unless the prosecution in the second trial had to prove failing to reduce speed to establish this particular offense.[159] In 1990, the Court modified the *Brown* approach, stating that the appropriate focus is on same conduct rather than same evidence.[160] That interpretation held sway only three years, however, before being repudiated as "wrong in principle [and] unstable in application."[161] The *Brown* Court had noted some limitations applicable to its holding,[162] and more have emerged subsequently. Principles appropriate in the "classically simple" lesser-included-offense and related situations are not readily transposable to "multilayered conduct" governed by the law of conspiracy and continuing criminal enterprise, and it remains the law that "a substantive crime and a conspiracy to commit that crime are not the 'same offense' for double jeopardy purposes."[163] For double jeopardy purposes, a defendant is "punished . . . only for the offense of which [he] is convicted"; a later prosecution or later punishment is not barred simply because the underlying criminal activity has been considered at sentencing for a different offense.[164] Similarly, recidivism-based sentence enhancement does not constitute mul-

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[159] Illinois v. Vitale, 447 U.S. 410 (1980).

[160] Grady v. Corbin, 495 U.S. 508 (1990) (holding that the state could not prosecute a traffic offender for negligent homicide because it would attempt to prove conduct for which the defendant had already been prosecuted—driving while intoxicated and failure to keep to the right of the median). A subsequent prosecution is barred, the Court explained, if the government, to establish an essential element of an offense, will prove conduct that constitutes an offense for which the defendant has already been prosecuted. Id. at 521.

[161] United States v. Dixon, 509 U.S. 688, 709 (1993) (applying *Blockburger* test to determine whether prosecution for a crime, following conviction for criminal contempt for violation of a court order prohibiting that crime, constitutes double jeopardy).

[162] The Court suggested that if the legislature had provided that joyriding is a separate offense for each day the vehicle is operated without the owner's consent, so that the two indictments each specifying a different date on which the offense occurred would have required different proof, the result might have been different, but this, of course, met the *Blockburger* problem. Brown v. Ohio, 432 U.S. 161, 169 n.8 (1977). The Court also suggested that an exception might be permitted where the State is unable to proceed on the more serious charge at the outset because the facts necessary to sustain that charge had not occurred or had not been discovered. Id. at 169 n.7. *See also* Jeffers v. United States, 432 U.S. 137, 150–54 (1977) (plurality opinion) (exception where defendant elects separate trials); Ohio v. Johnson, 467 U.S. 493 (1984) (trial court's acceptance of guilty plea to lesser included offense and dismissal of remaining charges over prosecution's objections does not bar subsequent prosecution on those "remaining" counts).

[163] United States v. Felix, 503 U.S. 378, 389 (1992). The fact that *Felix* constituted a "large exception" to *Grady* was one of the reasons the Court cited in overruling *Grady*. United States v. Dixon, 509 U.S. 688, 709–10 (1993).

[164] Witte v. United States, 515 U.S. 389 (1995) (consideration of defendant's alleged cocaine dealings in determining sentence for marijuana offenses does not bar subsequent prosecution on cocaine charges).