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Sovereignty in Sentencing: Concurrent and Consecutive Sentencing of a Defendant Subject to Simultaneous State and Federal Jurisdiction

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SOVEREIGNTY IN SENTENCING: CONCURRENT AND CONSECUTIVE SENTENCING OF A DEFENDANT SUBJECT TO SIMULTANEOUS STATE AND FEDERAL JURISDICTION

We live in the jurisdiction of two sovereignties, each having its own system of courts to declare and enforce its laws in common territory. It would be impossible for such courts to fulfill their respective functions without embarrassing conflict unless rules were adopted by them to avoid it. The people for whose benefit these two systems are maintained are deeply interested that each system shall be effective and unhindered in its vindication of its laws. The situation requires, therefore, not only definite rules fixing the powers of the courts in cases of jurisdiction over the same persons and things in actual litigation, but also a spirit of reciprocal comity and mutual assistance to promote due and orderly procedure.[1]

I. INTRODUCTION

In September, Joseph was arrested by Washington State Police and pleaded guilty to state charges of second-degree burglary and second-degree robbery.[2] Shortly thereafter, Joseph was delivered into federal custody on a writ of *habeas corpus ad prosequendum*[3] and was transported

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1 Ponzi v. Fessenden, 258 U.S. 254, 259 (1922) (Taft, C.J., delivering the opinion of the Court).

2 This illustration is based on *United States v. Clayton*, 927 F.2d 491 (9th Cir. 1991), to demonstrate the procedural complexity of the conflict addressed in this Note. However, minor facts of the case have been altered to present a complete picture of the custody and sentencing sequence of a defendant analyzed in this Note. Finally, this illustration provides a context for understanding the statutory and administrative changes proposed in Part V of this Note. For a discussion of *Clayton* and the holding of the Ninth Circuit, see *infra* notes 147-52 and accompanying text.

3 A writ of *habeas corpus ad prosequendum* is "used in criminal cases to bring before a court a prisoner to be tried on charges other than those for which the prisoner is currently being confined." BLACK'S LAW DICTIONARY 715 (7th ed. 1999); *see also* Jake v. Herschberger, 173 F.3d 1059, 1061 n.1 (7th Cir. 1999) (describing the process of "borrowing" a defendant under a writ of *habeas corpus ad prosequendum*); United States v. Ratcliff, No. CR. A. 98-300, 2001 WL 910402, at *1 (E.D. La. Aug. 2, 2001) (explaining that a defendant in state custody appeared before the federal court for sentencing on a writ of *habeas corpus ad prosequendum*). Similarly, a state may gain temporary custody of an inmate held in federal confinement by a writ of *habeas corpus ad prosequendum*. *See infra* note 81.

to the federal confinement facility for the duration of his federal trial on charges of making false statements in the acquisition of a firearm and to possession of a firearm by a felon. Three days after the state guilty plea, Joseph pleaded guilty in federal district court to the federal charges. In early November, the federal district court sentenced Joseph to a prison term of twenty-four months and indicated that the sentence would run *consecutively* to any state sentence.[4] Subsequently, Joseph was returned to state custody, and the court sentenced him to a seventeen-month term of imprisonment. However, the state court ordered that the state sentence run *concurrently* with the twenty-four-month federal sentence.[5]

Because the state had primary custody, Joseph was transported to a Washington State penitentiary to begin serving his state sentence.[6] As a result, Joseph's federal sentence will not begin until after he has completed the state sentence and is transferred to a federal prison, for a total of forty-one months imprisonment. The only way that Joseph's state and federal sentences will run concurrently, as ordered by the state court, the first sentencing court, is for Joseph to petition the federal Bureau of Prisons ("BOP") for designation of the state prison as the place of confinement for his federal sentence.[7] Unfortunately, it is unlikely that the BOP will grant the request in light of the federal district court's expressed intent that the sentences be served consecutively.[8]

The conflict between the federal and state sentences arises because the state court and the federal court have contemporaneous jurisdiction but conflicting views on concurrent service of Joseph's sentences.[9]

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4 "Consecutive sentences" are "[t]wo or more sentences of jail time to be served in sequence." BLACK'S LAW DICTIONARY 1367 (7th ed. 1999). For example, consecutive sentences of five years and fifteen years would run for a total prison time of twenty years. *Id.* Consecutive sentences are also termed "cumulative sentences" and "accumulative sentences." *Id.*

5 "Concurrent sentences" are defined as "[t]wo or more sentences of jail time to be served simultaneously." *Id.* Consequently, concurrent sentences of five years and fifteen years would run for a total prison time of fifteen years. *Id.* For examples of state statutes authorizing a state court to impose a sentence to run concurrently with an existing federal sentence, see *infra* note 74.

6 For a complete discussion of the sentencing sequence and the service of sentences addressed in this Note, see *infra* Part II.C.

7 *See infra* note 88 and accompanying text.

8 *See infra* note 91 and accompanying text.

9 *See* Alexander Bunin, *Time and Again: Concurrent and Consecutive Sentences Among State and Federal Jurisdictions*, CHAMPION, Mar. 21, 1997, at 34; *see also* McCarthy v. Doe, 146 F.3d 118, 120 (2d Cir. 1998) ("The law governing prisoners subject to multiple sentences, particularly prisoners subject to multiple state and federal sentences, is hardly a model of

Congress and most states have empowered their trial courts to determine whether a sentence should be imposed concurrently with or consecutively to an existing sentence.[10] And in Joseph's case, each court imposed a term of imprisonment commensurate with the jurisdiction's established law. Clearly, Joseph is subject to two terms of imprisonment, yet the sentences cannot be served both successively, as ordered by the federal court, and simultaneously, as directed by the state court. This Note seeks a practical and equitable resolution to this conflict within the framework of each court's sovereignty.

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clarity."). State and federal statutes and the promulgation of sentencing guidelines account for much of the discrepancy and confusion in modern sentencing. *See, e.g.*, MICHAEL TONRY, SENTENCING MATTERS 11 (1996) ("Few outside the federal commission would disagree that the federal guidelines have been a disaster."); TAMASAK WICHARAYA, SIMPLE THEORY, HARD REALITY: THE IMPACT OF SENTENCING REFORMS ON COURTS, PRISONS, AND CRIME 109-10 (1995) ("Sentencing reforms, particularly mandatory sentencing laws, tend to elicit widespread efforts by courthouse regulars to avoid their application."). Experienced practitioners of criminal defense appreciate the complex relationship between state and federal sentences and the careful attention that must be paid in representing a defendant such as Joseph. *See* Bunin, *supra*, at 36. "Even if you understand all the various possible results, you may still not affect the outcome. I have rarely seen presentence reports that adequately advise the court about [the interrelation of state and federal sentencing]." *Id.*

[10] See *infra* Part II.B for examples of state law addressing concurrent and consecutive sentencing. For a full discussion of the federal provisions, 18 U.S.C. § 3584 and United States Sentencing Guideline 5G1.3, see *infra* Part II.A. *See also* United States v. Tisdale, 248 F.3d 964, 979 (10th Cir. 2001) (holding that a district court may impose a federal sentence to run concurrently with or consecutively to an unrelated, undischarged state sentence); United States v. Fuentes, 107 F.3d 1515, 1519 (11th Cir. 1997) (noting that the Sentencing Reform Act of 1984 grants a district court the discretion to order a sentence to run concurrently with or consecutively to an undischarged term of imprisonment); United States v. Wills, 881 F.2d 823, 826-27 (9th Cir. 1989) (holding that the district court had authority to impose a concurrent or a consecutive sentence to the unrelated state sentence the defendant was currently serving).

State and the federal governments have carefully crafted statutory language to accommodate situations in which concurrent or consecutive sentencing issues surface. 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 26.3(f) (2d ed. 1999). First, Congress and state legislatures have singled out specific offenses for which a sentence of imprisonment must be served consecutively to preexisting sentences. *See infra* notes 50, 71 and accompanying text. Second, federal and state legislatures have mandated consecutive sentences for crimes committed while a prisoner is serving or subject to an undischarged sentence. *See infra* notes 50, 71 and accompanying text. Third, the federal government and some states have legislated the presumption of either consecutive or concurrent sentences when a defendant is subject to multiple convictions at one trial. *See, e.g.*, 18 U.S.C. § 3584(a) (2000) (providing that "[m]ultiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively"); State v. Jensen, 955 P.2d 195, 199 (N.M. Ct. App. 1997) (holding that the district court properly relied on common law when the court imposed consecutive sentences for multiple counts charged in the same indictment where no statute provided for consecutive sentences).

This Note addresses the controversial issue of whether a federal court is authorized to impose a term of imprisonment to be served consecutively to a future state sentence when the state has primary jurisdiction over the defendant and is the second sentencing court. Currently, the federal appellate courts disagree diametrically on the resolution of the issue, and a circuit split has resulted.[11] The early jurisprudence of this century logically recognized that a second sentence may be executed to commence when the first sentence terminates.[12] However, some federal courts today suggest the opposite-that a first sentence can be executed to commence at the termination of a second with the future sentence in another jurisdiction, while other courts recognize the sovereignty of the second court and its right not to be preempted.[13] The disparity in current views stems from divergent interpretations of 18 U.S.C. § 3584(a),[14] which is the federal statute that authorizes concurrent and consecutive sentencing, reliance on principles of dual sovereignty and comity, and justification based on the broad sentencing discretion granted to federal district courts.[15]

This Note acknowledges that each sentencing court, state and federal, having contemporaneous interests in a single defendant, is sovereign in its authority to impose an appropriate sentence within the statutory guidelines of the jurisdiction. However, neither sentencing court possesses the authority to impose a sentence of imprisonment to run concurrently with or consecutively to an anticipated, yet-to-be-imposed sentence in the other jurisdiction.[16] Therefore, the state, as the second court in the sentencing sequence, must be allowed to impose its

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11 See *infra* Part III for a comprehensive summary of the circuit split.

12 *See* Ponzi v. Fessenden, 258 U.S. 254, 265 (1922). For a discussion of federal sentences imposed on defendants subject to undischarged state sentences, see *infra* note 39 and accompanying text.

13 *See infra* Part III.

14 18 U.S.C. § 3584(a). Section 3584(a) provides in relevant part:

> If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively .... Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.

Id. For a discussion of § 3584, see *infra* Part II.A.1.

15 *See infra* Part III.

16 *See infra* Part IV.

sentence to run concurrently with or consecutively to an undischarged federal sentence without being preempted by the federal sentence.[17] Additionally, the federal prison authorities must implement a fixed procedure for facilitating state-imposed concurrent sentences.[18] Although this Note specifically addresses the circuit split regarding the authority of the federal courts to impose a sentence to be served consecutively to a future state sentence, the principles apply equally to each sovereign.[19]

In order to elucidate the complexity inherent in sentencing sequences, Part II of this Note will discuss the basic principles of concurrent and consecutive sentencing and the implications of custody sequencing under federal and state law.[20] Part III will set out the circuit split by grouping circuits with similar justifications for granting or denying this preemptive sentencing authority to federal courts.[21] Part IV will present a three-part analysis of the conflict.[22] First, intrinsic and extrinsic interpretations of § 3584 demonstrate that the statute does not authorize prospective sentencing.[23] Second, principles of comity and dual sovereignty require that state and federal courts abstain from abridging the authority of the other.[24] Third, the discretion of the BOP

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17 *See infra* Part IV.

18 For a discussion of the administrative procedural bars to concurrent state sentencing, see *infra* Part IV.C. In Part V.C, this Note proposes a Bureau of Prisons ("BOP") Program Statement that would effectuate concurrent sentences when the state court, having primary jurisdiction, sentences a defendant already subject to a federal term of imprisonment. *See infra* Part V.C.

In *Romandine v. United States*, the Seventh Circuit reasoned that a federal court may not sentence a defendant to a term of imprisonment to run consecutively to a future state sentence. 206 F.3d 731, 737 (7th Cir. 2000). However, the court did acknowledge the procedural reality of the current system. *Id.* Even if the federal district court could not mandate that the sentences be served consecutively, the practical effect of the primary custody of the state court is that the sentences are served consecutively. *Id.* The Seventh Circuit recognized that only two possible methods existed for rendering the sentences concurrent: (1) a reduction in sentence by the state court or (2) acceptance by the BOP of the state prisoner into federal custody earlier than the end of the state sentence. *Id.* at 738.

19 A state sentencing court is also prohibited from prospectively imposing its will on a federal court. As discussed in Part IV.B below, abundant federal case law already recognizes this limitation on state courts. The dispute remains as to whether the same restrictions should apply to the federal courts. This Note proposes that they do. *See infra* Part IV.

20 *See infra* Part II.

21 *See infra* Part III.

22 *See infra* Part IV.

23 *See infra* Part IV.A.

24 *See infra* Part IV.B.

over custody of federal prisoners can work to nullify a state-imposed concurrent sentence.[25] Finally, Part V will propose statutory and administrative changes that promote equity and predictability in multi-jurisdictional, contemporaneous sentencing.[26]

II. THE LAW OF CONCURRENT AND CONSECUTIVE SENTENCING

Whether a sentence is served concurrently with or consecutively to an existing sentence is a determination generally left to the discretion of a state or federal court, within carefully delineated statutory parameters.[27] As a result of the Comprehensive Crime Control Act of 1984 ("Act"),[28] a federal court must consider a series of factors when imposing a sentence.[29] Specifically, § 3584 guides a federal court in

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25 *See infra* Part IV.C.

26 *See infra* Part V.

27 *See* United States v. Gonzales, 520 U.S. 1, 6 (1997) (citing 18 U.S.C. § 3584(a) (2000) and United States Sentencing Guideline § 5G1.3 (2001)); United States v. Kalady, 941 F.2d 1090, 1097 (10th Cir. 1991) (holding that whether to impose a concurrent or consecutive sentence is normally within the discretion of the sentencing court); United States v. Wills, 881 F.2d 823, 826 (9th Cir. 1989). However, sentences for certain crimes may be automatically consecutive by statute. *See Gonzales*, 520 U.S. at 9-10 (holding that a sentence imposed under 18 U.S.C. § 924(c) runs consecutively to both state and federal terms of imprisonment). In addition, certain sentencing guidelines are unclear as to whether consecutive sentences are mandatory, and the circuit courts are split in their interpretations. *See infra* note 56. Nevertheless, sentencing judges incorporate a number of factors when imposing a sentence. *See* 5 LAFAVE ET AL., *supra* note 10, § 26.3(f). "In a short period of time, a judge assimilates a variety of information, assesses the credibility of it based to some extent on judicial training, intuition and 'gut,' and renders sentence after sentence in numerous cases." GEORGE B. PALERMO & MAXINE ALDRIDGE WHITE, LETTERS FROM PRISON: A CRY FOR JUSTICE 193 (1998).

28 Pub. L. 98-473, 98 Stat. 1989 (codified as amended in scattered sections of 18 U.S.C., 19 U.S.C., 28 U.S.C., 29 U.S.C., 42 U.S.C.).

29 *See* 18 U.S.C. § 3584 (referencing 18 U.S.C. § 3553(a) (2000)). Section 3553(a) provides:

> The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider–
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed–
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and

ordering concurrent or consecutive sentences.[30] States have enacted comparable legislation.[31] Although a court retains the power to weigh the statutory factors in order to render a fair and just sentence, statutory constraints have increasingly reduced judicial discretion in state and federal courts.[32]

A basic understanding of concurrent and consecutive sentencing law in state and federal jurisdictions, as well as the sequence of sentencing, is essential to an analysis of the circuit split and to resolving the conflict.

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for–

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code;

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a).

30 *Id.* For the text of § 3584, see *infra* text accompanying note 45.

31 *See infra* Part III.B.

32 *See* TONRY, *supra* note 9, at 3. Until the 1970s, judges exercised great freedom in fashioning sentences in accordance with the facts and special circumstances presented in each case. *Id.* However, legislators are increasingly unwilling to pass general sentencing guidelines with outer boundaries that allow substantial judicial choice within the limits. *Id.* As a result, sentencing laws often mandate a legislatively crafted sentence for specific crimes. *Id.* Nevertheless, most sentencing schemes do allow for the consideration of mitigating or aggravating circumstances:

> The sentencing guidelines system will not remove all of the judge's sentencing discretion. Instead, it will guide the judge in making his decision on the appropriate sentence. If the judge finds an aggravating or mitigating circumstance present in the case that was not adequately considered in the formulation of the guidelines and that should result in a sentence different from that recommended in the guidelines, the judge may sentence the defendant outside the guidelines.

S. REP. NO. 98-225, at 51-52 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3234-35.

First, the federal statutory approach to concurrent and consecutive sentencing is reviewed.[33] Second, the state approaches are categorized in order to demonstrate the state interest in maintaining its sentencing authority.[34] Finally, the complexity of sentencing and custody sequence, as well as the role of the BOP in carrying out federal terms of imprisonment, is emphasized.[35]

A. *Federal Law on Concurrent and Consecutive Sentencing*

1. 18 U.S.C. § 3584

Prior to the Act,[36] no federal statutory law expressly addressed concurrent or consecutive sentencing.[37] However, the practical effect of 18 U.S.C. § 3568 at that time was to render state and federal sentences consecutive.[38] Under § 3568, a federal term of imprisonment automatically was served consecutively to an *existing* state sentence because the federal sentence did not commence until the prisoner was received into federal custody at the termination of the state sentence.[39]

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[33] *See infra* Part II.A.

[34] *See infra* Part II.B.

[35] *See infra* Part II.C.

[36] Pub. L. No. 98-473, 98 Stat. 1989 (codified as amended in scattered sections of 18 U.S.C., 19 U.S.C., 21 U.S.C., 28 U.S.C., 29 U.S.C., 31 U.S.C., 42 U.S.C.) (establishing an effective date of November 1, 1987).

[37] S. REP. NO. 98-225, at 126 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3309.

[38] *Id.*; *see also* 18 U.S.C. § 3568 (1982) (*repealed by* Pub. L. No. 98-473, §§ 212(a)(1), (2), 235(a)(1), 98 Stat. 1987, 2031 (1984)). Section 3568 continues to govern sentencing for crimes committed prior to November 1, 1987, and provides, in relevant part, that

> the sentence of imprisonment of any person convicted of an offense shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of such sentence. The Attorney General shall give any such person credit toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed . . . . No sentence shall prescribe any other method of computing the term.

18 U.S.C. § 3568. For additional information on sentencing offenders after the effective date of the Comprehensive Crime Control Act for crimes committed prior to November 1, 1987, see generally JAMES B. EAGLIN, FEDERAL JUDICIAL CENTER, SENTENCING FEDERAL OFFENDERS FOR CRIMES COMMITTED BEFORE NOVEMBER 1, 1987 (1991).

[39] *See, e.g.*, United States v. Hernandez, 234 F.3d 252, 255 (5th Cir. 2000) (citing United States v. Myers, 451 F.2d 402 (9th Cir. 1972)); Meagher v. Clark, 943 F.2d 1277, 1280-84 (11th Cir. 1991) (holding that under principles of dual sovereignty and § 3568, the BOP was not required to grant a prisoner credit for time served on a state sentence that was subsequently vacated even though the state intended its sentence to run concurrently with the future federal sentence); Pinaud v. James, 851 F.2d 27, 30-31 (2d Cir. 1988) (same); United States v. Smith, 812 F. Supp. 368, 374-75 (E.D.N.Y. 1993) (same).

The same was true when a defendant was tried and sentenced in federal court *before* being sentenced on pending state charges.[40] Once the defendant was returned to state custody and was sentenced, the defendant served the state sentence first; the federal sentence only began once the prisoner was received into federal custody.[41] Because of the practical effect of § 3568, the district court lacked authority to order that its sentence run concurrently with or consecutively to an existing state sentence.[42] However, when the defendant was subject to an undischarged *federal* sentence, the opposite occurred; the current and existing federal sentences were deemed to run concurrently.[43]

Under the Act, § 3568 was repealed and § 3584 was enacted.[44] The present federal statutory treatment of concurrent and consecutive sentences resides in § 3584(a), which provides, in relevant part:

> If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run

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40 *See infra* note 41 and accompanying text.

41 *See, e.g.*, Cobb v. United States, 583 F.2d 695 (4th Cir. 1978) (holding that the district court is not required to notify a defendant tendering a guilty plea that the federal sentence will run consecutively to an anticipated state sentence as a result of § 3568); Kincade v. United States, 559 F.2d 906, 909 (3d Cir. 1977) (per curiam) (same). *But see* United States v. Myers, 451 F.2d 402 (9th Cir. 1972) (holding that the district court must advise a defendant who is pleading guilty that the federal sentence will run consecutively to an anticipated state sentence as a result of § 3568). The court in *Myers* noted that § 3568 effectively precluded the district court from imposing a sentence to run concurrently to any state confinement. *Id.* at 404. The only option available to a district judge, sentencing a prisoner already sentenced by or awaiting sentencing by a state court, was to suggest to the BOP that the federal sentence be served concurrently with the state sentence. *Id.* Yet, this option was not ideal because the BOP did not always abide by judicial suggestions. *Id.*

42 *See* Patricia M. Jones, *White-Collar Crime: Fourth Survey of Law, Procedural Issues SENTENCING*, 24 AM. CRIM. L. REV. 879, 887 (1987); *see also* United States v. Fuentes, 107 F.3d 1515, 1520 n.6 (11th Cir. 1997) (providing a comprehensive summary of federal/state concurrent sentencing prior to the Comprehensive Crime Control Act of 1984). Prior to the Comprehensive Crime Control Act of 1984 ("Act"), the district court could only make a recommendation to the BOP, which then implemented the sentence. *Fuentes*, 107 F.3d at 1520. Under the Act, the authority vested fully in the district court to articulate whether a federal sentence would be concurrent or consecutive to the state sentence. *Id.*

43 S. REP. NO. 98-225, at 126 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3309 (noting that a federal sentence ran concurrently with an undischarged federal sentence but consecutively with an undischarged state sentence).

44 *See supra* note 38. For a summary of other considerations in concurrent and consecutive sentencing, that are beyond the scope of this Note, see 21A AM. JUR. 2D *Criminal Law* § 853 (1998).

> concurrently or consecutively .... Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.[45]

The first sentence of the statute addresses two situations in which a defendant may be subject to more than one sentence: (1) when multiple terms of imprisonment are imposed at the same time and (2) when a term of imprisonment is imposed on a defendant already subject to an undischarged term of imprisonment.[46] At a minimum, a federal sentence imposed on a defendant in either situation may run concurrently with or consecutively to the other *federal* sentences.[47] Recently, many appellate courts have inferred further that a federal sentence may be imposed to run consecutively to an existing *state* sentence under § 3584, even though the statute does not specifically address undischarged sentences in foreign jurisdictions.[48] In contrast to the default practice prior to the

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45 18 U.S.C. § 3584(a) (2000). The ellipsis in the text accompanying this footnote replaces the single exception for consecutive sentences: "Except that the terms may not run consecutively for an attempt and for another offense that was the sole objective of the attempt." *Id.* This exception was recommended by the National Commission and was contrary to the then-current law. S. REP. NO. 98-225, at 126 (1984), *reprinted in* 1989 U.S.C.C.A.N. 3182, 3309. The next section of the statute, § 3584(b), guides the court in selecting concurrent or consecutive sentences: "The court, in determining whether the terms imposed are to be ordered to run concurrently or consecutively, shall consider, as to each offense for which a term of imprisonment is being imposed, the factors set forth in section 3553(a)." 18 U.S.C. § 3584(b). For the full text of 18 U.S.C. § 3553(a), see *supra* note 29.

46 *See supra* text accompanying note 45.

47 18 U.S.C. § 3584(a) ("[I]f a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively....").

48 *See, e.g.*, United States v. Graves, No. 00-4862, 2001 WL 672099, at *2 (4th Cir. June 15, 2001) (holding that it was not an error for a federal sentence to run consecutively with an existing state sentence according to § 3584(a) and United States Sentencing Guidelines section 5G1.3(a)); United States v. Covert, 117 F.3d 940, 945 (6th Cir. 1997) (same); United States v. Kezerle, 99 F.3d 867, 869-70 (7th Cir. 1996) (same); United States v. Morgano, 39 F.3d 1358 (7th Cir. 1994). For example, the defendant in *United States v. D'Iguillont* was subject to a prior state sentence at the time of his federal sentencing. 979 F.2d 612, 613 (7th Cir. 1992). The Seventh Circuit held that the district court judge did not err by failing to provide reasons for imposing a consecutive sentence because the final sentence of § 3584(a) creates a presumption of consecutive sentences for sentences imposed at different times. *Id.* at 615. In a similar unpublished Sixth Circuit case, the district court had imposed a sentence of five years to run consecutively to the defendant's prior state sentences. United

enactment of § 3584, a federal sentence may now run concurrently with an existing state sentence as well.[49] Finally, Congress has mandated consecutive sentences for specific serious offenses.[50]

States v. Underwood, No. 99-6399, 2001 WL 670044, at *5 (6th Cir. June 8, 2001). The state charges were unrelated to the federal charge; therefore, section 5G1.3(c) of the Federal Sentencing Guidelines directed the sentencing and gave the court discretion in ordering either consecutive or concurrent terms. *Id.* In this case, the district court had justified its decision appropriately based on 18 U.S.C. § 3553(a)(2)(A), which directs the district courts to consider "'the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense.'" *Id.* (citing 18 U.S.C. § 3553(a)(2)(A) (2000)). The Application Notes to Federal Sentencing Guidelines Manual Section 5G1.3 direct the court to consider the factors in § 3553(a) when selecting consecutive or concurrent sentences. *See infra* text accompanying note 64. The federal sentencing guidelines provide further guidance on when to impose a sentence to run consecutively to or concurrently with an existing state sentence. *See infra* Part II.A.2.

[49] *See* 18 U.S.C. § 3584(a); *see also* United States v. Fuentes, 107 F.3d 1515, 1520 n.6 (11th Cir. 1997) (explaining that Congress clearly intended for § 3584 to empower a district judge to impose a federal sentence to run concurrently with a state sentence); United States v. Spiers, 82 F.3d 1274, 1277 (3d Cir. 1996) (noting that a district court has discretion to impose a sentence to run concurrently with or consecutively to "another undischarged term of imprisonment" under § 3584); United States v. Devaney, 992 F.2d 75, 76 (6th Cir. 1993) (noting that the district judge possessed authority to run a federal sentence concurrently with an existing state sentence). For a discussion of statutory presumptions prior to the enactment of § 3584, see *supra* notes 36-43 and accompanying text.

[50] *See, e.g.*, 18 U.S.C. § 924(a)(4) (2000) (dictating that a term of imprisonment for a violation of § 922(q) shall not run concurrently with any other term of imprisonment); *Id.* § 924(c)(1)(D)(ii) (requiring that no sentence imposed for using or carrying a firearm in furtherance of a federal crime of violence or a federal drug trafficking crime may be imposed to run concurrently with any other term of imprisonment imposed on the defendant); *Id.* § 3146(b)(2) (mandating that a sentence imposed on a released individual, for a failure to appear as a condition to release or for service of sentence under court order, be imposed consecutively to a sentence of imprisonment for any other offense); *see also* United States v. Quintero, 157 F.3d 1038, 1039 (6th Cir. 1998) (imposing a consecutive term of imprisonment for an offense committed during supervised release); United States v. Kalady, 941 F.2d 1090, 1097 (10th Cir. 1991) (noting that consecutive sentences may be mandated by statute and discussing 18 U.S.C. § 3146(b)(2), which mandates consecutive sentences).

2. The Federal Sentencing Guidelines-Section 5G1.3[51]

In combination with § 3584(a), the Federal Sentencing Guidelines provide direction to courts in selecting either concurrent or consecutive sentences.[52] Section 5G1.3 addresses the "imposition of a sentence on a defendant subject to an undischarged term of imprisonment" and derives its authority from the similar provision of § 3584(a).[53] In three

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[51] FEDERAL SENTENCING GUIDELINES MANUAL § 5G1.3 (2001). Section 5G1.3 provides:

> (a) If the instant offense was committed while the defendant was serving a term of imprisonment ... or after sentencing for, but before commencing service of, such term of imprisonment, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment.
>
> (b) If subsection (a) does not apply, and the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense, the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment.
>
> (c) (Policy Statement) In any other case, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense.

Id. For a comprehensive, fact-based analysis of the distinctions between sections 5G1.3(b) and 5G1.3(c), see *Fuentes*, 107 F.3d at 1521-24.

[52] *See* FEDERAL SENTENCING GUIDELINES MANUAL § 5G1.3; *see also* 28 U.S.C. § 994 (2000) (providing the statutory framework for the Guidelines). Section 3584 was enacted and the United States Sentencing Commission was created as part of the Comprehensive Crime Control Act of 1984. S. REP. NO. 98-225, at 125, 159 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3308, 3342. The United States Sentencing Commission then developed the Federal Sentencing Guidelines to provide a structured system for the determination of sentences. *See* 28 U.S.C. § 994.

[53] FEDERAL SENTENCING GUIDELINES MANUAL § 5G1.3; *see also* 18 U.S.C. § 3584(a). The background comment to section 5G1.3 specifically designates § 3584(a) as the foundation for the power of the court in section 5G1.3 to impose a sentence to run concurrently with or consecutively to an undischarged term of imprisonment. FEDERAL SENTENCING GUIDELINES MANUAL § 5G1.3, cmt. background. For a discussion of the interaction between § 3584(a) and section 5G1.3, see JEFRI WOOD, FEDERAL JUDICIAL CENTER, GUIDELINE SENTENCING: AN OUTLINE OF APPELLATE CASE LAW ON SELECTED ISSUES 245-46 (Sept. 2000) (noting that there is no conflict between the sections). Section 5G1.3 does not address sentencing a defendant who is subject to pending charges in another jurisdiction. United States v. Brown, 920 F.2d 1212, 1216 (5th Cir. 1991). For a discussion of *United States v. Brown*, see *infra* Section III.B.1.

In addition, section 5G1.2 of the Federal Sentencing Guidelines, which addresses sentencing on multiple counts of conviction, works in conjunction with § 3584. *See* FEDERAL SENTENCING GUIDELINES MANUAL § 5G1.2 (2001); *see also* 18 U.S.C. § 3584(a); United States v. Joetzki, 952 F.2d 1090, 1098 (9th Cir. 1991) (holding that the multiple sentencing provisions of the federal guidelines must be read in combination with § 3584). Section 5G1.2 provides:

subsections, section 5G1.3 identifies distinct situations in which a defendant may be subject to an undischarged sentence and directs the type of sentencing for the instant offense in each case.[54] Under section 5G1.3(a), the court must impose a consecutive sentence for an offense that was committed while the defendant was serving a prison sentence or that was committed after the defendant had been sentenced for an earlier offense but before the defendant began serving the sentence.[55] The tension between the discretion provided to district judges in § 3584(a) and the mandate of consecutive sentences under section 5G1.3(a) has been resolved by recognizing section 5G1.3(a) as providing a presumption of consecutive sentences and allowing a sentencing judge the discretion to order concurrent sentences under § 3584(a).[56]

In contrast, section 5G1.3(b) requires a court to impose a term of imprisonment to run concurrently with any sentence that has been fully taken into account in designating the offense level for the instant

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(a) The sentence to be imposed on a count for which the statute (1) specifies a term of imprisonment to be imposed; and (2) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment shall be determined by that statute and imposed independently.

(b) Except as otherwise required by law (see § 5G1.1 (a), (b)), the sentence imposed on each other count shall be the total punishment as determined in accordance with Part D of Chapter Three, and Part C of this Chapter.

(c) If the sentence imposed on the count carrying the highest statutory maximum is adequate to achieve the total punishment, then the sentences on all counts shall run concurrently, except to the extent otherwise required by law.

(d) If the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment. In all other respects sentences on all counts shall run concurrently, except to the extent otherwise required by law.

FEDERAL SENTENCING GUIDELINES MANUAL § 5G1.2.

[54] *See supra* note 51.

[55] *See supra* note 51.

[56] *See, e.g.*, United States v. Flowers, 995 F.2d 315, 316-17 (1st Cir. 1993); United States v. Gullickson, 981 F.2d 344, 349 (8th Cir. 1992); United States v. Shewmaker, 936 F.2d 1124, 1128 (10th Cir. 1991); United States v. Pedrioli, 931 F.2d 31, 32 (9th Cir. 1991); United States v. Stewart, 917 F.2d 970, 973 (6th Cir. 1990); United States v. Miller, 903 F.2d 341, 349 (5th Cir. 1990); United States v. Rogers, 897 F.2d 134, 137 (4th Cir. 1990); United States v. Fossett, 881 F.2d 976 (11th Cir. 1989).

offense.[57] The Application Note to section 5G1.3(b) indicates that the credited offense may be a state offense for which the defendant has already received a state sentence.[58] In fact, a sentence for less than the federal mandatory minimum may be imposed if the federal sentence is combined with the sentence already served in state court.[59]

Finally, section 5G1.3(c),[60] a "policy statement," allows a court to impose a concurrent, partially concurrent, or consecutive sentence in any other case in which a defendant is subject to a prior undischarged term of imprisonment in order to achieve a reasonable punishment.[61]

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[57] *See supra* note 51; *see also* United States v. Washington, 17 F.3d 230, 234 (8th Cir. 1994) (holding that the district court was required to make the defendant's federal sentence run concurrently with an undischarged Missouri sentence under section 5G1.3 because the district court fully considered the conduct that had led to the Missouri sentence when calculating the federal sentence).

[58] FEDERAL SENTENCING GUIDELINES MANUAL § 5G1.3, cmt. n.2. The comment provides the following illustration:

> The defendant is convicted of a federal offense charging the sale of 30 grams of cocaine. Under § 1B1.3 [of the Federal Sentencing Guidelines] (Relevant Conduct), the defendant is held accountable for the sale of an additional 15 grams of cocaine, an offense for which the defendant has been convicted and sentenced in state court. The defendant received a nine-month sentence of imprisonment for the state offense and has served six months on that sentence at the time of sentencing on the instant federal offenses. The guideline range applicable to the defendant is 10-16 months . . . . The court determines that a sentence of 13 months provides the appropriate total punishment. Because the defendant has already served six months on the related state charge as of the date of sentencing on the instant federal offense, a sentence of seven months, imposed to run concurrently with the three months remaining on the defendant's state sentence, achieves this result.

Id. For an application of this section, see *United States v. Kiefer*, 20 F.3d 874 (8th Cir. 1994).

[59] *See Kiefer*, 20 F.3d 874. The court in *Kiefer* held that the district court could sentence a defendant charged under 18 U.S.C. § 924(e)(1) to a term of imprisonment shorter than the mandatory minimum of § 924(e)(1) when the court reduced the sentence under section 5G1.3(b) to account for a prior state sentence and when the combined number of months of the state and federal sentences met the mandatory minimum sentence under § 924(e)(1). *Id.* at 876. For a discussion of a similar case, *United States v. Tatum*, see *infra* note 62.

[60] *See supra* note 51. For a comprehensive discussion of amendments prior to 1995 affecting section 5G1.3(c), see WOOD, *supra* note 53, at 241. For an application of section 5G1.3(c), see *United States v. Spiers*, 82 F.3d 1274 (3d Cir. 1996).

[61] *See supra* note 51; *see also* United States v. Velasquez, 136 F.3d 921, 924-25 (2d Cir. 1998) (upholding a federal sentence that was ordered to run consecutively to previous undischarged state sentence, reasoning in part that the district court properly considered factors required by Sentencing Guidelines when it imposed consecutive sentence); United States v. Joetzki, 952 F.2d 1090, 1098 (9th Cir. 1991) (holding that the district court should have ordered the federal sentences to "overlap"); Montalvo v. United States, 174 F. Supp.

Application Note 3, which assists the court in applying section 5G1.3(c), articulates the overriding purpose of section 5G1.3(c): "to achieve a reasonable punishment and avoid unwarranted disparity."[62] In addition to the sentencing factors listed in 18 U.S.C. § 3553(a),[63] the Application Note directs a sentencing court to four sentencing factors:

> (a) the type . . . and length of the prior undischarged sentence; (b) the time served on the undischarged sentence and the time likely to be served before release; (c) *the fact that the prior undischarged sentence may have been imposed in state court rather than federal court,* or at a different time before the same or different federal court; and (d) any other circumstances relevant to the

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2d 10 (S.D.N.Y. 2001) (upholding a federal sentence that was made concurrent with an undischarged, unrelated state sentence and that was credited for time spent in the state institution under section 5G1.3(c)); United States v. Ali, 897 F. Supp. 267, 270 (E.D. Va. 1995) (discussing the authority of a district court to impose a part-concurrent and part-consecutive sentence in the case of multiple offenses). Most circuits have held that, although policy statements are written by the Sentencing Commission, which has full authority under 28 U.S.C. § 994 to develop the Guidelines, policy statements are neither guidelines nor interpretation of the guidelines. *See* United States v. Hill, 48 F.3d 228, 231 (7th Cir. 1995) (citing United States v. Mathena, 23 F.3d 87, 93 (5th Cir. 1994); United States v. Sparks, 19 F.3d 1099, 1101 n.3 (6th Cir. 1994); United States v. Anderson, 15 F.3d 278, 283-84 (2d Cir. 1994); United States v. O'Neil, 11 F.3d 292, 301 n.11 (1st Cir. 1993); United States v. Levi, 2 F.3d 842, 845 (8th Cir. 1993); United States v. Hooker, 993 F.2d 898, 901 (D.C. Cir. 1993)). *But see Spiers,* 82 F.3d at 1277 (holding that a sentencing court's discretion under § 3584 is subject to section 5G1.3 of the guidelines, which includes the policy statements and commentary). And, while policy statements deserve great deference, the sentencing court's discretion is not replaced by any rule within the policy statement. *See Hill,* 48 F.3d at 231 (overruling circuit precedent to hold that a sentence for a violation of supervised release does not have to be imposed consecutively to an undischarged sentence, as was otherwise suggested by the Sentencing Commission's policy statement).

62 FEDERAL SENTENCING GUIDELINES MANUAL § 5G1.3, cmt. n.3; *see also* Abraham L. Clott, *How to Sentence a Defendant Prosecuted Separately for Factually Unrelated Crimes: An Explanation and Defense of § 5G1.3(c),* 7 FEDERAL SENTENCING REPORTER 4, Jan./Feb. 1995. In *United States v. Tatum,* a federal district court held that the district court has discretion under section 5G1.3(c) to run a federal sentence concurrently with an existing state sentence and credit state jail time, even though 18 U.S.C. § 924(e)(1) commands a mandatory minimum sentence. 938 F. Supp. 542, 543 (D. Minn. 1996). Although the state and federal violations arose out of the same conduct, the state conduct was not "fully taken into account" in determining the federal offense level and section 5G1.3(b) was not applicable; therefore, the court's authority flowed from section 5G1.3(c). *Id.* (citing *Kiefer,* 20 F.3d 874). The court explained that the credit given for the state sentence effectively equates to a downward departure from the mandatory minimum. *Id.* For a discussion of *United States v. Kiefer,* see *supra* note 59.

63 *See supra* note 29.

determination of an appropriate sentence for the instant offense.[64]

Finally, Application Note 6 to section 5G1.3 grants the court broad discretion in sentencing a defendant subject to multiple undischarged terms of imprisonment that may trigger different rules.[65]

B. Concurrent and Consecutive Sentencing Under State Law

Just as § 3584 guides federal concurrent and consecutive sentencing, many states have enacted statutes and/or rules of criminal procedure or have developed case law to govern the imposition of multiple sentences.[66] Most states grant the trial court the authority to decide whether multiple sentences will be consecutive or concurrent.[67]

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[64] FEDERAL SENTENCING GUIDELINES MANUAL § 5G1.3, cmt. n.3 (emphasis added). For a discussion and case law on these factors, see WOOD, *supra* note 53, at 242-43.

[65] FEDERAL SENTENCING GUIDELINES MANUAL § 5G1.3, cmt. n.5, 6 (providing that if a defendant was on probation, parole, or supervised release at the time of the instant offense, and such has been revoked, the "sentence for the instant offense should be imposed to run consecutively to the term imposed for the violation of probation, parole, or supervised release"). The circuit courts are split as to whether the language of Note 6 is mandatory or permissive, or, in other words, whether the district court must impose consecutive sentences under the stated circumstances. *Compare* United States v. Tisdale, 248 F.3d 964, 977 (10th Cir. 2001) (holding that Note 6's language is permissive), *and* United States v. Maria, 186 F.3d 65, 70-73 (2d Cir. 1999) (same), *and* United States v. Walker, 98 F.3d 944, 944 (7th Cir. 1996) (noting that Note 6 creates a "strong presumption in favor of consecutive sentencing"), *with* United States v. Goldman, 228 F.3d 942, 944 (8th Cir. 2000) (holding that Note 6's language is mandatory), *and* United States v. Alexander, 100 F.3d 24, 26-27 (5th Cir. 1996) (same), *and* United States v. McCarthy, 77 F.3d 522, 539-40 (1st Cir. 1996) (same), *and* United States v. Bernard, 48 F.3d 427, 430-32 (9th Cir. 1995) (same).

[66] For a discussion of § 3584, see *supra* Part II.A.1. For examples of state statutes governing multiple sentencing, see *infra* this Part, Part II.B.

[67] *See* Bunin, *supra* note 9. For examples of state law vesting the trial court with the power to determine whether sentences shall run concurrently or consecutively, see CONN. GEN. STAT. ANN. § 53a-37 (West 2001); DEL. CODE ANN. tit. 11, § 3901(b) (1995); FLA. STAT. ANN. § 921.16(1) (West 2001); HAW. REV. STAT. § 706-668.5(1) (1993); IDAHO CODE § 18-308 (Michie 1997); 730 ILL. COMP. STAT. 5/5-8-4 (2000); IND. CODE § 35-50-1-2(c) (1998 & Supp. 2001); IOWA CODE ANN. § 901.8 (West 1994 & Supp. 2001); KAN. STAT. ANN. § 21-4608(a) (1995); KY. REV. STAT. ANN. § 532.110(1) (Banks-Baldwin 1995); LA. CODE CRIM PROC. ANN. art. 883 (West 1997); ME. REV. STAT. ANN. tit. 17-A, § 1256(2) (West 1983 & Supp. 2001); MICH. COMP. LAWS ANN. § 769.1h(1) (West 2000); MINN. STAT. ANN. § 609.15(1) (West 1987 & Supp. 2001); MISS. CODE ANN. § 99-19-21(1) (2000); MO. ANN. STAT. § 558.026 (West 1999); NEV. REV. STAT. ANN. § 176.035(1) (Michie 2001); N.J. STAT. ANN. § 2C:44-5(a), (b) & (d) (West 1995); N.Y. PENAL LAW § 70.25(1) (McKinney 1998); N.C. GEN. STAT. § 15A-1354(a) (1999); OKLA. STAT. ANN. tit. 22, § 976 (West 1986 & Supp. 2002); OR. REV. STAT. § 137.123(1) (1990 & Supp. 1998 Part 3); R.I. GEN. LAWS § 12-19-5 (2001); S.D. CODIFIED LAWS § 22-6-6.1 (Michie 1998); TENN. CODE ANN. § 40-20-111(a) (1997); TEX. CRIM. PROC. CODE ANN.

However, judicial discretion in every state is limited to some extent.[68] A majority of states have legislated a presumption that multiple sentences run concurrently if the court is silent as to sentencing order.[69] Conversely, a handful of states have established a presumption of consecutive sentences.[70] In addition, state law frequently identifies

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§ 42.08(a) (Vernon 1979 & Supp. 2001); VT. STAT. ANN. tit. 13, § 7032(a) (1998); WASH. REV. CODE ANN. § 9.92.080(3) (West 1998); CAL. CT. R. 4.433; MO. R. CRIM. P. 29.09; WYO. R. CRIM. P. 32(c)(2)(B). For examples of the authority promoted in case law, see *State v. Murillo*, 25 P.3d 124, 127 (Idaho Ct. App. 2001) (holding that an Idaho court has inherent authority to impose consecutive sentences, including sentences imposed to run consecutively to a sentence in a foreign jurisdiction); *State v. Jensen*, 955 P.2d 195 (N.M. Ct. App. 1998) (holding that section 31-18-15 of the New Mexico code does not proscribe consecutive sentencing, rather the common law grants the court the discretion to mandate that sentences be served concurrently or consecutively); *State v. Dunn*, 859 P.2d 1169, 293 (Or. Ct. App. 1993) (holding that the defendant did not have a right to concurrent sentences, rather the decision was within the court's discretion); *State v. Klump*, 909 P.2d 317, 396 (Wash. Ct. App. 1996) (holding that a sentencing court has total discretion to impose a sentence to run concurrently with or consecutively to a previously imposed felony sentence); *Keith v. Leverette*, 254 S.E.2d 700, 703 (W. Va. 1979) (holding that the trial court, in its discretion, may order that multiple sentences be served consecutively or concurrently); *Apodaca v. State*, 891 P.2d 83, 85 (Wyo. 1995) (holding that when a defendant is subject to sentences in different cases for different crimes, the trial judge has discretion to impose a sentence to be served consecutively or concurrently).

[68] 5 LAFAVE ET AL., *supra* note 10, § 26.3(f). Judicial discretion may be limited by statutes and rules "establishing a presumption of either consecutive or concurrent sentences, mandating consecutive sentences for specified offense combinations, or laying out conditions under which concurrent or consecutive sentences may be imposed." *Id.*

[69] *See, e.g.*, FLA. STAT. ANN. § 921.16(1); GA. CODE ANN. § 17-10-10(a) (1997); 730 ILL. COMP. STAT. 5/5-8-4(a), (b); KY. REV. STAT. ANN. § 532.110(2); LA. CODE CRIM PROC. ANN. art. 883 (mandating a presumption of concurrent sentences under specific conditions); ME. REV. STAT. ANN. tit. 17-A, § 1256(2); MINN. STAT. ANN. § 609.15(1); MO. ANN. STAT. § 558.026; NEV. REV. STAT. ANN. § 176.035(1); N.C. GEN. STAT. § 15A-1340.15(a) (1999); N.D. CENT. CODE § 12.1-32-11(1) (1997); OHIO REV. CODE ANN. § 2929.41(A) (West 1997 & Supp. 2001); OR. REV. STAT. § 137.123(1); 49 Op. S.D. Att'y Gen. 624 (1939); 48 Op. S.D. Att'y Gen. 99 (1947); MO. R. CRIM. P. § 29.09; *see also* Hadley v. State, 910 S.W.2d 675 (Ark. 1995); People v. Coleman, 652 N.E.2d 322 (Ill. 1995); Weaver v. State, 664 N.E.2d 1169 (Ind. 1996); People v. Nantelle, 544 N.W.2d 667 (Mich. 1996); State v. Rasinsky, 527 N.W.2d 593 (Minn. 1995); Bradley v. State, 864 P.2d 1272 (Nev. 1992); State v. Mayberry, 643 P.2d 629 (N.M. Ct. App. 1982); State v. Wall, 502 S.E.2d 585 (N.D. 1998); *In re* Samkas, 608 N.E.2d 1172 (Ohio 1992); State v. Hemlin, 950 P.2d 335 (Or. 1997); Cook v. State, 824 S.W.2d 634 (Tex. Ct. App. 1991); State v. Smith, 875 P.2d 1249 (Wash. 1994).

[70] *See, e.g.*, DEL. CODE ANN. tit. 11, § 3901(d) (ordering that no term of imprisonment for a state offense shall be run concurrently with any other state sentence); D.C. CODE ANN. § 23-112 (1996); FLA. STAT. ANN. § 921.16(1); LA. CODE CRIM PROC. ANN. art. 883 (mandating a presumption of consecutive sentences under specific conditions); MONT. CODE ANN. § 46-18-401(1)(a), (4) (2001); VA. CODE ANN. § 19.2-308 (Michie 2000); WASH. REV. CODE ANN. § 9.92.080(3); W. VA. CODE § 61-11-21 (2000); *see also* Robertson v. Superintendent of Wise Corr. Unit, 445 S.E.2d 116, 117 (Va. 1994); Keith v. Leverette, 254 S.E.2d 700, 703 (W. Va. 1979); Apodaca v. State, 891 P.2d 83, 85 (Wyo. 1995).

specific offenses for which consecutive sentences are mandatory, such as crimes committed by an escapee or while incarcerated, sex offenses or offenses committed while in possession of a firearm, or multiple violations of a single statute.[71] Finally, many states have also provided

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[71] *See, e.g.*, CAL. FIN. CODE § 5309 (West 1999) (requiring consecutive sentences for each violation under articles defining a breach of savings association law); CAL. FISH & GAME CODE § 12005(d) (West 1998) (mandating consecutive sentences for separate violations of this section on the punishment for the sale of bear meat or other parts); COLO. REV. STAT. ANN. § 18-8-209 (West 1999) (mandating that a sentence for a conviction of escape or other offenses related to custody shall run consecutively to any sentences the defendant was serving at the time of the prohibited offense); CONN. GEN. STAT. ANN. § 53-396(c) (West 2001) (providing that a sentence for an incident of racketeering activity shall run consecutively to a sentence for a violation of sections prohibiting the carrying of dangerous weapons, possession of a sawed-off shotgun or silencer, use of a machine gun to perpetrate certain crimes, or stealing of a firearm); DEL. CODE ANN. tit. 11, § 1447(c) (1995) ("Any sentence imposed upon conviction for possession of a deadly weapon during the commission of a felony shall not run concurrently with any other sentence."); FLA. STAT. ANN. § 921.16(1) (requiring that a sentence for sexual battery or for murder shall be imposed to run consecutively to any other sentence for those offenses arising out of separate episodes); IDAHO CODE § 19-2520F (Michie 1997) (requiring that a sentence for a felony committed in a correctional facility begin after all previous sentences have ended); 730 ILL. COMP. STAT. 5/5-8-4(f) (imposing consecutive sentences when an offender is committed to the Department of Corrections at the time of the subsequent offense); IND. CODE § 35-50-1-2(d) (requiring consecutive sentences when a person arrested for one crime subsequently commits another crime); IND. CODE § 35-50-1-2(e) ("If a court determines under IC 35-50-2-11 that a person used a firearm in the commission of the offense for which the person was convicted, the term of imprisonment for the underlying offense and the additional term of imprisonment imposed under IC 35-50-2-11 must be served consecutively."); IOWA CODE § 901.8 (mandating that a sentence for escape under section 719.4 or for a crime committed while imprisoned shall begin at the expiration of an existing sentence); KAN. STAT. ANN. § 21-4608(e)(1) (requiring that a sentence for a crime committed while a person is incarcerated and serving a sentence for a felony shall be consecutive to the original term(s) of incarceration); MICH. COMP. LAWS ANN. § 768.7b(2) (West 2000) (mandating consecutive sentences for a person charged with a felony who commits a major controlled substance offense while pending disposition of the felony charge); MISS. CODE ANN. § 99-19-21(2) ("The term of imprisonment for a felony committed during parole, probation, earned-release supervision, post-release supervision or suspended sentence shall not run concurrently with any preceding term of imprisonment."); MO. ANN. STAT. § 558.026(1) (providing that a sentence of imprisonment for the felony of rape, forcible rape, sodomy, or forcible sodomy shall run consecutively to the other sentences); NEV. REV. STAT. ANN. § 176.035(2) (mandating consecutive terms of imprisonment when a person under sentence of imprisonment for a felony commits another felony); S.D. CODIFIED LAWS § 23A-27-36 (Michie 1998) (same); WASH. REV. CODE ANN. § 9.41.040(6) (West 1998) (requiring consecutive sentences for a conviction of unlawful possession of a firearm and for the felony crimes of theft of a firearm or possession of a stolen firearm); W. VA. CODE ANN. § 61-3E-2 (Michie 2000) (providing that offenses involving explosives, defined in Article 3E, "shall be cumulative and shall be in addition to any other offenses and penalties provided for by law"). *But see* KY. REV. STAT. ANN. § 532.110(3) (mandating a presumption of

criteria and guidelines to assist courts in selecting concurrent or consecutive sentences.[72]

Unlike the federal system, states have adopted laws relevant to sentencing a defendant subject to an undischarged sentence in a foreign jurisdiction.[73] In anticipation of likely conflicts in the service of sentences, the state laws either grant the sentencing court authority to impose a sentence concurrently with or consecutively to the foreign sentence or provide a presumption in favor of one sentencing order or the other.[74] When a state court imposes a sentence to run concurrently

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concurrent sentences for any sentence of imprisonment or reimprisonment for a crime committed while on parole in Kentucky).

72 *See, e.g.*, HAW. REV. STAT. § 706-668.5(2) (requiring the court to consider the factors set forth in section 706-606 when choosing to impose consecutive or concurrent sentences); IND. CODE 35-50-1-2(c) (requiring the court to consider the aggravating and mitigating circumstances in IC 35-38-1-7.1(b), (c) when determining whether terms of imprisonment shall be served consecutively or concurrently); ME. REV. STAT. ANN. tit. 17-A, § 1256(2) (requiring concurrent sentences unless the court imposes consecutive sentences after considering specific factors); MO. ANN. STAT. § 558.026 (providing that a court should not impose consecutive sentences unless, in the court's opinion, the nature and circumstances of the offense and the history and character of the defendant require consecutive sentences); N.Y. PENAL LAW § 70.25 (allowing the court to impose a sentence to run concurrently based on mitigating factors when the sentences normally should be served consecutively); OHIO REV. CODE ANN. § 2929.12 (West 1997) (providing factors to consider in felony sentencing); OR. REV. STAT. § 137.123 (providing specific circumstances in which the court may impose consecutive sentences); TENN. CODE ANN. § 40-35-115 (1997) (same); UTAH CODE ANN. § 76-3-401 (1999) (requiring the court to consider the gravity and circumstances of the offenses and the history, character, and rehabilitative needs of the defendant when imposing consecutive sentences); CAL. CT. R. 4.425(a) (providing criteria relevant to imposing consecutive rather than concurrent sentences); CAL. CT. R. 4.425(b) (providing that circumstances in mitigation or aggravation may be considered in choosing to impose consecutive or concurrent sentences).

73 *See infra* note 74.

74 *See, e.g.*, FLA. STAT. ANN. § 921.16(2) (allowing the court to impose a sentence to run concurrently with an existing sentence in another jurisdiction); KAN. STAT. ANN. § 21-4608(h) (providing procedural mechanism for rendering a state sentence concurrent to an existing federal sentence); KY. REV. STAT. ANN. § 532.115 (Banks-Baldwin 1995) (authorizing the state court to run a sentence for a felony conviction concurrent with a sentence for a felony conviction in another jurisdiction); LA. CODE CRIM PROC. ANN. art. 883.1 (same); ME. REV. STAT. ANN. tit. 17-A, § 1256(7) (providing that a state sentence runs consecutively to an existing sentence in another jurisdiction, absent an order to the contrary); MO. ANN. STAT. § 558.026(3) (authorizing the court to impose a sentence to be served concurrently with an existing sentence in another state or federal jurisdiction); NEV. REV. STAT. ANN. § 176.045(1), (4) (Michie 2001) (allowing the court to order its sentence to run concurrently with or consecutively to an existing sentence in a foreign jurisdiction and providing a presumption of consecutive sentences in the absence thereof); N.Y. PENAL LAW § 70.25(4) (same); N.C. GEN. STAT. § 15A-1354(a) (2002) (allowing the court to order its sentence to run concurrently with or consecutively to an existing sentence in a foreign jurisdiction and

with an existing sentence in another jurisdiction, the courts or the state prison authorities may also have statutory authority to designate the foreign penitentiary as the place of confinement for the state sentence.[75] In fact, a defendant in California whose state sentence is imposed to run concurrently with an existing sentence in a foreign jurisdiction has a right to be transferred to the prison authorities of that jurisdiction and to have the foreign institution designated as the place of confinement for the California sentence.[76] Notably, state legislatures have not provided a

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providing a presumption of concurrent sentences in the absence thereof); OHIO REV. CODE ANN. § 2929.41(B)(3) (authorizing the court to impose a consecutive sentence on a defendant convicted of a felony who is subject to a sentence for a felony in another state or the United States, as an exception to § 2929.41(A)); OR. REV. STAT. § 137.123(2) (providing that "if the defendant previously was sentenced by any other court within the United States to a sentence which the defendant has not yet completed, the court may impose a sentence concurrent with or consecutive to the other sentence or sentences"); 42 PA. CONS. STAT. ANN. § 9761(b) (West 1987) (allowing the court to impose its sentence concurrently when a defendant is subject to imprisonment under the authority of any other sovereign at the time of sentencing); WASH. REV. CODE ANN. § 9.94A.400(3) (West 1998 & Supp. 2001) (providing a presumption of concurrent sentences when a defendant is subject to a sentence for a crime committed in another jurisdiction, prior to the crime being sentenced, unless the court orders the sentences to run consecutively); WIS. STAT. ANN. § 973.15(3) (West 1998) ("Courts may impose sentences to be served in whole or in part concurrently with a sentence being served or to be served in a federal institution or an institution of another state."); CAL. CT. R. 4.451(b) (providing sentencing instructions for a court imposing a consecutive sentence on a defendant subject to a sentence imposed by a court of another state or the United States); TENN. R. CRIM. P. 32(c)(2) (providing a presumption of consecutive sentences when a defendant has "additional sentences or portions thereof to serve as the result of conviction in other states or in federal court," unless the court shows that good cause exists to run the sentences concurrently and so orders); *see also* Brown v. United States, 920 F.2d 1012, 1013 (8th Cir. 1990) (holding that a Missouri court may impose a sentence to run concurrently with an existing federal sentence under state law); Taylor v. Green, 190 S.E.2d 66, 66 (Ga. 1972) (holding that a state sentence runs consecutively to federal sentence absent a contrary intent by the court); State v. Sundstrom, 474 N.W.2d 213, 216 (Minn. Ct. App. 1991) (holding that the rules of law pertinent to a Minnesota sentence made consecutive to a previously imposed Minnesota sentence are applicable when the preexisting sentence is imposed by a federal court); Breeden v. N.J. Dept. of Corrections, 625 A.2d 1125, 1129 (N.J. 1993) (holding that the consecutive sentencing provisions of the New Jersey code do not address the imposition of sentences in a foreign jurisdiction).

[75] *See, e.g.*, FLA. STAT. ANN. § 921.16(2); 730 ILL. COMP. STAT. 5/5-8-6(e) (2000); KAN. STAT. ANN. § 21-4608(h); KY. REV. STAT. ANN. § 532.115.

[76] *See* CAL. PENAL CODE § 2900(b)(2) (West 2000); Cozine v. Crabtree, 15 F. Supp. 2d 997, 1002 (D. Or. 1998); *In re* Stoliker, 315 P.2d 12, 13 (Cal. 1957); *In re* Altstatt, 38 Cal. Rptr. 616, 617 (Cal. Ct. App. 1964). California Penal Code § 2900(b)(2) provides:

> In any case in which . . . a prisoner of another jurisdiction is, before completion of actual confinement in a penal or correctional institution of a jurisdiction other than the State of California, sentenced by a California court to a term of imprisonment for a violation of California law, and the judge of the California court orders that the California

rule for sentencing a defendant who is subject to a yet-to-be-determined federal sentence.

C. *Sentencing Sequence and the Federal Bureau of Prisons*

As demonstrated, state and federal laws attempt to address contingencies in multi-jurisdictional sentencing, which include the process for transferring custody and commencing sentences.[77] However, these statutes do not address the confusion that arises when a court with *secondary jurisdiction* imposes its sentence *first*.[78] To understand the overall effect of the statutes and of actual practice, it is necessary to review the law on the sequence of custody for a single defendant in multiple jurisdictions, the order in which sentences given by those jurisdictions are served, and the role of the BOP in implementing the sentences.[79]

The court that gains custody of a defendant first, as determined by careful review of the facts of the arrest, enjoys "primary jurisdiction" over the defendant.[80] When a state court with primary jurisdiction has

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> sentence shall run concurrently with the sentence which such person is already serving, the Director of Corrections shall designate the institution of the other jurisdiction as the place for reception of such person within the meaning of the preceding provision of this section. He may also designate the place in California for reception of such person in the event that actual confinement under the prior sentence ends before the period of actual confinement required under the California sentence.

CAL. PENAL CODE § 2900(b)(2). When the California sentence may be longer than the unexpired sentence in the foreign jurisdiction, the California court may also designate a California prison as the place of confinement for the concurrent service of both sentences. *Id.*; *see also Cozine*, 15 F. Supp. 2d at 1002.

77 *See supra* Part II.A, B.

78 *See* Valerie Stewart, *Frequently Asked Questions Regarding Clients Facing Designation to the Federal Bureau of Prisons*, NEVADA LAW., Sept. 7, 1999, at 17 ("The issue of 'primary jurisdiction' is a confusing one even for experienced counsel, but is critical to understanding multiple jurisdiction cases."); *see also* Savvas Diacosavvas, *Vertical Conflicts in Sentencing Practices: Custody, Credit and Concurrency*, 57 N.Y.U. ANN. SURV. AM. L. 207, 209-218 (2000) (providing a detailed explanation of the custody and transfer of defendants simultaneously subject to state and federal jurisdiction).

79 For more information about the BOP, statistics, general information, and access to Program Statements and other documents, visit the BOP website at http://www.bop.gov.

80 Stewart, *supra* note 78, at 17; *see also* Diacosavvas, *supra* note 78, at 207. For examples of case law recognizing that the first jurisdiction that arrests a defendant has "primary jurisdiction," see *Thomas v. Whalen*, 962 F.2d 358, 361 n.3 (4th Cir. 1992); *Thomas v. Brewer*, 923 F.2d 1361, 1365 (9th Cir. 1991); *In re Liberatore*, 574 F.2d 78, 89 (2d Cir. 1978); *Zerbst v. McPike*, 97 F.2d 253, 254 (5th Cir. 1938); *Jimenez v. Warden*, 147 F. Supp. 2d 24, 28 (D. Mass.

custody of a defendant, a federal court may "borrow" the defendant from the state court on a writ of *habeas corpus ad prosequendum*.[81] At that point, the federal court has present custody of, but not primary jurisdiction over, the defendant.[82] Consequently, the federal court lacks jurisdiction to interfere with a state sentence because the state acquires primary jurisdiction for trial, sentencing, and incarceration.[83] Once sentenced by the federal district court, the defendant is returned to the state for sentencing on the state charges, after which the defendant will begin serving the *state* sentence.[84] The state sentence is served first because the state has primary custody of the defendant.[85] A consecutive federal sentence in this scenario will begin to run after the state authorities release the prisoner to the federal detainer lodged by the U.S.

2001); *Buggs v. Crabtree*, 32 F. Supp. 2d 1215, 1219 (D. Or. 1998); *Shumate v. United States*, 893 F. Supp. 137, 139 (N.D.N.Y. 1995); *United States v. Ayscue*, 187 F. Supp. 946, 947 (E.D.N.Y. 1960); *Millard v. Roach*, 631 A.2d 1217, 1222 (D.C. 1993).

81 *See supra* note 3. Similarly, the state court cannot assume control over a defendant in federal custody without the consent of the United States. Ponzi v. Fessenden, 258 U.S. 254, 261 (1922). A state jurisdiction may acquire temporary custody of an inmate housed in a BOP facility through the Interstate Agreement on Detainers Act ("IADA") or under a writ of *habeas corpus ad prosequendum*. United States Dep't of Justice, Bureau of Prisons, Detainers and the Interstate Agreement on Detainers, Program Statement 5130.06(2)(b) (Mar. 1, 1999) [hereinafter Program Statement 5130.06], *available at* http://www.bop.gov (last visited Mar. 18, 2003). Under the IADA, a "jurisdiction having an untried indictment, information, or complaint lodged as a detainer may secure temporary custody of the inmate for trial." *Id.* at 5130.06(1). For a contrasting of detainers and of writs of *habeas corpus ad prosequendum*, see Diacosavvas, *supra* note 78, at 215-16.

82 *Ponzi*, 258 U.S. at 260; Stewart, *supra* note 78, at 17.

83 *Ponzi*, 258 U.S. at 260-61.

> The chief rule which preserves our two systems of courts from actual conflict of jurisdiction is that the court which first takes the subject matter of the litigation into its control, whether this be person or property, must be permitted to exhaust its remedy, to attain which it assumed to control, before the other court shall attempt to take it for its purpose.

Id.; *see also* United States v. Warren, 610 F.2d 680, 684-85 (9th Cir. 1980) (recognizing that the sovereign that arrests the defendant first has primary jurisdiction for trial, sentencing, and incarceration); *In re* Liberatore, 574 F.2d 78, 89 (2d Cir. 1978); Cozine v. Crabtree, 15 F. Supp. 2d 997, 1017 (D. Or. 1998) (recognizing that the sovereign that arrests the defendant first has primary jurisdiction for trial, sentencing, and incarceration); United States v. Smith, 812 F. Supp. 368, 369 (E.D.N.Y. 1993); People v. Alba, 730 N.Y.S.2d 191, 196-97 (N.Y. Sup. Ct. 2001) (recognizing that a court of primary jurisdiction does not lose its rights as such when it delivers a defendant to a court of secondary jurisdiction for a pending matter in the secondary jurisdiction).

84 Stewart, *supra* note 78, at 17.

85 *Id.*

Marshall.[86] Therefore, the first sentence imposed is not automatically the first sentence served by a defendant.[87]

In the same procedural custody and sentencing sequence, there are two ways in which the federal sentence may be made concurrent with the state sentence. First, the BOP may designate the state prison as the place of confinement for the federal term of imprisonment.[88] Second, the

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[86] *Id.* A detainer is a "hold order" filed by a sovereign to notify an incarcerating sovereign that the prisoner is wanted and to request prior notification of the prisoner's release date in order to arrange transfer of custody to the requesting sovereign. 5 LAFAVE ET AL., *supra* note 10, at 798 n.2. Federal statute dictates that the federal term of imprisonment begins to accrue once the defendant is "received into custody awaiting transportation to, or arrives voluntarily to commence service of sentence at, the official detention facility at which the sentence is to be served." 18 U.S.C. § 3585(a) (2000).

[87] For examples of cases in which the second sentence is served first, see *infra* Part III.

[88] *See* Stewart, *supra* note 78, at 17; *see also* Romandine v. United States, 206 F.3d 731, 738 (7th Cir. 2000) ("[T]he Attorney General could make the federal sentence run concurrently by designating the state prison as a place of federal confinement, so that the clock would start to tick on the federal sentence.") (citing 18 U.S.C. § 3585(a); *Id.* § 3621(b); United States v. Hill, 48 F.3d 228, 234 (7th Cir. 1995)); McCarthy v. Doe, 146 F.3d 118, 119, 122 (2d Cir. 1998) (holding that the BOP has the authority to allow a federal sentence to run concurrently with a future state sentence by designating the state prison as the place of confinement for the federal sentence). By designating the state prison as the place of federal confinement, the Attorney General, through the BOP, can commence a federal sentence before the completion of the state sentence when the state has primary jurisdiction over the defendant. Jimenez v. Warden, 147 F. Supp. 2d 24, 28 (D. Mass. 2001) (citing Barden v. Koehane, 921 F.2d 476, 481-82 (3d Cir. 1990)); United States v. Smith, 812 F. Supp. 368, 370 (E.D.N.Y. 1993) (same).

In order for the BOP to make the designation, the defendant must be in BOP custody. Under 18 U.S.C. § 3621(a), the BOP takes a defendant into custody for the duration of the term of imprisonment once the defendant is sentenced by the federal district court. 18 U.S.C. § 3621(a) ("A person who has been sentenced to a term of imprisonment . . . shall be committed to the custody of the BOP until the expiration of the term imposed."). Historically, defendants were placed in the custody of the Attorney General who designated the place of imprisonment. *Ponzi*, 258 U.S. at 260-62 (citations omitted). The Comprehensive Crime Control Act of 1984 transferred the power to designate the place of confinement from the Attorney General directly to the BOP. S. REP. NO. 98-225, at 141 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3324 (providing that "custody of Federal prisoners is placed in the Bureau of Prisons directly rather than in the Attorney General"). The Attorney General also delegated all of its authority to the BOP "relating to the commitment, control, or treatment of persons . . . charged with or convicted of offenses against the United States." 28 C.F.R. § 0.96 (2002). Having obtained custody, the BOP then designates the prisoner's place of imprisonment under 18 U.S.C. § 3621(b), which generally entails identifying the specific penitentiary based on a number of considerations. 18 U.S.C. § 3621(b). Section 3621(b) provides:

> The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau, whether maintained by the

BOP may accept a state prisoner into federal custody when state officials offer to transfer a prisoner who has not fulfilled the state term of imprisonment.[89] However, the BOP's authority to make the designation or to accept the prisoner is discretionary.[90] In addition, the BOP defers to the sentencing intent of the federal district court.[91] By utilizing either option, the BOP can significantly affect the length of a defendant's prison term.[92]

> Federal Government or otherwise and whether within or without the judicial district in which the person was convicted, that the Bureau determines to be appropriate and suitable, considering–
> (1) the resources of the facility contemplated;
> (2) the nature and circumstances of the offense;
> (3) the history and characteristics of the prisoner;
> (4) any statement by the court that imposed the sentence–
> (A) concerning the purposes for which the sentence to imprisonment was determined to be warranted; or
> (B) recommending a type of penal or correctional facility as appropriate; and
> (5) any pertinent policy statement issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28.

Id. Once the state penitentiary has been designated, the federal sentence begins to run because the defendant has been received into custody at "the official detention facility at which the sentence is to be served." 18 U.S.C. § 3585(a).

The procedural instructions for designating a state institution for concurrent service of a federal sentence are in BOP Program Statement 5160.04(1). United States Dep't of Justice, Bureau of Prisons, Designation of State Institution for Service of Federal Sentence, Program Statement 5160.04(1) (April 19, 2000) [hereinafter Program Statement 5160.04], *available at* http://www.bop.gov (last visited Mar. 18, 2003). The Program Objective states that "[a]ppropriate state institutions will be designated for service of Federal sentences when such actions are in compliance with applicable statutes, court orders, or recommendations, and the goals of the criminal justice system." *Id.* at 5160.04(3). Provisions for the transfer of prisoners to state custody prior to the release from a federal sentence are set forth in Program Statement 5140.35. United States Dep't of Justice, Bureau of Prisons, Designation of State Institution for Service of Federal Sentence, Program Statement 5140.35(3) (Sept. 12, 2001).

89 Program Statement 5160.04, *supra* note 88, at 5160.04(9)(e).

90 *Id.*

91 *Id.* at 5160.04(8). "A designation for concurrent service of sentence will be made only when it is consistent with the intent of the sentencing Federal court, or with the goals of the criminal justice system." *Id.* "Designating a non-Federal institution for the inmate, when the primary custody is not Federal, is done when consistent with the intent of the sentencing Federal court." *Id.* at 5160.04(9).

92 McCarthy v. Doe, 146 F.3d 118, 122 (2d Cir. 1998); Del Guzzi v. United States, 980 F.2d 1269 (9th Cir. 1992) (concerning an inmate who served a seven-year state sentence followed by a five-year federal sentence, even though the state court had ordered the sentences to run concurrently and the state prosecutor had argued for a longer state sentence because of the anticipated concurrency); Cozine v. Crabtree, 15 F. Supp. 2d 997, 1003 (D. Or. 1998)

Under both state and federal law, concurrent and consecutive sentencing resides generally within the purview of trial-level courts. Nevertheless, restrictions on the imposition of either concurrent or consecutive sentences are also delineated. Although each jurisdiction has an independent body of law, the practical implementation of sentences is often ultimately affected by the procedural decisions of the BOP. Inequitably, as a result of the BOP's deference to federal district courts, the conflicting intentions of a federal and a state court will frequently be resolved in favor of the federal court.

III. THE CIRCUIT SPLIT

Federal appellate courts disagree about whether a federal district court has the authority to order that a sentence be served consecutively to a future state sentence.[93] The Fifth, Eighth, Tenth, and Eleventh Circuits have held that district courts possess such authority.[94] In contrast, the Sixth and Ninth Circuits have held, and the Seventh Circuit has reasoned in dicta, that district courts may not usurp the state court's power to fashion a sentence according to the relevant state sentencing factors, which may include an undischarged federal sentence.[95] The primary point of divergence among the circuits involves incompatible interpretations of 18 U.S.C. § 3584(a). However, tension over the conflicting sovereign authority of the state and federal courts is woven

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(noting that, where a federal prison warden refused to recognize a state order of concurrent sentences, the warden "unilaterally transformed [the defendant's] concurrent state sentence into a consecutive sentence, and thereby extended the duration of his incarceration by three years"); Faulkner v. State, No. W1999-00223-CCA-R3-PC, 2000 WL 1671470 (Tenn. Crim. App. Oct. 17, 2000) (involving a defendant sentenced to twenty-five years of imprisonment in both state and federal court, whose concurrent state sentence was not effectuated because the BOP refused to take him into federal custody prior to the expiration of his state sentence). The BOP Program Statement suggests that a nonfederal institution ordinarily is designated when the federal court has primary custody of the defendant and the sentencing court intended that the federal and nonfederal sentences be served concurrently. *See* Program Statement 5160.04, *supra* note 88, at 5160.04(9); *see also* Barden v. Koehane, 921 F.2d 476, 483 (3d Cir. 1990).

93 *See infra* notes 117-18 and accompanying text. For a brief summary of the disagreement, see WOOD, *supra* note 53, at 239.

94 *See* United States v. Mayotte, 249 F.3d 797 (8th Cir. 2001); United States v. Williams, 46 F.3d 57 (10th Cir. 1995); United States v. Ballard, 6 F.3d 1502 (11th Cir. 1993); United States v. Brown, 920 F.2d 1212 (5th Cir. 1991). For a discussion of these cases, see *infra* Part III.B.1.

95 *See* Romandine v. United States, 206 F.3d 731 (7th Cir. 2000); United States v. Quintero, 157 F.3d 1038 (6th Cir. 1998); United States v. Clayton, 927 F.2d 491 (9th Cir. 1991). For a discussion of these cases, see *infra* Part III.B.2.

throughout the cases and is often openly asserted in support of each position.

Each case in the circuit split embodies a similar custody and sentencing sequence that is essential to understanding the inherent tension in this conflict.[96] Consistently, the state had primary jurisdiction over the defendant, but before the state sentence was imposed, the federal court obtained custody of the defendant by a writ of *habeas corpus ad prosequendum* for trial on the federal charges.[97] The status of the state proceedings at the time of federal custody varies–either the defendant had been charged with a state crime or the defendant had been found guilty, had confessed, or had pleaded guilty.[98] After either a guilty plea or a jury trial, the federal court sentenced the defendant and mandated that the federal sentence run *consecutively* to the yet-to-be-imposed state sentence. Once the defendant was returned to state custody, the state court sentenced the defendant to a term of imprisonment to run *concurrently* with the existing federal sentence.[99] Just as the principle of comity allows the federal court to borrow the defendant from the state, comity also requires that the state sentence be served first.[100] Procedurally, the BOP would then follow the district court order for consecutive sentences and only accept the state prisoner into federal custody for the federal sentence at the completion of the state sentence.[101]

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[96] These cases follow the custody sequence described in Part II of this note. *See supra* notes 80-87 and accompanying text.

[97] For a discussion of primary jurisdiction and its effect on custody and the service of a term of imprisonment, see *supra* notes 80-87 and accompanying text. For a discussion of a writ of *habeas corpus ad prosequendum*, see *supra* note 3.

[98] *See Mayotte*, 249 F.3d 797, 798 (pending state charges); *Quintero*, 157 F.3d at 1039 (pending state charges); *Williams*, 46 F.3d 57, 58 (pending state charges); *Ballard*, 6 F.3d 1502 (pending state charges); *Clayton*, 927 F.2d at 492-93 (pleaded guilty to state charges); *Brown*, 920 F.2d 1212, 1216 (pending state charges); Salley v. United States, 786 F.2d 546, 547 (2d Cir. 1986) (pending state charges); United States v. Eastman, 758 F.2d 1315, 1317 (9th Cir. 1985) (illustrating where defendant had been convicted of the state charges). For a discussion of *Romandine*, 206 F.3d at 737-38, see *infra* notes 161-69 and accompanying text.

[99] However, in *Eastman*, the defendant appealed the consecutive federal sentence under Federal Rule of Criminal Procedure 35 before he was sentenced by the state court. 758 F.2d at 1317.

[100] For a discussion of primary jurisdiction and its effects on sentencing, see *supra* Part II.C. "Unquestionably, the [State], having first acquired jurisdiction over appellee, was entitled to retain him in custody until he had finished his sentence .... That rule rests upon principles of comity, and it exists between state and federal courts." United States *ex rel.* Lombardo v. McDonnell, 153 F.2d 919, 920 (7th Cir. 1946) (citations omitted).

[101] Technically, this would be the outcome of each case. However, not all of the cases reached this stage. *See infra* notes 123, 124, 130, 133, 147, 154, 161 and accompanying text.

In Part A, two cases representative of the sentencing conflict prior to the enactment of § 3584 are considered. Part B presents the current circuit split that has arisen since the enactment of § 3584. Part B is further divided along the split according to the courts' positions in support of or against prospective district court sentencing.

A. The Split Prior to the Enactment § 3584(a)

Prior to the enactment of 18 U.S.C. § 3584(a), two primary decisions initiated the incompatible reasoning by the circuit courts.[102] These cases provide insight into the legal reasoning behind the conflict without the burden of the statutory interpretation introduced by § 3584. The courts in *Salley v. United States*[103] and *United States v. Eastman*[104] each focused on the sovereignty of the state and federal courts.[105] However, the Second Circuit, in *Salley*, held that the district court was authorized to impose its sentence to run consecutively to a yet-to-be-determined state sentence,

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For example, the defendant in *United States v. Quintero* appealed his consecutive federal sentence immediately after sentencing, before he was sentenced in state court. 157 F.3d at 1039. For a discussion of *Quintero*, see *infra* notes 153-59.

102 *See Salley*, 786 F.2d 546 (holding that the district court can sentence prospectively); *Eastman*, 758 F.2d 1315 (holding that the district court cannot sentence prospectively); *see also* Tinsley v. United States, No. 95-5564, 1997 WL 63156, at *3 (6th Cir. Feb. 12, 1997) (summarizing the opposing positions taken by the two cases).

103 786 F.2d 546. Shortly after his arrest and release for a federal crime, Salley was arrested on state charges and held by the State. *Id.* at 547. While in state custody, Salley appeared before the federal court on a number of occasions pursuant to a writ of *habeas corpus ad prosequendum* and was ultimately sentenced to four years and nine months of prison for the federal crime, to be served *consecutively* to the sentence in the pending state case. *Id.* Subsequently, Salley was sentenced by the state court to a term of one and a half to four and a half years to run *concurrently* with the undischarged federal sentence. *Id.* In an effort to render his federal sentence concurrent with the state sentence that he would serve first, Salley repeatedly, but unsuccessfully, attempted to transfer to a federal prison through administrative proceedings, in order to serve both sentences in the federal facility. *Id.* In order for the place of incarceration for the state sentence to satisfy the federal sentence, however, the Attorney General was required to designate the state prison as the place of incarceration for the federal sentence. *Id.* at 548. Finally, Salley moved the district court to order the BOP to begin the calculation of his federal sentence from the time of sentencing in federal court, rather than from the time of release from his state sentence, in order to get credit for the time served in state prison against the federal sentence. *Id.* at 547. Ultimately, the district court denied Salley's motion for the district court to order the BOP to calculate his sentence from the time of federal sentencing rather than from his release from state prison. *Id.*

104 758 F.2d 1315.

105 *Salley*, 786 F.2d at 547-58; *Eastman*, 758 F.2d at 1318.

whereas the Ninth Circuit, in *Eastman*, rejected the preemptive sentencing by the district court.[106]

In *Salley*, the Second Circuit noted that the right of a federal court to impose "a federal sentence that is not to commence until [an existing] state sentence has been completed" has been recognized for many years.[107] The court expanded this reasoning and announced that the same would be true for a yet-to-be-determined state sentence.[108] In acknowledging the tension between the state and federal sentences, the court justified the pronouncement by reasoning that "[t]here is no reason why the district court's sentence, which was prior in time, must give way

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106 *See Salley*, 786 F.2d at 547-58; *Eastman*, 758 F.2d at 1318.

107 *Salley*, 786 F.2d at 547 (citing United States v. Lee, 500 F.2d 586, 587 (8th Cir. 1974) (addressing a federal sentence imposed after a state sentence); Lavoie v. United States, 310 F.2d 117, 118 (1st Cir. 1962) (per curiam) (same); United States *ex rel.* Lombardo v. McDonnell, 153 F.2d 919, 920 (7th Cir. 1946); Hayden v. Warden, 124 F.2d 514 (9th Cir. 1941) (same)).

The concern raised in the cases cited in *Salley* must be distinguished from that of this Note. The current circuit split is concerned with the order of the sentences and the power the first court has to constrain the second court. In contrast, the cases cited in *Salley* were concerned with a federal sentence imposed *after* a state sentence had been imposed and the uncertainty of the date such federal sentences would commence; in many cases, the state sentences were indeterminate. *See, e.g., Hayden*, 124 F.2d at 514-15. Most of the cited cases refer to the Supreme Court's decision in *United States v. Daugherty*, which held that "[s]entences in criminal cases should reveal with fair certainty the intent of the court and exclude any serious misapprehensions by those who must execute them. The elimination of every possible doubt cannot be demanded." 269 U.S. 360, 363 (1926); *see, e.g., McDonnell*, 153 F.2d at 922.

108 *Salley*, 786 F.2d at 547. In *Salley*, the court cited *Anderson v. United States*, 405 F.2d 492 (10th Cir. 1969) (per curiam), which held that the federal sentence, to be served consecutively to a yet-to-be determined state sentence, was only uncertain in time, not in occurrence, and *Farley v. Nelson*, 469 F. Supp. 796, 801 (D. Conn. 1979), *aff'd*, 607 F.2d 995 (2d Cir. 1979), which held that a consecutive federal sentence, imposed upon a defendant in state custody who subsequently receives additional state sentences, does not begin until the person is in federal custody. *Id.* However, the court in *Anderson* did not explain why it supported the sentencing scheme, and the approval was made in dicta. *See id.* at 549 (concurrence). In *Farley*, the sentencing court did impose a federal sentence to be served consecutively to future state sentences, but the reviewing court did not endorse such a scheme. *See id.* The court in *Salley* also cited *Casias v. United States*, 421 F.2d 1233 (10th Cir. 1970) (per curiam), for the proposition that whether the state sentence had not yet been imposed was immaterial. *Id. Casias* does not stand for this proposition. Casias was first convicted of a federal offense and received a sentence of fourteen years. *See Casias*, 421 F.2d 1233. While his appeal was pending, he was free on bond and was taken into state custody on state charges. *Id.* Once sentenced in state court, he began serving his state sentence, which was to be served consecutively to any then-existing sentences (i.e., the federal sentence). *Id.* The state court, the second sentencing court, clearly imposed the consecutive sentences. *Id.*

to that of the State court."[109] Interestingly, in 1998, the Second Circuit took a giant step back from this holding by reasoning that § 3584 applied to multiple sentences imposed at different times only when the defendant was already subject to an undischarged term of imprisonment.[110]

In contrast, the Ninth Circuit held that the district court wrongly had preempted the state from giving force to its own laws.[111] In *Eastman*, the district court imposed Eastman's five-year federal sentence to run consecutively to any sentence that the defendant might receive from the State of California.[112] At the time, Eastman had been convicted of a state offense but had not yet been sentenced.[113] California law expressly authorized the state court to impose a sentence to run concurrently with or consecutively to a federal sentence, with a presumption of concurrent sentences in the absence of specification.[114] The Ninth Circuit reasoned that the federal sentence was prejudicial to Eastman's right to have the state court consider the possibility of a concurrent sentence and deprived him of the benefits of the liberal California law.[115]

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109 *Salley*, 786 F.2d at 548.

110 *See* McCarthy v. Doe, 146 F.3d 118, 121 (2d Cir. 1998). In *McCarthy*, the court noted that *Salley* was decided prior to the enactment of 18 U.S.C. § 3584 and proceeded to reason that the law had changed with the enactment of 18 U.S.C. § 3584(a). *Id.*

111 *Eastman*, 758 F.2d at 1318. At the time of appeal, Eastman still had not been sentenced by the state court. *Id.* at 1316. To challenge the imposition of the consecutive sentence, Eastman filed a motion to reduce his sentence under Federal Rule of Criminal Procedure 35. *Id.*

112 *Id.* at 1317. Eastman pleaded guilty to one count of violating 18 U.S.C. § 2314, the transportation of stolen monies known to be taken by fraud, and to two counts of violating 15 U.S.C. § 77q, fraudulent interstate transactions. *Id.* at 1316. Eastman was sentenced to five years imprisonment for the violation of § 77q. *Id.* On the other counts, the court suspended the imposition of sentences and gave Eastman five-year probationary terms for each count. *Id.* The terms of probation would be served concurrently to begin at the termination of the five-year term of imprisonment for the § 77q conviction. *Id.*

113 *Id.* at 1317.

114 *Id.* at 1318 (citing section 669 of the California Penal Code).

115 *Id.* ("Eastman would be deprived of the benefit of the liberal California law in that he would lose his chance to have the state sentence run concurrently with his federal sentence."). The court also reasoned that the district court's sentence had created potential uncertainty and ambiguity in the calculation of Eastman's sentence, and Eastman had a right to an unambiguous sentence. *Id.*

B. The Current Split Under § 3584(a)[116]

With the enactment of § 3584, appellate courts found a new ground on which to affirm or deny federal district courts' prospective sentencing authority. The Fifth, Eighth, Tenth, and Eleventh Circuits interpreted § 3584(a) to authorize a court to impose a sentence to run consecutively to a future sentence.[117] In contrast, the Sixth, Ninth, and Seventh Circuits reasoned that a court is authorized to impose consecutive or concurrent sentences only as to existing sentences or sentences imposed at the same time.[118]

1. The Fifth, Eighth, Tenth, and Eleventh Circuits: Granting the District Court Authority to Impose a Consecutive Sentence Prospectively

The appellate courts have articulated four reasons for granting a district court authority to impose a federal sentence to run consecutively to a future state sentence. First, the federal district court has broad sentencing discretion under § 3584(a).[119] Second, the text of § 3584(a) does not explicitly prohibit prospective sentencing.[120] Third, § 3584(a) generally establishes a preference for consecutive sentencing.[121] And finally, federal courts should not be bound by state courts.[122]

Both the Fifth Circuit in *United States v. Brown*[123] and the Eighth Circuit in *United States v. Mayotte*[124] based their holdings, in part, on the

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116 For a discussion of 18 U.S.C. § 3584(a), see *supra* Part II.A.1.

117 *See* United States v. Mayotte, 249 F.3d 797 (8th Cir. 2001); United States v. Williams, 46 F.3d 57 (10th Cir. 1995); United States v. Ballard, 6 F.3d 1502 (11th Cir. 1993); United States v. Brown, 920 F.2d 1212 (5th Cir. 1991). For a discussion of these cases, see *infra* notes 119-42 and accompanying text.

118 *See* Romandine v. United States, 206 F.3d 731 (7th Cir. 2000); United States v. Quintero, 157 F.3d 1038 (6th Cir. 1998); United States v. Clayton, 927 F.2d 491 (9th Cir. 1991). For a discussion of these cases, see *infra* notes 143-68 and accompanying text.

119 *See infra* notes 123-27 and accompanying text.

120 *See infra* notes 128-31 and accompanying text.

121 *See infra* notes 132-37 and accompanying text.

122 *See infra* notes 138-42 and accompanying text.

123 920 F.2d 1212 (5th Cir. 1991). The defendant was convicted of robbing the First National Bank of Commerce in New Orleans in violation of 18 U.S.C. § 2113(a). *Id.* at 1213-14. "The district court sentenced Brown to 240 months of imprisonment, three years of supervised release, and a $50 special assessment." *Id.* at 1214. The court made it clear that it did not intend for the federal sentence to run concurrently with any future state sentence arising out of the same conduct. *Id.* at 1216. The judge specifically ordered, "Now, because state charges are still pending against the defendant, I want the record to be clear that it is not my intention that this Court's sentence should or shall run concurrently with any state

broad sentencing discretion of the federal district court under § 3584(a) and § 3553(a).[125] The Fifth Circuit recognized that prospective sentencing authority is not expressly granted by the Federal Sentencing Guidelines.[126] Nevertheless, the court determined that the broad

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court sentence which might be imposed on the charges pending against him in state court." *Id.*

[124] 249 F.3d 797 (8th Cir. 2001). In *Mayotte*, the defendant committed two robberies while on supervised release from a prior federal conviction. *Id.* at 798. For a bank robbery, Mayotte was charged with a federal offense, whereas a pizza store robbery was a state offense. *Id.* The federal district court sentenced Mayotte to forty months of imprisonment and three years of supervised release. *Id.* In addition, Mayotte's supervised release for the prior conviction was revoked and replaced with a six-month term of imprisonment to be served *consecutively* to both the forty-month sentence and any sentence he may receive in any pending state cases. *Id.* The state court then sentenced Mayotte to five years imprisonment for the pizza store robbery to be served *concurrently* with *both* federal sentences. *Id.*

[125] *Id.* at 799 (citing United States v. Ballard, 6 F.3d 1502, 1509-10 (11th Cir. 1993); Salley v. United Sates, 786 F.2d 546, 548 (2d Cir. 1986)); *Brown*, 920 F.2d at 1216-17 (citing United States v. Adeniyi, 912 F.2d 615, 618 (2d Cir. 1990); United States v. Burns, 894 F.2d 334, 337 (9th Cir. 1990)).

In *Mayotte*, on a question of first impression, the Eighth Circuit chose to follow the majority of circuits and agreed that the federal district court possesses the authority to impose its sentence to run consecutively to a yet-to-be-determined state sentence. 249 F.3d at 799. "The district court has broad discretion to determine whether a sentence should be consecutive or concurrent ... within the constraints of the relevant statute, 18 U.S.C. Section 3584." *Id.*

In addition, the Fifth Circuit determined that the district court had properly applied the factors in 18 U.S.C. § 3553(a) when it imposed the sentence. *Brown*, 920 F.2d at 1217. It was within the district court's discretion to determine that Brown was a dangerous recidivist who merited the maximum penalty, which the district court extrapolated into consecutive sentences. *Id.* However, the two cases cited in *Brown* in support of this proposition, *Adeniyi* and *Burns*, do not address the same sentencing progression presented in *Brown*. In *Adeniyi*, the state sentence had already been imposed and served, and in *Burns*, the state sentence was in existence but unexpired. *Id.* However, both cases do stand for the proposition that a federal sentence may be imposed to run consecutively to an existing state sentence when both sentences punish conduct arising out of the same occurrence. *Id.*

[126] *Brown*, 920 F.2d at 1216. The Fifth Circuit recently reaffirmed this position in *United States v. Hernandez*. 234 F.3d 252 (5th Cir. 2000) (holding that the district court is not required to notify the defendant that his federal sentence would run consecutively to an anticipated state sentence). *Brown* differs from the other cases in the circuit split because the state and federal sentences arose out of the same conduct. *See Brown*, 920 F.2d at 1213. In the other seven cases, the state and federal charges are unrelated. Regardless, *Brown* is cited consistently by the other courts as part of the case law authorizing prospective consecutive sentencing. *See Mayotte*, 249 F.3d at 799; Romandine v. United States, 206 F.3d 731, 738 (7th Cir. 2000); United States v. Quintero, 157 F.3d 1038, 1040 (6th Cir. 1998); United States v. Williams, 46 F.3d 57, 58-59 (10th Cir. 1995); *Ballard*, 6 F.3d at 1508 n.9.

statutory discretion to impose concurrent or consecutive sentences extended to "anticipated, but not yet imposed," state sentences.[127]

In addition, the Eighth and Tenth Circuits reasoned that § 3584(a) does not overtly prohibit prospective sentencing.[128] In *Mayotte*, the Eighth Circuit based this reasoning on the ambiguous language of § 3584(a).[129] Similarly, in *United States v. Williams*,[130] the Tenth Circuit found no language in the statute that prohibited the district court from imposing its sentence to run consecutively to a future state sentence.[131]

Three courts reasoned that § 3584(a) expresses a preference for consecutive sentences.[132] In *United States v. Ballard*,[133] the Eleventh

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127 *Brown*, 920 F.2d at 1217. Because the state and federal charges arose out of the same criminal conduct, the court also relied on the principle that a defendant may be prosecuted by both the state and federal governments if the defendant violated the laws of each. *Id.* at 1216.

128 *See Mayotte*, 249 F.3d at 799; *Williams*, 46 F.3d at 58-59.

129 *Mayotte*, 249 F.3d at 799.

130 46 F.3d 57. While state charges were pending against Williams, the district court sentenced Williams to seventy-eight months in prison to "be served consecutively to any sentence of imprisonment imposed [in state court]." *Id.* at 58. Subsequently, the state court imposed a sentence of five years to be served concurrently with the federal sentence. *Id.* When Williams was returned to state custody to begin serving the state sentence, the State returned him to federal custody the following day, explaining that Williams had satisfied his state sentence. *Id.* It is likely that the state court knew that the BOP would not designate the state prison as the place of federal confinement in light of the consecutive sentence given by the district court. By releasing Williams to the federal system one day after taking custody of him, the court effectively rendered the sentences concurrent.

131 *Id.* at 59. In response to Williams' final argument, the court held that Williams' sentencing scheme did not violate the principle in *Anderson v. United States* that criminal sentences must be definite and certain. *Id.* (citing Anderson v. United States, 405 F.2d 492, 493 (10th Cir. 1969) (per curiam)). For a discussion of *Anderson*, see *supra* note 108.

132 *See Mayotte*, 249 F.3d at 799; *Williams*, 46 F.3d at 59; United States v. Ballard, 6 F.3d 1502, 1508 n.9 (11th Cir. 1993).

133 6 F.3d 1502. The facts of *Ballard* are unique in that the defendant manipulated the system to gain the advantage of concurrent sentences. While awaiting state trial in a county jail, Ballard wrote a threatening letter to the United States President in an attempt to transfer his place of incarceration to a federal prison. *Id.* Ballard allegedly feared that prisoners with whom he had fought in the county jail would kill him if they were incarcerated together in Alabama state prison. *Id.* at 1503. Ballard, believing that the state court would run its sentence concurrent to the federal sentence, pleaded guilty to the federal charges so that his federal sentence would be in place at the time of his state sentencing. *Id.* If the state court, as the second sentencing body, wished to run the sentences concurrently, it could designate the place of state incarceration as the federal prison and Ballard would serve part, if not all, of his state sentence in federal prison. *Id.* at 1504. As a result of this manipulation, the federal district court was confronted with the strange situation that the normal sentence of federal incarceration would not serve as punishment or a deterrent, but as a reward, because Ballard committed the crime in hopes

Circuit concluded that, under section 5G1.3(a) and § 3584(a), a preference for consecutive sentences attaches when sentences are imposed at different times.[134] In *Williams*, the Tenth Circuit refused to accept Williams' argument that the federal district court could only impose consecutive sentences when a defendant is "already subject to" a state sentence based on the wording of § 3584(a).[135] Rather, the court considered the "plain meaning" of the section as a whole and concluded that, if terms of imprisonment are given at different times, a presumption of consecutive sentences attaches, unless the federal district court expressly orders that the terms be concurrent.[136] In *Mayotte*, the Eighth Circuit even reasoned that the statute "encourages consecutive sentences when prison terms are imposed at different times."[137]

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of receiving the standard sentence. *Id.* To thwart Ballard's scheme, the district court imposed the federal sentence of twenty-one months to be served consecutively to the future state sentence. *Id.* The court believed that the state court would be prevented from imposing a concurrent sentence. *Id.* Ballard appealed, arguing that his sentence violated the doctrine of dual sovereignty. *Id.* at 1504-05. The Eleventh Circuit held that the district court was authorized to render a federal sentence consecutive to a future sentence in a state case but was careful to emphasize that it did so on the unique facts of the case. *Id.* at 1503.

134 *Id.* at 1505-06. Section 5G1.3(a) of the Federal Sentencing Guidelines Manual provides in part that a "sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment." FEDERAL SENTENCING GUIDELINES MANUAL § 5G1.3(a) (2001). Under 18 U.S.C. § 3584(a), "[m]ultiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently." 18 U.S.C. § 3584(a) (2000). For a full discussion of these provisions, see *supra* Part II.A.1, 2. The court in *Ballard* justified its decision by noting that consecutive sentences are legal, *see United States v. Buide-Gomez*, 744 F.2d 781, 784 (11th Cir. 1984), and that a federal court has the power to impose a federal sentence consecutive to a state sentence, *see United States v. Adair*, 826 F.2d 1040, 1041 (11th Cir. 1987) (reasoning that a defendant who has violated the laws of both sovereigns may not complain about the order of his sentences). *Ballard*, 6 F.3d at 1506.

135 *Williams*, 46 F.3d at 58. To make his argument, Williams relied on the language of § 3584(a), which provides that "if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run consecutively." *Id.* (citation omitted).

136 *Id.* at 58-59. For this proposition, the court cited *United States v. Rising*, 867 F.2d 1255, 1260 (10th Cir. 1989). *Id.* at 59. The court then recognized the split in the circuits and agreed with the "majority" of circuits that had addressed the question at the time, citing *Ballard*, 6 F.3d at 1510, *United States v. Brown*, 920 F.2d 1212, 1217 (5th Cir. 1991), and *Salley v. United States*, 786 F.2d 546, 547 (2d Cir. 1986). *Id.* The implication of this reasoning is that the district court could impose not only a consecutive sentence to a yet-to-be-determined state sentence, but a concurrent sentence as well.

137 *Mayotte*, 249 F.3d at 799. The court cited the FEDERAL SENTENCING GUIDELINES MANUAL section 7B1.3, policy statement, comment 4, which provides that a "supervised-release revocation sentence should be consecutive to a sentence imposed for an offense committed while on supervised release." *Id.* In addition, the court was careful to recognize

Finally, the courts in *Williams*, *Ballard*, and *Mayotte* reasoned that the state court could not attempt to defy the federal district court's expressed intent by imposing the state sentence to be served concurrently with the federal sentence.[138] The Eleventh Circuit countered Ballard's dual sovereignty argument by reasoning that, under principles of dual sovereignty, the federal court's sentence should not be "negated" by a future state sentence.[139] The court relied on two federal cases which correctly invalidated a state sentence imposed to be served concurrently with a *future* federal sentence.[140] The court reasoned that a future state sentence should be no more binding than a prior state sentence.[141] In *Mayotte*, the Eighth Circuit held that when state and federal sentences conflict, the federal sentence controls.[142]

2. The Sixth, Seventh, and Ninth Circuits: Denying the District Court Authority to Impose a Prospective Consecutive Sentence

Both the Sixth and Ninth Circuits held that a federal district court lacks the authority to mandate that a federal sentence be served

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that a court must consider the factors in 18 U.S.C. § 3553(a), as required by § 3584(b), when exercising its discretion. *See id.* It should be noted that although the court claimed to consider the plain meaning of the section as a whole, it appeared to focus solely on the plain meaning of the final sentence of § 3584 standing alone.

138 *See Mayotte*, 249 F.3d at 799; *Williams*, 46 F.3d at 58-59; *Ballard*, 6 F.3d at 1507-10.

139 *See Ballard*, 6 F.3d at 1507-10. The court extended this reasoning to argue that if a state court were allowed to impose its sentence concurrently to a federal sentence, the federal sentence would, in effect, be "negated." *Id.* at 1509. "[A] concurrent sentence by the state court would encroach on the federal court's sentencing authority." *Id.*

140 *Id.* at 1507-09 (citing Hawley v. United States, 898 F.2d 1513 (11th Cir. 1990) (per curiam); United States v. Adair, 826 F.2d 1040 (11th Cir. 1987)). Interestingly, the court is allowing federal courts to bind future state courts while simultaneously disallowing the same binding of future federal courts.

141 *Id.* at 1507-08 ("[C]learly the district court need not concern itself about a state sentence not yet imposed, from a dual sovereignty perspective."). The court cited *Adair* and reasoned that it is the proper precedent "to conclude that a defendant cannot complain on appeal about the order of imposition of sentences by the dual sovereigns when he has broken federal and state law." *Id.* at 1508. However, *Adair* concerned a defendant who was charged under state and federal law for the same crime. *See Adair*, 826 F.2d 1040. Interestingly, the court in *Ballard* recognized that the federal court in *Adair* refused to allow the state court to constrict the federal sentence by the state court imposing a concurrent sentence to a yet-to-be-imposed federal sentence. *See Ballard*, 6 F.3d at 1509. Although the vast majority of the court's reasoning addressed the authority of the district court and dual sovereignty, the final portion of the opinion addressed Ballard's manipulation of the court. *See id.* at 1510. The court suggested that Ballard was responsible for restricting the sentencing of the state court, not the district court. *Id.*

142 249 F.3d at 799.

consecutively to a yet-to-be-imposed state sentence.[143] Further, both courts relied on statutory construction and the legislative history of § 3584(a), as well as principles of dual sovereignty, in their reasoning.[144] The Seventh Circuit, in dicta, also concluded that § 3584(a) does not authorize a federal district court to "declare" that a federal sentence run consecutively to a yet-to-be-imposed state sentence.[145] However, the court went further to discuss the practical reality of federal-state sentencing and reasoned that, as a default, sentences would be served consecutively absent action by the state sentencing court or the Attorney General.[146]

The Ninth Circuit, in *United States v. Clayton*,[147] relied heavily on statutory construction and the legislative history of § 3584 in its reasoning.[148] The court highlighted the first sentence of § 3584, which provides that, "if a term of imprisonment is imposed on a defendant who is *already subject to an undischarged term of imprisonment*, the terms may run concurrently or consecutively."[149] Within the legislative history, the court found that the "undischarged term of imprisonment" equated to a state term the defendant was actually *serving* at the time of the federal sentence and, therefore, rejected the possibility that "already subject to" could be interpreted to include guilty, yet-to-be-sentenced defendants.[150] Finally, the court's prior decision in *Eastman* remained

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143 *See* United States v. Quintero, 157 F.3d 1038, 1039 (6th Cir. 1998); United States v. Clayton, 927 F.2d 491, 492-93 (9th Cir. 1991).

144 *See Quintero*, 157 F.3d at 1040; *Clayton*, 927 F.2d at 492-93.

145 Romandine v. United States, 206 F.3d 731, 737-38 (7th Cir. 2000).

146 *See infra* notes 161-69 and accompanying text.

147 927 F.2d 491. Clayton first pleaded guilty to charges in state court. *Id.* at 492. In federal court, he then pleaded guilty to unrelated federal charges, for which he was sentenced to twenty-four months of imprisonment to run consecutively to any state sentence. *Id.* Once returned to state custody, Clayton received a seventeen-month state prison term to be served concurrently with the previously imposed federal sentence. *Id.* Nevertheless, the federal court's mandate for consecutive sentences was fulfilled when the United States Marshall released its detainer and Clayton began his sentence in state prison. *Id.* As a result, Clayton's twenty-four month federal sentence commenced at the termination of the state sentence, for a cumulative sentence of forty-one months. *See id.*

148 *Id.* at 492-93.

149 *Id.* at 492. The court conceded that the phrase "already subject to" could be interpreted to include guilty, yet-to-be-sentenced defendants but then turned to the legislative history to reject such an interpretation. *Id.* For further discussion of the legislative history of § 3584(a) in relation to statutory interpretation, see *infra* Part IV.A.

150 *Id.* at 492 (citing 1984 U.S.C.C.A.N. 3182, 3309-10) (citing language such as "a term of imprisonment imposed on a person *already serving* a prison term," "imposed *while the defendant is serving* another one," and "a person sentenced for a Federal offense who is *already serving* a term of imprisonment for a State offense"). In addition, the court

persuasive because the decision had challenged the encroachment by federal sentences on the rights of the state and of the defendant.[151] Adopting *Eastman*'s approach, the court in *Clayton* articulated its disapproval in terms of dual sovereignty and reasoned that the sentencing discretion of neither sovereign should be restricted by the other.[152]

In *United States v. Quintero*,[153] the Sixth Circuit took a two-step approach. The court began its analysis by establishing its standard of review.[154] An appellate court reviews a federal district court's choice of a concurrent or consecutive sentence for an abuse of discretion when the federal district court is empowered to make such a choice.[155] Finding that the federal district court did not possess this power, the court identified the issue as a question of statutory interpretation, subject to de novo review.[156] The court held that a federal district court is not authorized under § 3584(a) to run a sentence consecutively to a future state sentence.[157] Second, the court read the final sentence of § 3584(a)–"Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run

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referenced the concurrence in *Salley v. United States*, 786 F.2d 546, 550 (2d Cir. 1986), which also found § 3584 not to authorize such sentencing by the federal court. *Id.*

151 *Id.* at 493 (citing United States v. Eastman, 758 F.2d 1315 (9th Cir. 1985)). Regarding a defendant's rights, the court relied on the finding in *Eastman* that the defendant was denied the opportunity to have the state consider a concurrent sentence and the right to an unambiguous sentence. *See id.* For a discussion of *Eastman*, see *supra* notes 111-15 and accompanying text.

152 *Clayton*, 927 F.2d at 493.

153 157 F.3d 1038 (6th Cir. 1998). In *Quintero*, the defendant's federal sentence was imposed consecutively to a yet-to-be-determined state sentence. *Id.* at 1039.

154 *Id.* Initially sentenced to forty-two months of imprisonment and five years of supervised release in federal court, Quintero violated his supervised release and received a new federal sentence of eighteen months to be served consecutively to any sentence arising from pending state charges. *Id.* The unrelated state charges were brought against Quintero during the period of supervised release, but before he received the second federal sentence. *Id.*

155 *Id.* (citing United States v. Devaney, 992 F.2d 75, 76-77 (6th Cir. 1993)).

156 *Id.*

157 *Id.* ("[Section 3584(a)] does not authorize district courts to order a sentence to be served consecutively to a not-yet-imposed state sentence."). Interestingly, in one unpublished opinion, the Sixth Circuit held that a district court *may* order its sentence to be served consecutively to a future state sentence. *See* United States v. Holmes, No. 92-00098, 1993 WL 337545 (6th Cir. Aug. 31, 1993). Yet, in two other unpublished opinions, the court held that the district court may not order its sentence to be served *concurrently* with a future state sentence. *See* United States v. Means, 1997 WL 584259, at *2 (6th Cir. Sept. 19, 1997) (order); United States v. Abro, 1997 WL 345736, at *1 (6th Cir. June 20, 1997) (order).

concurrently"-as clarification of the first sentence-"if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively."[158] The court determined that the final sentence is a default rule that applies when the defendant is subject to an undischarged term of imprisonment and the federal district court fails to designate whether the sentence is consecutive to or concurrent with the undischarged sentence.[159] Like the Ninth Circuit in *Clayton*, the court looked to the legislative history of the statute and found that the final sentence was a rule of construction.[160]

Finally, the Seventh Circuit, in *Romandine v. United States*,[161] agreed in dicta that no federal statute, including § 3584(a), empowers a federal

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158 *Quintero*, 157 F.3d at 1040. For the full text of the section, see *supra* note 45 and accompanying text.

159 *Id.* at 1040. The court disagreed with the interpretation in *United States v. Williams*, 46 F.3d 57, 58-59 (10th Cir. 1995), which read the final sentence for its plain meaning and not in relation to the rest of the statute. *Id.* The Sixth Circuit also noted that the Second Circuit recently rejected the *Williams* interpretation as well. *Id.* (citing McCarthy v. Doe, 146 F.3d 188, 121-22 (2d Cir. 1998)).

160 *Id.* at 1041 (internal quotation marks omitted) (citing S. REP. NO. 98-225, at 127 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3310).

161 206 F.3d 731 (7th Cir. 2000). Romandine was first sentenced to ten months of prison in the federal court, to be served consecutively to any future state sentence, and was then sentenced to a fifteen-year state prison term on unrelated charges. *Id.* at 733. Then a complicated series of district court proceedings followed, including two adjustments to the federal sentence. *Id.* at 733-34. After the state sentence was imposed, the federal district court judge reduced Romandine's March 1995 sentence. *Id.* at 733. In December 1998, a different district court judge vacated the adjusted sentence of March 1995 and reinstated the original sentence. *Id.* at 734. The Seventh Circuit determined that both the reduced and reinstated sentences were unlawful. *Id.* at 737. Although the appellate court could not correct the reduced sentence of March 1995 because only an appeal by the aggrieved party for relief under § 2255 would have permitted correction of the sentence, the court did vacate the reinstated sentence of December 1998 on this appeal. *Id.* After lengthy analysis, the appellate court determined that Romandine's enforceable federal sentence was the first adjusted sentence, which had been announced *after* the state sentence was determined. *Id.* Consequently, Romandine's claim that the district court erred in declaring his federal sentence consecutive to the future state sentence was no longer feasible; the adjusted federal sentence was imposed *after* the state sentence and could be run consecutively to the state sentence. *Id.* Romandine also conceded that a federal sentence may be imposed to run consecutively to a state sentence already in existence. *Id.*

It appears that this holding gives the district court a way to revisit a sentence it would like to have run consecutively to a state sentence simply by later adjusting the federal sentence after state sentencing. However, strict federal law governs the time period in which a federal court may change a federal sentence. *See, e.g.*, FED. R. CRIM. P. 35(c) ("The court, acting within 7 days after the imposition of sentence, may correct a sentence that was imposed as a result of arithmetical, technical, or other clear error."). Even the appellate

district court to impose a sentence consecutively to a future state sentence.[162] Section 3584(a) permits the sequencing of sentences only when sentences are imposed simultaneously or when the defendant is "already subject" to an undischarged term of imprisonment.[163] However, the Seventh Circuit went a step further and created a hybrid analysis of § 3584(a).

The court claimed that the sentencing conflict between federal and state courts is "illusory" based on the final sentence of § 3584(a).[164] Unlike the Sixth and Ninth Circuits, the court reasoned that the final sentence of § 3584(a) covers "unprovided-for cases" by establishing presumptively consecutive sentences even as to future sentences.[165] The court recognized that the statute rendered the sentences consecutive by force of law.[166] Therefore, a federal sentence automatically would be consecutive to a future state sentence, unless the *next* court or the Attorney General rendered the sentences concurrent in practical effect.[167] The only way for the second sentence, the state sentence, to be served concurrently with the federal sentence is either (1) for the state court to credit the state sentence to account for the undischarged federal sentence or (2) for the Attorney General to designate the state prison as the place

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court here noted that the adjusted sentence was unlawful, but the appellate court was powerless at this point to override it. *Romandine*, 206 F.3d at 737. Nevertheless, the court analyzed § 3584(a) in order to demonstrate that Romandine's position would be no different had the original federal sentence remained in effect. *Id.* at 737.

162 *Romandine*, 206 F.3d at 737.

163 *Id.* at 738.

164 *Id.*

165 *Id.* at 737-38. The final sentence of § 3584(a) provides that "[m]ultiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently." 18 U.S.C. § 3584(a) (2000). The court read the third sentence independent of the first two sentences to determine that the third sentence applies to future sentences. *Romandine*, 206 F.3d at 738. For the text of the first two sentences, see *supra* note 45 and accompanying text. The Seventh Circuit expressed its disagreement with *McCarthy v. Doe*, in which the Second Circuit read the third sentence as limited by the first sentence. *Id.* at 738 (citing McCarthy v. Doe, 146 F.3d 118, 121-22 (2d Cir. 1998)). The Seventh Circuit reasoned that the *McCarthy* interpretation rendered the third sentence surplusage. *Id.* Therefore, the best interpretation was that the third sentence covered unprovided-for cases. *Id.* This is the opposite interpretation taken by the Sixth Circuit in *United States v. Quintero*, 157 F.3d 1038, 1040 (6th Cir. 1998). *See supra* notes 153-60 and accompanying text.

166 *Romandine*, 206 F.3d at 738.

167 *Id.* ("Still, even this disagreement is irrelevant, for the state judge and the Attorney General, exercising power under § 3585(a), have the effective last word.").

of federal confinement.[168] Finally, the court warned that the Attorney General, when deciding whether to grant an inmate request for designation of the state prison, should not assume that views of the federal district court forbid concurrent sentences.[169]

On one hand, four federal courts of appeals have granted a federal district court the authority to impose a consecutive federal sentence on a defendant who has not yet been sentenced by a state court based on the broad sentencing discretion and authority of federal district courts. On the other hand, three federal courts of appeals have recognized the sovereignty of a state sentencing court with primary jurisdiction and have refused to authorize this prospective sentencing. These incompatible approaches to federal sentencing have caused uncertainty in the implementation of state sentences.

IV. A CASE FOR SOVEREIGNTY IN SENTENCING

Although four of seven circuit courts endorse authorizing a federal district court to impose a sentence to run consecutively to a future state sentence, there is no legitimate basis to sustain this abridgment of state sentencing authority. First, a statutory interpretation of § 3584(a), comprised of intrinsic scrutiny of the language, as well as extrinsic analysis of legislative history, similar statutory provisions, and case holdings, demonstrates that the statute does not sanction prospective sentencing.[170] Second, fundamental principles of dual sovereignty and comity mandate that each jurisdiction exercise equally its right to

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168 *Id.* For a discussion of the BOP's power to designate the state prison as the place of confinement for the federal sentence, see *supra* note 88. Romandine's federal sentence will begin at the expiration of his state sentence. *Id.* at 739. Because the state judge did not discount the state sentence for the federal sentence, Romandine's only hope for a shorter total sentence would be for the Attorney General to designate the state prison as the place of federal confinement. *Id.* Nevertheless, the court noted that the Attorney General could ensure consecutive sentences by lodging a detainer with state officials rather than designating the state as the place of confinement for the federal term of imprisonment. *Id.* at 738.

169 *Id.*

170 *See infra* Part IV.A. Intrinsic aids in statutory interpretation are "those which derive meaning from the internal structure of the text and conventional or dictionary meanings of the terms used in it." 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 45:14, at 109 (6th ed. 2000). Extrinsic aids "consist of information which comprises the background of the text, such as legislative history and related statutes." 2A *id.* Normally, the intrinsic meaning of the statute is more authoritative than searching for intent in legislative history. 2A *id.* at 109-10. However, in the present discussion, both analyses lead to the same interpretation: the statute does not authorize prospective sentencing.

sentence a defendant according to its laws.[171] This right comprises the authority to order, as a second sentencing court, that a sentence be served concurrently with a sentence the defendant is already serving in the other jurisdiction. Finally, even if state authority to impose a sentence to run concurrently with an existing federal sentence were fully recognized, procedural discretion allows the BOP effectively to determine if the sentences will be served concurrently.[172]

A. *Deconstructing the Circuits' Statutory Interpretation of § 3584(a)*

Most of the appellate courts have grounded their positions to some extent in the interpretation of § 3584(a).[173] The circuits that advocate a federal district court's authority read the statute broadly to suggest that the statute encourages consecutive sentences when sentences are imposed at different times, regardless of sentencing sequence.[174] Those circuits rejecting such federal authority understand the statutory language, in combination with the legislative history of § 3584, to permit consecutive sentences only when the defendant is already subject to an undischarged term of imprisonment.[175] Technically, § 3584(a) and its legislative history are silent as to whether the term "multiple sentences" encompasses a yet-to-be-determined sentence in an unrelated case.[176] A

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171 *See infra* Part IV.B.

172 *See infra* Part IV.C. Although other suggestions have been made for resolving some of the conflicts in sentencing and custody raised in this Note through executive waiver, direct judicial review, or defense attorney strategy, this Note seeks a systematic resolution that eliminates elements of discretion. *See generally* Diacosavvas, *supra* note 78.

173 *See* United States v. Mayotte, 249 F.3d 797, 799 (8th Cir. 2001); *Romandine*, 206 F.3d at 737; United States v. Quintero, 157 F.3d 1038, 1040 (6th Cir. 1998); United States v. Williams, 46 F.3d 57, 58-59 (10th Cir. 1995); United States v. Ballard, 6 F.3d 1502, 1505-06 (11th Cir. 1993); United States v. Clayton, 927 F.2d 491, 492 (9th Cir. 1991); United States v. Brown, 920 F.2d 1212, 1216-17 (5th Cir. 1991). For the full text of 18 U.S.C. § 3584(a), see *supra* note 45 and accompanying text.

174 *See Mayotte*, 249 F.3d at 798; *Williams*, 46 F.3d at 58-59; *Ballard*, 6 F.3d at 1505-06; *Brown*, 920 F.2d at 1216; *see also* Diacosavvas, *supra* note 78, at 234-35 (suggesting that district courts should be authorized to impose a federal sentence to run concurrently to a future state sentence in order to allow the BOP to run the sentences concurrently).

175 *See Romandine*, 206 F.3d at 737; *Quintero*, 157 F.3d at 1040; *Clayton*, 927 F.2d at 492.

176 *See* S. REP. NO. 98-225, at 126-28 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3309-11; *see also Clayton*, 927 F.2d at 492; Salley v. United States, 786 F.2d 546, 550 (2d Cir. 1986) (Newman, J., concurring) (concluding that a federal judge is not authorized to render a sentence consecutive to a future state sentence based on the language of § 3584(a), which only permits consecutive sentences when imposed simultaneously or when the defendant is already subject to an undischarged term). In *Clayton*, the court considered the possibility that the language "already subject to" in § 3584(a) incorporates defendants who have been found guilty in state court but have not yet been sentenced. 927 F.2d at 492. This

careful review of the statute and its legislative history will demonstrate a lack of any such intent to affect future sentences.

1. The Language of § 3584(a)

Intrinsically, the plain language of the statute clearly limits the imposition of consecutive sentences as to those already in existence at the time of sentencing.[177] The first sentence of § 3584(a) provides two situations in which a district court has authority to give consecutive or concurrent sentences: (1) when "multiple terms of imprisonment are imposed on a defendant at the *same time*" or (2) when the defendant "is *already subject to an undischarged term of imprisonment.*"[178] The final two

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interpretation was rejected once the court reviewed the legislative history and determined that "already subject to" referred to a preexisting sentence. *Id.* (citing S. REP. NO. 98-225, at 126-27 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3309-10.)

[177] *See infra* text accompanying notes 178-79; *see also* McCarthy v. Doe, 146 F.3d 118, 121 (2d Cir. 1998) (holding that the BOP has the discretion to designate a state correctional facility as the place of confinement for a federal sentence when a federal sentencing court does not indicate whether a federal sentence should be served concurrently with or consecutively to a not-yet-imposed state sentence). In *McCarthy*, the state had primary custody of the defendant. *McCarthy*, 146 F.3d at 119. Exercising authority over the defendant pursuant to a writ of *habeas corpus ad prosequendum*, the federal court sentenced the defendant to 235 months of prison on two counts of possession of a firearm but did not indicate whether the sentence should run consecutively to or concurrently with any sentence resulting from the state proceedings. *Id.* Three months later, the state court sentenced the defendant to a seven-year term of imprisonment to be served concurrently with the federal sentence. *Id.* at 119-20. The narrow issued addressed by the Second Circuit was whether the BOP could designate a state penitentiary as the place of confinement for the defendant's federal sentence, in order to render the federal sentence concurrent with a state sentence, when the district court had been silent on the issue. *Id.* at 119. As part of its analysis, the Second Circuit interpreted § 3584(a) to allow a district court to order that a federal sentence be served consecutively or concurrently only to a state sentence in existence at the time of federal sentencing. *Id.* at 122. The court considered the plain language of the statute, a common sense interpretation, and the legislative history to arrive at this holding. *Id.* Nevertheless, the court was careful to indicate that the facts did not propose the question of whether or not a sentencing court is authorized to designate a federal sentence to run consecutively to a yet-to-be-determined state sentence. *Id.* at 121. The court recognized the determination of this question in *Salley v. United States* prior to 1987, when it held that sentencing courts did possess such authority, but that the circuit had not readdressed the issue under the statutory authority of § 3584. *Id.* Because the district court had been silent on the issue, the BOP had the authority to consider the defendant's request to run the federal sentence concurrently with the state sentence through designation of the state prison as the place of federal confinement. *Id.* at 121-22.

[178] 18 U.S.C. § 3584(a) (2000) (emphasis added). The first sentence of § 3584(a) provides that "[i]f multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively. . . ." *Id.*

sentences of the section then establish a presumption for each of these situations.[179]

When a court fails to articulate a consecutive or a concurrent sentence in either scenario, the BOP or other courts can look to the presumptions in § 3584(a). The first presumption, in the second sentence of § 3584(a), provides for *concurrent* sentences when "multiple terms of imprisonment are imposed on a defendant at the same time."[180] This presumption applies to the first situation in the first sentence of § 3584(a).[181] The second presumption, in the third sentence of § 3584(a), provides for *consecutive* sentences when "[m]ultiple terms of imprisonment [are] imposed at different times."[182] This presumption addresses the second situation in the first sentence of § 3584(a).[183] Granted, the third sentence does not use the identical language "already subject to an undischarged term of imprisonment" employed in the first sentence. However, the parallel structure of the second and third sentences with the first sentence suggests that the third sentence applies to a federal court sentencing a defendant already subject to a term of imprisonment.[184] Logically, a defendant already subject to a term of imprisonment at the time of federal sentencing is one for whom multiple terms of imprisonment are imposed at different times.

In addition, common sense indicates that a sentencing court can only impose a sentence consecutively to a sentence already in existence; it is illogical that a silent court could be inferred to have intended to run a

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179 *See infra* notes 180, 182; *see also McCarthy*, 146 F.3d at 121.

180 18 U.S.C. § 3584(a). The second sentence of § 3584(a) provides that "[m]ultiple terms of imprisonment *imposed at the same time* run concurrently unless the court orders or the statute mandates that the terms are to run consecutively." *Id.* (emphasis added).

181 *See supra* text accompanying note 178.

182 18 U.S.C. § 3584(a). The third sentence provides that "[m]ultiple terms of imprisonment *imposed at different times* run consecutively unless the court orders that the terms are to run concurrently." *Id.* (emphasis added).

183 *See supra* text accompanying note 178.

184 See *supra* text accompanying note 45 for the text of the statute; *see also* Cozine v. Crabtree, 15 F. Supp. 2d 997, 1006 (D. Or. 1998) (reasoning that § 3584(a) is only implicated when multiple terms of imprisonment are imposed at the same time or when a defendant is already subject to an undischarged term of imprisonment because, otherwise, there is nothing for the federal sentence to be consecutive to or concurrent with) (citing United States v. Clayton, 927 F.2d 491, 492-93 (9th Cir. 1991); United States v. Eastman, 758 F.2d 1315, 1318 (9th Cir. 1984)). "[The] federal court does not acquire discretion to impose a concurrent sentence until the defendant has [already] been sentenced by another court." United States v. Neely, 38 F.3d 458, 461 (9th Cir. 2001).

sentence consecutively to a nonexistent sentence.[185] A sentencing court should be aware of preexisting sentences but cannot be certain of a future sentence from a different court.[186] The federal sentencing court may be alerted to the existence of pending state proceedings, as in some of the cases in the circuit split; however, the federal court cannot predict the outcome of the state proceedings and, therefore, has no ground on which to incorporate the possible state sentence in its own sentencing.[187] For the same reason, the language "unless the court orders that the terms are to run concurrently" in the third sentence of § 3584(a) would be

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[185] In *McCarthy v. Doe*, the court reasoned that a court's silence as to concurrent or consecutive sentences in relation to a future sentence should not be interpreted as an intent to impose consecutive sentences:

> [T]here is no basis to infer any intention as to consecutive or concurrent service from the sentencing judge's silence, which could equally well indicate either that the judge did not know another sentence would be imposed, or did not know what the future sentence would be. The judge's failure to specify concurrence in these circumstances is not reasonably interpreted as indicating an intention that the sentences be consecutive.

146 F.3d 118, 122 (2d Cir. 1998). In *Cozine v. Crabtree*, the court also rejected an interpretation of § 3584(a) that presumed an intent of consecutive sentences by the federal court when the state sentence was later imposed; at the time the federal sentence was imposed, the state sentence did not exist, so there can be no presumptive intent of the sentencing court. 15 F. Supp. 2d at 1006. The court said that, in this context, "§ 3584(a) is inapposite." *Id.* In *Barden v. Koehane*, the court concluded that "the sentencing court not only was unable to order concurrency because it sentenced [the defendant] before the state did but was actually powerless to do so." 921 F.2d 476, 483-84 (3d Cir. 1991). Finally, the court in *Luther v. Vanyur* reasoned that the plain language of § 3584(a) does not mandate that, when a federal judge is silent at sentencing as to concurrency because no other sentence exists, and later a state sentence is imposed, the sentences should run consecutively. 14 F. Supp. 2d 773, 776 (E.D.N.C. 1997).

[186] *McCarthy*, 146 F.3d at 122.

> The federal sentencing court would be expected to know about a sentence previously imposed .... On the other hand, where the sentence in question is imposed prior to another sentence, the sentencing judge by definition cannot know what sentence will be imposed. (Indeed, the judge may not even know that criminal charges will be brought, or that they will result in conviction.)

Id. See also United States v. Ratcliff, No. CR. A. 98-300, 2001 WL 910402, at *1 (E.D. La. Aug. 2, 2001) (noting that the federal sentencing court "did not address the issue of concurrent sentences because the defendant had not yet been sentenced for the state offense").

[187] *See Cozine*, 15 F. Supp. 2d at 1007 (citing *McCarthy*, 146 F.3d at 122).

> Indeed, without knowing the duration of the future [state] sentence, or the charges on which it would be based, or any of the other circumstances of that case, it would have been presumptuous for the federal judge to have made an anticipatory ruling on that question without knowledge of the relevant facts.

Id.

surplusage unless the federal court were the second sentencing court.[188] Indeed, a number of courts have read the statute to be retrospective, not prospective.[189]

Finally, the circuit courts holding that § 3584(a) supports the power to sentence prospectively either did not analyze the statutory language or failed to adequately interpret the language.[190] In *Brown*, which supports prospective sentencing, the Fifth Circuit recognized the broad discretion of the sentencing court to impose concurrent or consecutive sentences, cited § 3584(a), and, without legal analysis or explanation, inferred prospective sentencing power.[191] The courts in *Mayotte*, *Williams*, and *Ballard* reasoned that § 3584(a) encouraged consecutive sentencing, or established a "preference" for consecutive sentences when sentences were given at different times, because of the presumption in the third sentence of § 3584(a).[192] However, a reading of § 3584(a) in its entirety does not suggest a preference for one kind of sentencing or the other; rather, Congress has provided a presumption for the practical implementation of a sentence by the BOP when a federal district court is

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188 *Luther*, 14 F. Supp. 2d at 776 ("A federal court would have no reason to order a federal sentence to run concurrently or consecutively unless the imposition of the federal sentence is subsequent to the imposition of the state sentence."). For the text of the third sentence of § 3584(a), see *supra* note 182.

189 *See* United States v. Chea, 231 F.3d 531, 535 (9th Cir. 2000) ("Pursuant to 18 U.S.C. § 3584(a), in the absence of an order to the contrary, a federal sentence is to run consecutively to a prior state sentence."); Romandine v. United States, 206 F.3d 731, 737-38 (7th Cir. 2000) ("A judge cannot make his sentence concurrent to nonexistent sentences that some other tribunal may or may not impose."); United States v. Means, No. 97-5316, 1997 WL 584259, at *2 (6th Cir. Sept. 19, 1997) ("The law is clear that a federal district court does not have the power to impose a federal sentence to run concurrently with a state sentence that has not yet been imposed.") (citations omitted); United States v. Abro, No. 96-1202, 1997 WL 345736, at *1 (6th Cir. June 20, 1997) ("A district court does not have the authority to impose a federal sentence to run concurrently to a state sentence that had not yet been imposed."); Barden v. Keohane, 921 F.2d 476, 484 (3d Cir. 1990) (reasoning that the federal court was "unable to order concurrency because it sentenced [the defendant] before the state did"); United States v. McBride, No. CIV. A. 92-671-10, 2000 WL 1386029, at *2 (E.D. Pa. Sep. 13, 2000) ("A district court has no authority to make a sentence either concurrent or consecutive to a state sentence that has not been imposed.").

190 For a discussion of the holdings of these circuits, see *supra* Part III.B.1. In addition, some of the courts arrived at their holdings through reasoning based on case law that did not directly support the stated conclusions. *See supra* notes 103, 125, 134, 141.

191 *See supra* notes 125-27 and accompanying text.

192 *See supra* notes 132-37 and accompanying text.

silent. The first sentence of the statute makes clear that a federal district court may impose *either* concurrent *or* consecutive sentences.[193]

In addition, the courts in *Williams* and *Mayotte* reasoned that the "plain language" of § 3584 does not prohibit prospective sentencing.[194] However, a reading of the statute "as a whole" elucidates the parallel structure of the statute, which authorizes a court to impose either consecutive or concurrent sentences and establishes presumptions in anticipation of a court's silence in two different situations.[195] Although the courts are correct that prospective sentencing is not expressly prohibited, the weight of the evidence demonstrates that prospective sentencing is not authorized. Each of the courts' analyses of the statute was rather brief, and, unlike the courts that rejected prospective sentencing authority, none of the courts looked to extrinsic evidence in support of their interpretations.[196]

2. The Legislative History of § 3584(a)

The legislative history of § 3584(a) reinforces the interpretation that Congress did not incorporate prospective sentencing in the statute.[197] The drafters of § 3584(a) envisioned a second term of imprisonment being imposed on a defendant already subject to a sentence from a prior conviction. The legislative history states that multiple terms of imprisonment may "be imposed to be served either concurrently or consecutively, whether they are imposed at the same time or one term of imprisonment is imposed *while the defendant is serving another one.*" [198] The Senate Report also references "a person sentenced for a Federal offense who is *already serving* a term of imprisonment for a State

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193 *See supra* text accompanying note 45.

194 *See supra* notes 128-31 and accompanying text. The "plain meaning rule" states that "the meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms." 2A SINGER, *supra* note 170, at 113 (citing Caminetti v. United States, 242 U.S. 470 (1917)).

195 *See supra* text accompanying notes 179-84.

196 *See supra* Part III.B.2.

197 *See* S. REP. NO. 98-225, at 125-28 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182. "It is established practice in American legal processes to consider relevant information concerning the historical background of enactment in making decisions about how a statute is to be construed and applied." 2A SINGER, *supra* note 170, at 422.

198 S. REP. NO. 98-225, at 126 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3308-11 (emphasis added); *see also* McCarthy v. Doe, 146 F.3d 118, 122 (2d Cir. 1998) (citing United States v. Clayton, 927 F.2d 491, 492 (9th Cir. 1991)); *Clayton*, 927 F.2d at 492.

offense."[199] At no point does the Report discuss granting prospective sentencing power.

Regarding the structure of the statute, "[Section 3584(a) was] intended to be used as a rule of construction [where] the court is silent as to whether sentences are consecutive or concurrent, in order to avoid litigation on the subject."[200] As a rule of construction, § 3584 provides presumptions when the court fails to indicate its intention. Read together with the previously cited language, the presumptions also apply to existing or simultaneous sentences. Finally, during the hearings, the Senate acknowledged the new powers that would be granted to the sentencing courts with the enactment of § 3584.[201] Perceptibly, the discussion did not recognize prospective sentencing power.[202] Throughout the entire legislative history, any discussion of the ability of a court to impose a sentence to run concurrently with or consecutively to a future sentence is noticeably absent.[203]

3. Other Extrinsic Evidence

Related state and federal laws provide additional support for disavowing prospective sentencing power. As statutes *in pari materia*, § 3584(a) can be interpreted in light of section 5G1.3 of the Federal Sentencing Guidelines.[204] Like § 3584(a), section 5G1.3, entitled

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199 S. REP. NO. 98-225, at 127 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3308-11 (emphasis added).

200 *Id.* The report went on to provide, "However, the [Senate Judiciary] Committee hopes that the courts will attempt to avoid the need for such a rule by specifying whether a sentence is to be served concurrently or consecutively." *Id.*

201 *Id.* at 3310. "[I]t is doubtful that the framers of § 3584 contemplated that the statute would be used where there is a subsequent state sentence." Luther v. Vanyur, 14 F. Supp. 2d 773, 776 (E.D.N.C. 1997). Prior to its enactment, § 3584 had the practical effect of automatically rendering federal sentences consecutive to existing state sentences, leaving the district court no discretion to impose a sentence concurrently with a state sentence. *See supra* notes 38-41 and accompanying text. The Senate noted that the effects of § 3568 no longer existed and that the discretion to impose a sentence to run concurrently with or consecutively to an existing state sentence resided with the district courts. S. REP. NO. 98-225, at 127 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3310.

202 "Committee Reports present the most persuasive indicia of congressional intent in enacting a statute .... [A]bsent contrary legislative history, a clear statement in the principal committee report is powerful evidence of legislative purpose and may be given effect even if it is imperfectly expressed in statutory language." 2A SINGER, *supra* note 170, at 440-41.

203 S. REP. NO. 98-225, at 127 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182.

204 "Other statutes dealing with the same subject as the one being construed–commonly referred to as statutes *in pari materia*–comprise another form of extrinsic aid useful in

"Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment," is applicable only when the defendant is already subject to an undischarged term of imprisonment.[205] Section 5G1.3 is designed to provide guidance for a court considering sentencing options under § 3584(a), and among the three subsections of section 5G1.3 and the accompanying comments, no contingencies are omitted. If Congress had intended for § 3584(a) to authorize a court to impose its sentence on an anticipated *future* sentence, it is likely that Congress would have enacted a corresponding guideline.

BOP Policy Statement 5160.04 also provides interesting insight into the court's sentencing power under § 3584(a).[206] Section nine of the Statement encompasses the concurrent service of state and federal sentences and specifically covers the circumstances allowing for designation of the state institution as the place of confinement for the federal sentence.[207] To determine if the federal court intended for the federal sentence to be served concurrently with the state sentence, the section offers five enumerated ways in which the intent of the federal sentencing court is made known.[208] Only subsection (a) discusses a sentencing court's order, and all of the examples of possible sentencing orders contemplate that the state sentence exists at the time of the federal

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deciding questions of interpretation." *See* 2B SINGER, *supra* note 170, at 170. For a discussion of section 5G1.3 of the Federal Sentencing Guidelines, see *supra* notes 52-65 and accompanying text.

[205] *See supra* note 53 and accompanying text; *see also* United States v. Rosario, 134 F. Supp. 2d 661, 667 (E.D. Pa. 2001); United States v. Hawkins, 1996 WL 617430, at *3 (E.D. Pa. Oct. 22, 1996) (holding that a defendant wishing to invoke section 5G1.3 must be subject to an undischarged term of imprisonment, which means that the defendant must actually be incarcerated at the time of sentencing). In *Rosario*, the defendant was sentenced for a crime committed while on supervised release. *Rosario*, 134 F. Supp. 2d at 662. Rosario requested that the court recommend to the BOP that his federal sentence be served concurrently with a future sentence to be imposed for the violation of supervised release. *Id.* at 666. He attempted to invoke Application Note 6 of section 5G1.3, which provides, in part, that when a defendant has committed the instant offense while on supervised release and has had his supervised release revoked, the sentence for the instant offense should run consecutively to the sentence for the violation of supervised release. *Id.* The court denied the request, holding that Application Note 6 is only applicable when the defendant is "already subject to an undischarged term of imprisonment," and, in this case, Rosario had not yet been sentenced for the violation of supervised release. *Id.* at 667.

[206] *See supra* note 88.

[207] *See supra* note 89 and accompanying text.

[208] Program Statement 5160.04, *supra* note 88, at 5160.04(9)(a)-(e). The five ways in which a court's intent may be made known are a sentencing court order, a sentencing court recommendation of nonfederal confinement, concurrent service of sentences after imposition, an inmate request, and a state request. *Id.*

sentencing.[209] Subsection (c) does provide for a court order for concurrent service after a federal sentence is imposed; however, this may occur when the state has primary jurisdiction and the federal court *mistakenly* believed that the inmate was in federal custody at the time of federal sentencing.[210] Notably, subsection (c) does not suggest that the state sentence was imposed after the federal sentence.[211] In light of the law on concurrent and consecutive sentencing, the treatment by the Sentencing Guidelines, and the approach by state courts, it is illogical to read the final sentence of § 3584 as referencing future sentences.

B. *Comity and Dual Sovereignty*

Relying on the principles of comity and dual sovereignty, this Part first will argue that each sovereign, state and federal, must be permitted to impose its sentence independently and must be required to display the courtesy of judicial comity.[212] Second, this Part will demonstrate that existing state and federal case law suggests that a first sentencing court may not bind a subsequent court, and, therefore, the second court, whether federal or state, should maintain the authority to determine how its sentence should relate to any existing sentences.[213] Finally, this Part will examine the ways in which federal courts have sustained their sentencing sovereignty while denying the same to the states and will argue that state courts should be afforded comparable respect.[214]

Within both state and federal jurisdictions, sentencing power emanates from the jurisdiction's constitution, statutes, rules, and common law.[215] However, when state and federal courts simultaneously

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[209] *Id.* The Statement provides that the sentencing court may indicate its intent with language such as:

> 'Said sentence to run concurrently with the State sentence the defendant *is presently serving*.'
> 'Sentence to run concurrently with sentence *imposed* under Docket 168-88, San Diego County Court, on May 14, 1988.'
> 'Sentence is hereby ordered to run concurrently with *any other sentence presently being served*.'
> 'Sentenced under *5G1.3(b)* [(discussing *undischarged* terms of imprisonment)].'

Id. at 5160.04(9)(a) (emphasis added).

[210] *Id.* at 5160.04(9)(c).

[211] *Id.*

[212] *See infra* text accompanying notes 215-33.

[213] *See infra* text accompanying notes 234-37.

[214] *See infra* text accompanying notes 238-39.

[215] For examples relating to concurrent and consecutive sentencing, see *supra* Part II.A, B.

assert jurisdiction over a defendant, the broader principle of judicial comity provides a backdrop to the jurisdictional laws. Judicial comity is defined as "[t]he respect a court of one state or jurisdiction shows to another state or jurisdiction in giving effect to the other's laws and judicial decisions."[216] More generally, comity suggests courtesy and mutual recognition.[217] Each court is an independent sovereign, and under the doctrine of dual sovereignty, courts must respect not only the sentencing authority of other courts but also their sentences. [218] When two courts simultaneously assert grievances against a single defendant, each court must have an opportunity to sentence the defendant under the appropriate laws, while refraining from unnecessarily restricting the power of the other jurisdiction.[219] In addition, a defendant has a right to be sentenced under the law of each jurisdiction in which he is tried, which includes beneficial provisions such as concurrent sentences.[220]

Inevitably, the sentence of one court will affect the decisions of the other simply by interjecting the options of concurrent and consecutive sentencing. Yet, comity between the state and federal courts "is a principle of right and of law, and therefore, of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system . . . and although they coexist in the same space, they

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216 BLACK'S LAW DICTIONARY 262 (7th ed. 1999).

217 *Id.* at 261. Comity is defined as "courtesy among political entities (as nations, states, or courts of different jurisdictions), involving [especially] mutual recognition of legislative, executive, and judicial acts." *Id.*

218 United States v. Ballard, 6 F.3d 1502, 1509 (11th Cir. 1993) ("The tenet for dual sovereignty purposes is that each sovereign must respect not only the sentencing authority of the other, but also the sentence.").

219 *See supra* text accompanying note 1; *see also* Mikus v. Haro, No. 98-16724, 1999 WL 1206618, at *1 (9th Cir. Dec. 13, 1999) (reasoning that "in cases where dual sovereignty exists, neither sovereign should attempt to bind the sentencing discretion of the other"); Oses v. United States, 833 F. Supp. 49, 54 (D. Mass. 1993). "It is elementary that the United States and the several states constitute separate sovereignties, and that each sovereign is free to exercise its own prerogatives, within the limits set by the federal Constitution, to convict and punish criminals in accordance with its own sense of discretion, justice, and utility." *Oses*, 833 F.Supp. at 54 (referencing Heath v. Alabama, 474 U.S. 82 (1985); Abbate v. United States, 359 U.S. 187 (1959)). "Just as the dual sovereignty doctrine acknowledges and protects the rights of each sovereign to exact as much punishment for a crime as that sovereign desires, the doctrine also acknowledges and protects the rights of each sovereign to exact as little punishment for the crime as that sovereign desires." *See* Cozine v. Crabtree, 15 F. Supp. 2d 997, 1010 (D. Or. 1998).

220 "One accused of crime has a right to a full and fair trial according to the law of the government whose sovereignty he is alleged to have offended." Ponzi v. Fessenden, 258 U.S. 254, 260 (1922).

are independent, and have no common superior."[221] Federal courts often express the perception that federal courts should control the sentencing process, as demonstrated by the cases in the circuit split.[222] However, comity requires "a proper respect for state functions."[223] Under federal law, a federal court may believe that consecutive sentences are the appropriate punishment for certain defendants faced with state and federal criminal charges. However, when the federal sentence is imposed first, the federal court must recognize that the prerogative to impose concurrent or consecutive sentences lies with the second court, the state court. At the time of federal sentencing, the state sentence does not yet exist. Necessarily, the federal sentence will be in place for the state sentencing, and the state should not be precluded from exercising an option of concurrent sentences available under state law.[224]

Federal courts have expressed the sentiment that the federal sentence "disappears" or is "negated" when a state sentence is served concurrently with the federal sentence.[225] This is a fallacy. A federal court has no authority over a sentence given in a state court nor over the manner in which a state court effectuates state law. At the time a federal court sentences a defendant, it intends for the defendant to serve a specified number of months in prison. A concurrent state sentence in no way reduces the length of the original sentence imposed by the federal court.

In addition, the courts that promote prospective sentencing authority abuse the principle of comity to garner all the benefits of the doctrine. A federal court with secondary jurisdiction benefits from comity in that a state court will release a defendant to federal custody under a writ of *habeas corpus ad prosequendum*.[226] As a result, the federal court is permitted to be the first sentencing court. By also asserting that it can control the concurrent or consecutive service of its sentence and a future

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221 *Id.* at 261.

222 *See supra* Part III.

223 Younger v. Harris, 401 U.S. 37, 44 (1971).

224 Allowing a federal court to impose its sentence to run consecutively to a yet-to-be-imposed state sentence would "violate basic principles of comity." Luther v. Vanyur, 14 F. Supp. 2d 773, 777 (E.D.N.C. 1997).

225 *See* United States v. Ballard, 6 F.3d 1502, 1509 (11th Cir. 1993). The court in *Ballard* reasoned that if a state court were allowed to impose its sentence to be served concurrently with a federal sentence, the federal sentence would, in effect, be "negated." *Id.* "*[A] concurrent sentence by the state court would encroach on the federal court's sentencing authority. . . .*" *Id.*

226 *See supra* note 3.

state sentence, a federal court violates comity by usurping the power of the state court as the second sentencing authority and the court with primary jurisdiction.[227]

Therefore, the second sentencing court, whether state or federal, should have the discretion to select consecutive or concurrent sentences.[228] Otherwise, the first court preempts the second from exercising its "function and power to impose a sentence which is based upon all that has gone before."[229] Courts at all levels have recognized the reasonableness of the principle.[230] From a practical perspective, a sentencing court cannot be certain of the length of a future sentence or assured that another sentence will be imposed by a different court, unless the other sentence already exists.[231] "The length of a primary sentence is always relevant to a reasoned decision concerning both the length of a consecutive sentence and the choice of imposing it

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227 *See Younger*, 401 U.S. at 44. The principles of federalism and comity

> represent . . . a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Id.

228 Cozine v. Crabtree, 15 F. Supp. 2d 997, 1012 (D. Or. 1998); People v. Chaklader, 29 Cal. Rptr. 2d 344, 346-47 (Cal. Ct. App. 1994) (citing section 669 of the California Penal Code and reasoning that "[e]ven under California law, the choice between concurrent and consecutive sentences lies in the court which pronounces judgment second"); State v. Arnold, 824 S.W.2d 176 (Tenn. Crim. App. 1991). "Allowing the second sentencing court to determine whether a sentence is to run concurrently with, or consecutively to, the prior sentence(s), is consistent with this goal of avoiding conflicts between coordinate courts and sovereigns." *Cozine*, 15 F. Supp. 2d at 1012.

229 *Arnold*, 824 S.W.2d at 178. Discussing the option of a federal court imposing a sentence to run consecutively to a future state sentence, the court in *Cozine* reasoned that "[s]uch an anticipatory ruling by the federal court also would have interfered with [the state's] right 'to apply its own laws on sentencing for violation of state criminal laws.'" *Cozine*, 15 F. Supp. 2d at 1007 (citing United States v. Clayton, 927 F.2d 491, 493 (9th Cir. 1991)) (quoting United States v. Eastman, 758 F.2d 1315, 1318 (9th Cir. 1984)).

230 *See, e.g.*, Clark v. State, 468 S.E.2d 653, 655 (S.C. 1996) (citing United States v. Neely, 38 F.3d 458 (9th Cir. 1994), for the proposition that a "federal court is powerless to impose a concurrent sentence until the defendant has been sentenced by another court"); Thompson v. State, 565 S.W.2d 889 (Tenn. Crim. App. 1977) (holding that a consecutive sentence may only be imposed in relation to a previously imposed sentence and that a sentence may not be made consecutive to a sentence that may later be imposed in another county).

231 *See* Luther v. Vanyur, 14 F. Supp. 2d 773, 776 (E.D.N.C. 1997) ("[w]hether two sentences imposed at different times by different judges should run consecutively or concurrently must necessarily be decided by the second sentencing judge because at the first sentencing the issue doesn't arise.").

consecutively."[232] The length of a consecutive sentence is not reasoned when the court cannot know how long the other sentence will be. The concurring judge in *Salley*, disagreeing that the federal district court could impose its sentence to run consecutively to a future state sentence, reasoned that consecutive sentences should only be used "after awareness of a sentence already imposed so that the punitive effect of the consecutive sentence is carefully considered at the time of its imposition."[233]

Based upon the principal of dual sovereignty, state and federal case law recognize that a state court cannot prospectively bind a federal court by imposing a sentence to be served concurrently with an anticipated federal sentence, whether imposed pursuant to a plea bargain or under applicable state law.[234] Comity is a "two-way street" such that the federal court should not be permitted to bind the states either.[235] "It would be extraordinarily provincial for the United States to assert that federal courts may impose sentences that run concurrently with preexisting state sentences but not the other way around."[236] The impact

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232 Salley v. United States, 786 F.2d 546, 548 (2d Cir. 1986) (concurring opinion). The concurrence in *Salley* reasoned that the first judge absconds sentencing authority to the second judge who effectively extends the expiration date of the first judge's sentence. *Id.*

233 *Id.*

234 *See, e.g.*, Mikus v. Haro, No. 98-16724, 1999 WL 1206618, at *1 (9th Cir. Dec. 13, 1999) (holding that the state court could not order that its sentence run concurrently with a future federal sentence); United States v. Ballard, 6 F.3d 1502, 1508 (11th Cir. 1993) ("[A] defendant may not, by agreement with state authorities, compel the federal government to impose a sentence that is concurrent with an existing state sentence.") (internal quotation marks and citations omitted); United States v. Smith, 972 F.2d 243, 244 (8th Cir. 1992) (refusing to grant the defendant credit for time served under a state sentence and reasoning that "when federal and state sentences conflict, the district court's sentence does not have to give way to the earlier state court sentence"); Hawley v. United States, 898 F.2d 1513, 1514 (11th Cir. 1990) ("Because of the division of power between the federal government and the states under the dual sovereignty principle of our form of government, a defendant may not, by agreement with state authorities, compel the federal government to impose a sentence that is concurrent with an existing state sentence."); United States v. Sackinger, 704 F.2d 29, 32 (2d Cir. 1983) (holding that under dual sovereignty, the defendant cannot compel the federal government to grant a concurrent sentence under a plea agreement with a state court); Meagher v. Dugger, 737 F. Supp. 641, 646-49 (S.D. Fla. 1990) (holding that the state court could not bind the federal court with a state plea agreement for concurrent sentences); People v. Chaklader, 29 Cal. Rptr. 2d 344, 346-47 (Cal. Ct. App. 1994) (reasoning that under dual sovereignty, the California court did not have authority to "control the United States District Court's sentencing discretion"); Bell v. State, 759 So. 2d 1111, 1117 (Miss. 1999) (dissenting opinion) ("[T]he United States is not bound by a plea bargain in any state proceedings.").

235 Cozine v. Crabtree, 15 F. Supp. 2d 997, 1012 (D. Or. 1998).

236 *Id.*

of a prospectively consecutive sentence given by a federal court is just as intrusive on a state court as the state imposition of a prospectively concurrent sentence on a federal court.[237] In both cases, whether concurrent or consecutive, the first sentencing court is imposing on the sentencing authority of the second court, and comity permits neither.

Finally, some courts have employed dual sovereignty to justify a federal court's refusal to acknowledge a concurrent state sentence.[238] This analysis is appropriate when the federal court orders a sentence to run consecutively to an existing state sentence that had been made to run concurrently with a future federal sentence. However, this reasoning is inappropriate when employed to hold that a subsequent state sentence cannot be binding on a prior federal sentence.[239] At the present time, a state court, as a second sentencing court, is not afforded the same powers by federal courts that a federal court rightly holds as a second sentencing court. Ultimately, the goal is for each sovereign to impose its sentence in light of the relevant sentencing factors established by the law of the jurisdiction and to have the sentence fulfilled.

C. *The Practical Impediments to Concurrent State Sentencing*

Even if federal courts cease prospective consecutive sentencing, states may remain frustrated by their inability to effectuate concurrent sentences. When a state has primary custody of a defendant, even as a second sentencing court, the defendant will begin serving the state sentence first. As discussed in Part II.C, the BOP can render a federal sentence concurrent with a state sentence by designating the state institution as the place of confinement for the federal sentence. In addition, the BOP can accept a state prisoner into federal custody for concurrent service of sentences. However, both options are discretionary under the relevant BOP Program Statements.[240]

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237 *See supra* note 234.

238 *See, e.g.*, Jake v. Herschberger, 173 F.3d 1059, 1065-66 (7th Cir. 1999); Bloomgren v. Belaski, 948 F.2d 688, 690-91 (10th Cir. 1991); Meagher v. Clark, 943 F.2d 1277, 1282 (11th Cir. 1991); Goode v. McCune, 543 F.2d 751, 753 (10th Cir. 1976); United States v. Miller, 49 F. Supp. 2d 489, 494-95 (E.D. Va. 1999).

239 *See supra* Part III.B.1.

240 *See supra* text accompanying note 90; *see also* Barden v. Koehane, 921 F.2d 476, 478 n.4 (3d Cir. 1990) (referencing Article VI, clause 2 of the United States Constitution). Barden, already charged with state crimes, was sentenced to twenty years in prison on federal charges under a writ of *habeas corpus ad prosequendum*. *Id.* at 477-78. The federal judge did not designate whether the sentence should be consecutive to or concurrent with the

Therefore, even if a state orders that its sentence will run concurrently with an existing federal sentence, the BOP can thwart the court's intent. To begin with, the BOP can allow the prisoner to remain in state custody for the duration of the state sentence. In addition, once the defendant is in federal custody, the BOP can deny a *nunc pro tunc*[241] request for the federal sentence to be credited for the time served in state prison.[242] As a result, state prisoners who may have tendered guilty pleas under a state plea agreement, providing for the state sentence to run concurrently with an existing federal sentence, are forced to serve the sentences consecutively.[243]

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anticipated state sentence. *Id.* at 477. After federal sentencing, the state judge imposed a sentence of eleven to thirty years of imprisonment to be served *concurrently* with the federal term. *Id.* at 478. Before arriving in federal custody to begin serving the federal sentence, Barden served more than ten years of the state sentence. *Id.* at 477. However, the BOP refused to consider his request for credit for the state sentence against the federal sentence by the federal authorities. *Id.* The court agreed with Barden that the BOP had an obligation to consider Barden's *nunc pro tunc* request for designation of the state penitentiary as the place of federal confinement for the time served in the state prison. *Id.* at 478. However, the BOP was not required to grant the request, but only to consider the request, and then exercise its discretion as to whether to make the designation. *Id.*

For other cases discussing the discretion of the federal authorities to accept state prisoners into federal custody, see *Finch v. Vaughn*, 67 F.3d 909, 915 (11th Cir. 1995) (reasoning that the state could not impose a sentence on a defendant concurrent with an existing federal sentence because a state plea bargain is not binding on the federal authorities); *United States v. Miller*, 49 F. Supp. 2d 489, 494 (E.D. Va. 1999) (noting the "well-established principle that a state court cannot unilaterally impose a concurrent sentence between a federal and a state court"); *Cozine*, 15 F. Supp. 2d at 1003 (characterizing the actions of the federal prison warden, who refused to credit time spent under a California sentence as a "refusal to honor the concurrent sentence that California imposed on Cozine"); *Commonwealth v. Mendoza*, 730 A.2d 503, 504 n.2 (Pa. 1999) (reasoning that a state trial court lacks authority to impose its sentence to run concurrently with an existing federal sentence because only the BOP can designate the federal institution as the place of state confinement); *Faulkner v. State*, No. W1999-00223-CCA-R3-PC, 2000 WL 1671470, at *3 (Tenn. Crim. App. Oct. 17, 2000) ("'There is also absolutely no indication of record that the United States played any part in fashioning [the appellant's] Tennessee plea bargain or sentence. Absent this, federal prison officials are under no obligation to take state prisoners into custody until released from the state sentence.'") (citing United States v. Derrick Eugene Means, No. 97-5316, 1997 WL 584259 (6th Cir. Sept. 19, 1997) (order)).

241 A *nunc pro tunc* designation allows the BOP to give credit for time served in state prison that should have been given at an earlier date. *See* BLACK'S LAW DICTIONARY 1097 (7th ed. 1999) (defining *nunc pro tunc* as "having retroactive legal effect through a court's inherent power").

242 *See supra* note 240.

243 People v. Chaklader, 29 Cal. Rptr. 2d 344, 346-47 (Cal. Ct. App. 1994) (citing Del Guzzi v. United States, 980 F.2d 1269, 1272-73 (9th Cir. 1992) ("Those [federal] officials remain free to turn those concurrent sentences into consecutive sentences by refusing to accept the state

As discussed in Part II.B, many states have enacted statutes granting a trial court the authority to impose a sentence to run concurrently with an existing federal sentence.[244] States like California have gone one step farther.[245] In California, a defendant subject to a state sentence to be served concurrently with an existing federal sentence has the right to be transferred to the BOP to have the federal prison designated as the place of confinement for the California sentence.[246] If a defendant is transferred to a federal prison, the defendant satisfies the federal requirement under § 3585(a) that the defendant be in federal custody to begin the federal sentence.[247] The goal is for the state to do everything within its power to ensure that the defendant receives the benefit of the concurrent sentence.[248]

The burden rests on the state to transfer the defendant to federal custody for concurrent service of the sentences.[249] This is where the California system breaks down; the BOP's authority to accept a state prisoner is discretionary. Nevertheless, at a minimum, California officials must tender the prisoner and receive a formal objection from the foreign jurisdiction.[250] Ultimately, California and other states have recognized that they are powerless to compel the federal authorities to take custody of the prisoner.[251]

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prisoner until the completion of the state sentence and refusing to credit the time the prisoner spent in state custody.")).

244 *See supra* Part II.B.

245 *See supra* note 76 and accompanying text.

246 *See supra* note 76 and accompanying text.

247 18 U.S.C. § 3585(a) (2000); Cozine v. Crabtree, 15 F. Supp. 2d 997, 1004 (D. Or. 1998). For the full text of § 3585(a), see *supra* note 45.

248 *See Cozine*, 15 F. Supp. 2d at 1002, 1004-05.

249 *See* Brown v. United States, 912 F.2d 1012, 1014 (8th Cir. 1990). In *Brown*, the state court ordered that Brown's state sentence be served concurrently with an existing federal sentence. *Id.* at 1013. However, the state failed to transfer Brown to federal custody, and, as a result, Brown served his state sentence before he was taken into federal custody. *Id.*

250 *See Cozine*, 15 F. Supp. 2d at 1005 (citing *In re* Cain, 52 Cal. Rptr. 860 (1966)); People v. Chaklader, 29 Cal. Rptr. 2d 344, 347 (Cal. Ct. App. 1994) ("Federal prison officials are under no obligation to, and may well refuse to, follow the recommendation of state sentencing judges that a prisoner be transported to a federal facility. Moreover, concurrent sentences imposed by state judges are nothing more than recommendations to federal officials.") (citing Del Guzzi v. United States, 980 F.2d 1269, 1272-73 (9th Cir. 1992)).

251 *E.g.*, *Cozine*, 15 F. Supp. 2d at 1013; Faulkner v. State, No. W1999-00223-CCA-R3-PC, 2000 WL 1671470, at *3 (Tenn. Crim. App. Oct. 17, 2000). California has expressed its frustration that its sentences are not being carried out as ordered by the court. *Cozine*, 15 F. Supp. 2d at 1013. "Federal officials' recalcitrance in honoring California concurrent sentences has been a continuing source of conflict for decades, despite efforts by

States like California are taking the right steps toward an equitable sentencing structure in which each jurisdiction's sentences are fulfilled and respected. As sovereigns, states have an interest in imposing concurrent sentences for a variety of reasons, such as encouraging plea bargains or because the additional length of consecutive sentences may be too harsh.[252] However, as long as the BOP is only authorized, but not required, to cooperate with state authorities to effectuate concurrent sentences, a statutory scheme like California's will provide no uniformity or reliance in sentencing.[253] Therefore, procedural mechanisms within

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California's legislature and courts to remedy this problem through the enactment of Calif. Penal Code § 2900(b) and adoption of the *In re Stoliker* doctrine." *Id.* In *Faulkner v. State*, the Tennessee court concluded that the federal authorities had rendered the state plea agreement incapable of enforcement but that the State had fulfilled its end of the bargain to the extent possible. 2000 WL 1671470, at *2. In *Faulkner*, the state sentenced the defendant second. *Id.* at *1. The defendant's state sentence was ordered to run concurrently with outstanding federal sentences pursuant to a plea agreement with state authorities. *Id.* Further, the agreement provided that the sentences would be served in the federal institution. *Id.* However, the federal authorities refused to take the defendant into federal custody for service of the sentences. *Id.* The court noted the difficulty that the state had in actually implementing the concurrent sentences although authorized by state law. *Id.* at *3. The court reasoned that this difficulty stemmed from dual sovereignty because neither sovereign could control the other's proceedings. *Id.* As a result, the state appellate court granted post-conviction relief, having found that the defendant's guilty plea was not voluntarily and knowingly entered, and remanded the case for further proceedings. *Id.*; *see also* Cerisse Anderson, *Friedman's State Term Held Concurrent to Federal Sentence: Appellate Court Modifies Penalty in Interests of Justice*, 206 N.Y. L.J., Sept. 13, 1991, at 1 ("'In the interests of justice' the five-judge panel modified the sentence of 2 1/3-to-7 years to run concurrently with the 12-year federal term that had been imposed . . . .").

252 *See Faulkner*, 2000 WL 1671470, at *3 ("Concurrency of sentences is a valuable agreement which, if not performed as promised, results in an involuntary plea."). In Minnesota, consecutive sentences are the exception, not the rule. *See* State v. Sundstrom, 474 N.W.2d 213, 215 (Minn. Ct. App. 1991) (citing Minnesota Sentencing Guidelines II.F).

> Consecutive sentences are a more severe sanction because the intent of using them is to confine the offender for a longer period than under concurrent sentences. If the severity of the sanction is to be proportional to the severity of the offense, consecutive sentences should be limited to more severe offenses . . . .

Id. In all cases, the Commission suggests that judges consider carefully whether the purposes of the sentencing guidelines (in terms of punishment proportional to the severity of the offense and the criminal history) would be served best by concurrent rather than consecutive sentences. *Id.*

253 The legislative history of 18 U.S.C. § 3585(a) provides:

> The Committee does not intend that this provision be read to bar concurrent Federal and State sentences for a defendant who is serving a State sentence at the time he receives a Federal sentence. It should be possible for the BOP to use its authority to contract with State facilities to make equitable arrangement for a defendant to continue to reside in the State facility while serving part of his Federal sentence.

the BOP must be established to facilitate the smooth transfer of these prisoners.

V. PROPOSED CHANGES TO ESTABLISH EQUALITY IN FEDERAL/STATE SENTENCING

To give full recognition to the sentencing authority of state courts, this Note proposes that the federal system should make legislative and administrative changes to eliminate prospective federal sentencing.[254] First, Congress should amend § 3584 to clarify the present language and to prohibit prospective sentencing. Practically, however, a defendant like Joseph, introduced in the illustration in Part I, will still serve consecutive sentences unless the BOP recognizes the concurrency of the state sentence.[255] Therefore, the BOP should adopt a Program Statement in order to achieve the practical implementation of the state sentence.[256] Finally, should Congress and the BOP fail to adopt these proposals, states should consider passing legislation to effectuate the intent of the sentencing court.[257] After each of the proposals, the new provision is applied to Joseph to demonstrate its practical effect on his situation.

A. Amendment to § 3584(a)

Based on sound statutory interpretation and legislative history, § 3584(a) only grants a federal district court the authority to impose a federal sentence to be served consecutively to an existing sentence or to a sentence imposed simultaneously.[258] However, some courts have

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S. REP. NO. 98-225, at 129 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3312. In addition, the federal authorities have taken California inmates into custody to effectuate concurrent sentences or have designated the state institution as the place of confinement for the federal sentence. *See Cozine*, 15 F. Supp. 2d at 1016 (citing Thomas v. Brewer, 923 F.2d 1362, 1364 (9th Cir. 1991)).

254 *See infra* Part V.A.

255 *See supra* Part I. Joseph was in the primary custody of the State of Washington when he was sentenced by a federal district court to a term of imprisonment to be served consecutively to the yet-to-be-imposed Washington sentence. A Washington court then sentenced Joseph to a term of imprisonment to be served concurrently with the federal sentence. Because Joseph is in the primary custody of the state court, he will serve the state sentence first. Under current federal law, Joseph's sentences will effectively be consecutive unless the BOP takes him into federal custody or designates the state institution as the place of confinement for the federal sentence. However, it is unlikely that the BOP would do either because the federal district court has expressed an intent for consecutive sentences.

256 *See infra* Part V.B.

257 *See infra* Part V.C.

258 *See supra* Part IV.A and accompanying text.

interpreted § 3584(a) to allow consecutive sentencing as to *future* sentences, rendering the statute ambiguous.[259] Congress should amend § 3584(a) to reorganize the structure for clarity and to grant a federal district court the defined and limited authority originally intended. Congress should also provide an official comment to eliminate the ambiguity and to clarify that a federal court may not restrict the sentencing discretion of a future court. The proposed amended version of § 3584(a) resolves any doubt as to the sentencing authority of federal district courts when a defendant is awaiting a sentence in a state proceeding:

> (a) Imposition of concurrent or consecutive terms[260]
>
> *(1) Discretion of the district court.* If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively, except that the terms may not run consecutively for an attempt and for another offense that was the sole objective of the attempt.
>
> *(2) Presumptions.* Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. *A term of imprisonment imposed on a defendant who is already subject to an undischarged term of imprisonment runs consecutively to the undischarged term of imprisonment* unless the court orders that the terms are to run concurrently.
>
> *Official Comment to § 3584(a).*[261] *The amended language clarifies a conflict among federal circuit courts of appeals as to the application of § 3584(a) when a federal district court sentences a defendant who is in the primary custody of the state court and not yet sentenced by the state court. Some circuit courts have held that a district court is authorized to*

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[259] *See* 2A SINGER, *supra* note 170, at 145-46. "A statute is ambiguous when it is capable of being understood by reasonably well-informed persons in two or more senses." *Id.*

[260] The proposed structural and linguistic changes are italicized and are the contribution of the author. The remaining language is drawn directly from 18 U.S.C. § 3584(a) (2000).

[261] The Official Comment to the Proposed Amendment is the contribution of the author.

> *impose a sentence to run consecutively to a yet-to-be-determined state sentence. See United States v. Mayotte, 249 F.3d 797 (8th Cir. 2001); United States v. Williams, 46 F.3d 57 (10th Cir. 1995); United States v. Ballard, 6 F.3d 1502 (11th Cir. 1993); United States v. Brown, 920 F.2d 1212 (5th Cir. 1991). In contrast, other courts have held that a district court is not empowered to impose a sentence to be served consecutively to a future state sentence. See United States v. Quintero, 157 F.3d 1038, 1039 (6th Cir. 1998); United States v. Clayton, 927 F.2d 491, 492-93 (9th Cir. 1991); Romandine v. United States, 206 F.3d 731, 737-38 (7th Cir. 2000) (supporting the proposition in dicta). Section 3584(a) authorizes the district court to impose a consecutive or concurrent sentence when the sentences are being imposed at the same time or when the defendant is already subject to an undischarged term of imprisonment. This section does not authorize a district court to impose a sentence to run concurrently or consecutively to an anticipated sentence that is not yet in existence.*

For Joseph, the effect of the new statutory language is limited. At a minimum, the federal district court would have sentenced Joseph to twenty-four months imprisonment but would not have indicated the relationship of the federal sentence to the anticipated state sentence. Practically, the actual length of Joseph's sentence ultimately would be determined by the actions of the federal prison authorities, the BOP.[262] Although the BOP has authority to accept Joseph for concurrent service of his sentences, the authority is entirely discretionary.[263] Granted, the BOP will no longer factor in the intent of the federal district court to impose consecutive sentences if the federal court is no longer able to make the designation. However, there is still no guarantee that Joseph's seventeen-month state sentence and twenty-four month federal sentence would be served simultaneously. Accordingly, a defendant in Joseph's position will only benefit if an amendment is also made to BOP Program Statement 5160.04.

B. Amendment to BOP Program Statement 5160.04

The proposed amendment to § 3584(a) does not resolve the procedural issue of effectuating concurrent sentences discussed in Part

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262 *See supra* notes 88-92 and accompanying text.

263 *See supra* notes 88-92 and accompanying text.

IV.C. A defendant in the primary custody of the state will serve a state sentence first. As a result, a state sentence ordered to run concurrently with an existing federal sentence will only be concurrent if the BOP (1) accepts a state prisoner into federal custody for service of both sentences in a federal institution or (2) designates a state institution as the place of service for a federal term of imprisonment.[264] Currently, the BOP has authority to do both under BOP Program Statement 5160; however, the authority is discretionary.[265] In addition, the BOP must communicate with the federal sentencing court to determine if the court has any objections to the sentences being served concurrently.[266] The federal court in this procedural posture has no authority to review the judgment of the state court, as the second sentencing court with primary jurisdiction, which ordered concurrent sentences.[267] Therefore, BOP Program Statement 5160.04(9)(e) should be amended to eliminate discretion and to require that the state sentence be honored.[268]

> e. State request:[269] *When a state jurisdiction with primary custody of a prisoner subject to an undischarged federal term*

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264 *See supra* notes 88-92 and accompanying text.

265 *See supra* notes 88-92 and accompanying text.

266 Program Statement 5160.04, *supra* note 88, at 5160.04(9)(e)(6).

267 As discussed in Part II.C, *supra*, the state sentence was not in existence at the time of the federal sentence. If the BOP is required to consult with a federal sentencing court in order to effectuate concurrent sentences, the federal court has a free veto of any concurrent state sentence with which it disagrees. There is no basis for this authority, nor should there be. The federal courts would no more tolerate such review by the states than the states should by the federal courts.

268 "The language of BOPPS 5160.03 . . . suggest[s] that the BOP views service of concurrent sentences as purely a matter of grace, which the BOP has no obligation to accommodate. This court does not agree with that view, at least under the circumstances presented by this case." Cozine v. Crabtree, 15 F. Supp. 2d 997, 1010 (D. Or. 1998).

269 The proposed amendments are italicized and are the contribution of the author. The remaining text is the current language of the Statement. Subsection (e) currently provides:

> e. State Request. When the regional office receives a request from a state jurisdiction that the state and Federal sentences are to be served concurrently, whether by state court order or department of corrections referral, the regional office will respond stating that if the Bureau agrees that the sentences should be served concurrently, the Bureau may designate the state institution in which the inmate is presently located for service of the Federal sentence.
>
> The Bureau will not, under ordinary circumstances (such as overcrowding in a state institution), accept transfer of the inmate into Federal custody for concurrent service. Therefore, this communication will also explain that if the state jurisdiction wishes to pursue the request, before a final decision is made, an information packet must be sent to Correctional Programs staff in the regional office to include:

of imprisonment submits a request to the regional office that the state sentence be served concurrently with the federal sentence, the regional office must:

(1) communicate to the state jurisdiction that it must send an information packet to Correctional Programs staff in the regional office that includes:

(a) The reason for the request, if not previously indicated.

(b) A copy of the state Judgment and Commitment Order.

(c) A state sentence data record that shows the parole eligibility date and the earliest release date if not paroled.

(d) A copy of the state presentence investigation (PSI) report.

(e) State classification studies/reports (including psychological and psychiatric reports) and any other reports pertaining to the inmate.

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(1) The reason for the request, if not previously indicated.
(2) A copy of the state Judgment and Commitment Order.
(3) A state sentence data record that shows the parole eligibility date and the earliest release date if not paroled.
(4) A copy of the state presentence investigation (PSI) report.
(5) State classification studies/reports (including psychological and psychiatric reports) and any other reports pertaining to the inmate.
(6) FBI record, NCIC record, state identification record, or other law enforcement records; and

If, after a careful review of this information, Correctional Programs staff determine that concurrent service of the sentences would be consistent with the goals of the Federal criminal justice system, the RISA will correspond with the sentencing Federal court to ascertain whether it has any objections to the Federal and state sentences running concurrently.

If the court has no objections, the state institution may be designated as the place to serve the Federal sentence concurrently with the state sentence according to the procedures detailed in this Program Statement.

Program Statement 5160.04, *supra* note 88, at 5160.04(9)(e).

> *(f)* FBI record, NCIC record, state identification record, or other law enforcement records; and
>
> *(2) verify that the state had primary custody of the prisoner at the time the federal sentence was imposed and that the federal sentence was already imposed at the time the state sentence was imposed.*
>
> If, after a careful review of the information, Correctional Programs staff determine that concurrent service of the sentences *was ordered by the state court under the conditions described in Section (e)(2), RISA must either:*
>
> *(1) designate the state institution as the place of confinement for concurrent service of the federal and state sentences according to the procedures detailed in this Program Statement; or*
>
> *(2) accept transfer of the state inmate into federal custody for concurrent service of the federal and state sentences.*

In addition, the Program Statement only authorizes the designation of a state institution for concurrent service of a federal sentence when "it is consistent with the intent of the sentencing Federal court, or with the goals of the criminal justice system."[270] Therefore, BOP Program Statement 5160.04(8) should also be amended to reflect the principle of comity by adding the intent of a state court with primary jurisdiction that sentences second.

> 8. Authority for Designations. . . .[271]
>
> A designation for concurrent service of sentence will be made only when it is consistent with the intent of the sentencing Federal court, with the goals of the criminal justice system, *or in a situation as described in Section 9(e).*

In Joseph's case, these amendments would have required that the BOP either accept Joseph into federal custody if offered by Washington or designate the Washington prison as the place of confinement for

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[270] *Id.* at 5160.04(8). In the next section, the "goals of the criminal justice system" is specified as the "goals of the Federal criminal justice system." *Id.* at 5160.04(9)(e)(6).

[271] The proposed amendments are italicized and are the contribution of the author.

Joseph's federal sentence. Because Joseph's federal sentence was longer than the state sentence by seven months, it is likely that the state would have offered Joseph to the federal authorities for service of both sentences in federal custody.

This procedural change would be most effective for states with statutes like California Penal Code § 2900(b)(2).[272] The state statute facilitates the transfer of state prisoners to a federal institution when a state sentence is ordered to be served concurrently with an existing federal sentence.[273] A defendant in a state court could enter a plea bargain knowing that a promised concurrent sentence would be honored. This system also would decrease state litigation of ineffective assistance of counsel claims and involuntary plea agreement claims because concurrent sentences would be effectuated.[274]

C. *Empowering the States: A Model State Statute*

Ideally, a model sentencing and custody scheme would combine state statutes, such as California Penal Code § 2900(b), and the proposed BOP Program Statements in Part V.B in order for a state sentence to run concurrently with an existing federal sentence when the state has

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[272] *See supra* note 76 and accompanying text. Although Joseph's federal sentence was longer than the state sentence, the California statute provides for situations in which the state sentence is longer. If the concurrent sentences are served in the federal institution, the statute allows the court to designate a California institution for receipt of the prisoner at the termination of the federal sentence for service of the remainder of the state sentence. *See supra* notes 76 and accompanying text; *see also* FLA. STAT. ANN. § 921.16 (West 2001); 730 ILL. COMP. STAT. 5/5-8-6(e) (West 1997); NEV. REV. STAT. ANN. § 176.045(2) (Michie 2001).

[273] Without a uniform standard, low-level federal prison officials wield discretion to grant or deny credit for time served under a state sentence. For example, in *Del Guzzi v. United States*, two state defendants were sentenced to state sentences to be served concurrently with federal sentences. 980 F.2d 1269, 1272 (9th Cir. 1992). Once the state prisoners had served the state time and were transferred to federal prison, the federal officials credited one of the prisoners with the time spent in state prison and not the other, even though both had similar sentencing structures. *Id.* For other examples of similar problems, see *Thomas v. Whalen*, 962 F.2d 358, 364 (4th Cir. 1992) (concurring opinion of Judge Hall); *Thomas v. Brewer*, 923 F.2d 1361, 1369-70 (9th Cir. 1991) (separate opinion of Judge Reinhardt); *Kiendra v. Hadden*, 763 F.2d 69, 72-73 (2d Cir. 1985); *United States v. Croft*, 450 F.2d 1094, 1096-99 (6th Cir. 1971); *Smith v. Swope*, 91 F.2d 260, 262 (9th Cir. 1937); *Gillman v. Saxby*, 392 F. Supp. 1070 (D. Haw. 1975); *Millard v. Roach*, 631 A.2d 1217, 1224 (D.C. App. 1993).

[274] In addition, a defendant already subject to the federal sentence could enter plea bargaining knowing that a concurrent sentence would be effectuated. Unfortunately, Joseph would not have had this advantage because he entered his state guilty plea prior to the federal sentence.

primary jurisdiction and is the second sentencing court. This system is necessary when the state has primary jurisdiction because the state sentence will be served first, and an undischarged federal sentence will not begin until the state sentence has been served. In the absence of such a system, states could effectively render a state sentence concurrent with an undischarged federal sentence by crediting the state term of imprisonment for the period of desired concurrency with the federal sentence.[275] However, a state sentencing court faced with a mandatory minimum term of imprisonment for certain crimes would have to possess the authority to circumvent the statutory minimum. Therefore, states should consider adopting the following model statute that would allow a court to credit a state sentence for the length of an existing federal sentence that has not yet been served, even in states with mandatory minimum sentences.[276]

> *Concurrent sentences; crediting a term of imprisonment to account for an undischarged federal sentence*
>
> *(a) Eligible Defendants. This section is applicable to defendants who are in the primary custody of the state and are*

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[275] In fact, in *Romandine*, the Seventh Circuit indicated that under the current system, the only way for a state court to ensure that the state sentence runs concurrently with an existing federal sentence is for the state court to credit the state sentence for the federal sentence. *See supra* notes 18, 168 and accompanying text.

[276] This model state statute is the contribution of the author. The text of the proposed model statute differs significantly from existing state statutes that allow for credit against a state term of imprisonment for a sentence the defendant is currently serving in a foreign jurisdiction. For example, a Pennsylvania statute provides: "[I]f the defendant is at the time of sentencing *subject to imprisonment* under the authority of any other sovereign, the court may indicate that imprisonment under such other authority shall satisfy or be credited against both the minimum and maximum time imposed under the court's sentence." 42 PA. CONS. STAT. ANN. § 9761(b) (West 1987) (emphasis added). Under this statute, the defendant has already begun serving the sentence in the foreign jurisdiction at the time of state sentencing and will continue service of that first sentence as soon as the sentencing for the second offense is completed.

However, the proposed model statute in this Note applies to a defendant who is subject to a federal sentence, but who has not yet begun to serve the sentence, and who will serve the state sentence first under principles of comity. As a result, the federal sentence will automatically be consecutive to the state sentence because it will not begin until the prisoner is released from state prison. Therefore, this statute allows the state to effectively reduce the state sentence before the federal sentence even begins in anticipation of the time that will be served in the federal institution.

Congress has given the federal courts a similar, although slightly less powerful, option in section 5G1.3(b) of the federal sentencing guidelines. *See supra* notes 57-59 and accompanying text.

subject to an undischarged federal term of imprisonment, and for whom the court wishes to impose a sentence to run concurrently with the undischarged term of imprisonment.

(b) Statement of Purpose. The purpose of this section is to authorize the court to effectuate a concurrent sentence in those instances in which the court has discretion under [insert state statute(s)] to impose a sentence to be served concurrently with an undischarged federal term of imprisonment. In order to ensure that the court's sentence will be served concurrently with the existing federal sentence, the court may achieve the equivalent of concurrent sentences by crediting the state sentence by the number of months intended to run concurrently with the federal sentence.

(c) Realization of Concurrent Sentences. When sentencing an eligible defendant, the court, in order to effectuate concurrent sentences, shall establish the term of imprisonment for the instant offense, including any credit as calculated under state statute, shall identify the proceedings in which the federal sentence was imposed, and

> *(1) if the term of imprisonment for the instant offense is longer than the undischarged federal term of imprisonment, shall credit the term of imprisonment for the instant offense by the minimum number of months of the undischarged federal term of imprisonment that remain at the time of sentencing for the instant offense; or*
>
> *(2) if the term of imprisonment for the instant offense is shorter than the minimum number of months of the undischarged federal term of imprisonment that remain at the time of sentencing for the instant offense, shall designate the defendant's sentence as satisfied by the federal sentence and shall order the defendant released to federal custody.*

(d) Substitution of Credited Sentence for Mandatory Minimum. If the sentence for the instant offense mandates a minimum term of imprisonment, the court may substitute a credited sentence for the statutory minimum according to provisions (c)(1) and (c)(2) of this section.

Joseph would have benefited from this model statute and would not have had to petition the BOP, which probably would not have granted his request. Rather, the state court could have accounted for the twenty-four month federal sentence. Under section (c), the court would have first determined that Joseph's term of imprisonment for the burglary and the robbery was seventeen months. Next, under section (c)(2), the court would have noted that Joseph's seventeen-month state sentence was shorter than his twenty-four month federal sentence, and the court would have designated the state sentence as fulfilled by the federal sentence. At that point, Joseph would have been released to the federal authorities for service of his twenty-four month federal sentence.

If Joseph's state sentence had been longer than the federal sentence, the court would have looked to section (c)(1). For example, a twenty-four month state sentence given credit for a seventeen-month federal sentence would result in a seven month state sentence. After serving seven months in state prison, Joseph would have been released to the federal detainer for service of the remaining seventeen months in federal prison, for a total of twenty-four months. In either case, the intention of the state court to impose concurrent sentences would have been fulfilled.

VI. CONCLUSION

Under federal statutory and administrative law, a concurrent state sentence imposed subsequent to a prospectively consecutive federal sentence is devalued. Federal district courts preempt state sentencing power by imposing a sentence to run consecutively to a future state sentence. The BOP may circumvent a state court's intent to render sentences concurrent by refusing to make a designation for concurrent service of sentences and by only accepting the prisoner into federal custody at the termination of the state sentence. Equitably, the doctrines of comity and dual sovereignty mandate that a second sentencing court be as free in its authority to sentence under the laws of the jurisdiction as a first sentencing court. Federal courts refuse to be bound by a prior state sentence; the same principle should apply when the state court is second. Therefore, Congress should amend 18 U.S.C. § 3584(a) to prohibit prospective sentencing. The BOP Program Statement 5160.04 should also be reorganized to require the BOP to honor a concurrent sentence imposed by a state court with primary jurisdiction of a defendant already subject to an undischarged federal sentence. Finally, if these federal changes are not adopted, state legislatures should consider adopting the proposed model statute to allow state courts to

adjust a state sentence to account for an undischarged federal sentence. These proposals will create uniformity and reliability in the criminal sentencing process for defendants subject to contemporaneous state and federal jurisdiction.

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