishments under consecutive sentences: a shorter felony conviction was vacated, and time served was credited to the life sentence imposed for felony-murder. Even though the first sentence had been commuted and hence fully satisfied at the time the trial court revised the second sentence, the resulting punishment was "no greater than the legislature intended," hence there was no double jeopardy violation.[141]

The Court is also quite deferential to legislative classification of recidivism sentencing enhancement factors as relating only to sentencing and as not constituting elements of an "offense" that must be proved beyond a reasonable doubt. Ordinarily, therefore, sentence enhancements cannot be construed as additional punishment for the previous offense, and the Double Jeopardy Clause is not implicated. "Sentencing enhancements do not punish a defendant for crimes for which he was not convicted, but rather increase his sentence because of the manner in which he committed his crime of conviction." [142]

"For the Same Offence"

Sometimes as difficult as determining when a defendant has been placed in jeopardy is determining whether he was placed in jeopardy for the same offense. As noted previously, the same conduct may violate the laws of two different sovereigns, and a defendant

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[141] Jones v. Thomas, 491 U.S. 376, 381–82 (1989).

[142] United States v. Watts, 519 U.S. 148, 154 (1997) (relying on Witte v. United States, 515 U.S. 389 (1995), and holding that a sentencing court may consider earlier conduct of which the defendant was acquitted, so long as that conduct is proved by a preponderance of the evidence). *See also* Almendarez-Torres v. United States, 523 U.S. 224 (1998) (Congress's decision to treat recidivism as a sentencing factor does not violate due process); Monge v. California, 524 U.S. 721 (1998) (retrial is permissible following appellate holding of failure of proof relating to sentence enhancement). Justice Scalia, whose dissent in *Almendarez-Torres* argued that there was constitutional doubt over whether recidivism factors that increase a maximum sentence must be treated as a separate offense for double jeopardy purposes (523 U.S. at 248), answered that question affirmatively in his dissent in *Monge*. 524 U.S. 740–41.