II. THE DISTRICT COURT ERRED IN ORDERING MS. TORTELLI'S SENTENCE TO RUN CONSECUTIVE TO ANY YET-TO-BE IMPOSED STATE SENTENCE WHEN THERE WAS NOT A PENDING STATE CASE BECAUSE IT IS AN AMBIGUOUS AND INDEFINITE SENTENCE, A JUDGE DOES NOT HAVE THE STATUTORY POWER TO ISSUE SUCH A SENTENCE, AND THE SENTENCE VIOLATES THE DOCTRINE OF DUAL SOVEREIGNTY BY FORCING A STATE COURT TO ISSUE A CONSECUTIVE SENTENCE.

The District Court erred by sentencing the Petitioner, Ms. Tortelli, to a term of "20 years of imprisonment, to run consecutively to any yet-to-be-imposed state court sentence" when she had no pending state charges against her. (R. 16). To support this contention, the following three arguments will be addressed at length. First, the District Court's sentence violates Ms. Tortelli's right to have a sentence that is "definite and certain." Anderson v. U.S., 405 F.2d 492, 493 (10th Cir. 1969). Second, the District Court did not have the statutory authority to implement a sentence that is consecutive to a yet-to-be-imposed state sentence. See U.S. v. Clayton, 927 F.2d 491, 493 (9th Cir. 1991). Third, even if the District court's sentence was definite and authorized, it violated the doctrine of dual sovereignty. See U.S. v. Eastman, 758 F.2d 1315, 1318 (9th Cir. 1985).

This Court has the power to review the District Court's sentence even though the error was not preserved for appeal. Under Federal Rule of Criminal Procedure 52(b), an appellate court can overturn a district court's ruling consisting of "plain errors or defects affecting substantial rights." Fed. R. Crim. P. 52(b). There is a substantial right not to be imprisoned for a term longer than what is within the power of a district court to authorize. See Eastman, 758 F.2d at 1318. In reviewing the District Court's decision, this Court should use a *de novo* standard of review. See Clayton, 927 F.2d at 492; See also U.S. v. Quintero, 157 F.3d 1038, 1039 (6th Cir. 1998). The Petitioner respectfully requests this Court to reverse the District Court's sentence

and remand for resentencing to exclude the portion consisting of "consecutive to any yet-to-be-imposed state court sentence."

A. The District Court's sentence of a term to run consecutive to any yet-to-be-impose state sentence is invalid because it is indefinite, unclear, and ambiguous and would require a review by a future court to determine the Court's intention.

The District Court's sentence is indefinite and uncertain and therefore is an invalid sentence. See Anderson, 405 F.2d at 492. A criminal sentence must be clear and definite. See U.S. v. Buide-Gomez, 744 F.2d 781, 783 (11th Cir. 1984). A sentence is clear and definite if it has a commencement and termination point. See U.S. v. Ballard, 6 F.3d 1502, 1510 (11th Cir. 1993). The commencement and termination point does not need to be an exact date but can be upon the expiration of an event certain to happen. See Anderson, 405 F.2d at 492. Such an event can be the termination of state custody. See Id. However, where state custody is absent, a sentence that is ordered to be consecutive to any non-existing state sentence is indefinite and unclear. See Clayton, 927 F.2d at 493. Since Ms. Tortelli was not in state custody, and since the order did not address any particular event, the commencement and termination dates of her sentence are ambiguous and, therefore, her sentence is invalid.

A criminal sentence must be definite and clear to be valid. See Smallwood v. U.S., 386 F.2d 175, 176 (5th Cir. 1967). In Smallwood, the district court judge verbally ordered the defendant to a term consecutive to a state sentence and another federal sentence. Id. However, the written order only stated that the sentence should run consecutive to the federal sentence and did not mention the state sentence. Id. On appeal, the Fifth Circuit held that the sentence was invalid because it was unclear and indefinite. Id. The rule the court adopted to determine if a sentence is valid is whether the sentence is "clear and definite . . . and . . . complete as to need no construction of a court to ascertain its import." Id. (quoting Chasteen v. Denemark, 138 F.2d

289 (7th Cir. 1943)). Since another court ruling would be needed to reconcile the difference between the verbal and written sentences, the sentence was invalid. Smallwood, 386 F.2d at 176.

A criminal sentence must have a definite and clear commencement and termination point in order to be valid. See Ballard, 6 F.3d at 1510. In Ballard, while in prison awaiting trial on state charges the defendant committed a federal offense. Id. at 1503, 1504. The defendant pled guilty to the federal offense, which he admitted committing for the purpose of receiving concurrent state and federal sentences so that he could serve his state time in a federal penitentiary. Id. at 1504. The judge ordered the defendant to a term of imprisonment which would begin only after state custody ended. Id. The defendant was then turned over to the state authorities for his state trial. Id. The Eleventh Circuit ruled that the district court's sentence was valid because it had a definite commencement date- when the state custody ended. Id. at 1510. The Court stated, "Ballard has no right to know the exact date that his federal sentence will begin, provided that the sentence is sufficiently clear and definite." Id. Since the defendant was exposed to state custody when sentenced by the federal court, there was no ambiguity of when his term would start; that is, it would commence as soon as the state custody ended. Id.

Similar to Ballard is Anderson, in which the defendant was sentenced for a federal crime to a term that would be consecutive to "any confinement under which defendant is being held by state authorities." 405 F.2d at 492. Similar to Ballard, the defendant in Anderson was facing pending state charges and was immediately transferred to state custody after the federal sentence. Id. The court in Anderson agreed with Ballard that a sentence to begin after state custody ends is definite and clear. Id.

In U.S. v. Williams, the Tenth Circuit relied upon Anderson in upholding the district court's sentence. 46 F.3d 57 (10th Cir. 1995). In Williams, the court ordered the defendant to a

term consecutive to any sentence imposed "in Arkansas or Oklahoma in a case or cases that is now pending." Id. at 58. As in Anderson, the district court in Williams articulated when the federal sentence would begin and what sentence the charges were to run consecutive to; that is, the federal prison term would begin following the defendant's prison term arising under any pending cases in the states of Arkansas and Oklahoma. Id. at 59.

The court in Clayton distinguished itself from the holdings in Ballard, Anderson, and Williams. Clayton, 927 F.2d at 491. In Clayton, the defendant was facing both state and federal charges in relation to the same course of events. Id. at 492. He was sentenced in federal court to a prison term "consecutive to any state sentence." Id. The court held that this sentence was ambiguous and uncertain. Id. at 493. In this case the term was not to begin after current state custody ended, but after "any state sentence." Id. at 492. Such language "creates uncertainty and ambiguity which may in the future result in problems in calculation of service of his sentence. [The defendant] has a right to a clear, unambiguous sentence." Id. at 493.

The sentence the District Court pronounced in the present case is strikingly similar to the language in Clayton. In Clayton, where the sentence was ruled to be invalid, the court sentenced the defendant to a term "consecutive to any state sentence." 927 F.2d at 492. In the present case the District Court sentenced Ms. Tortelli to a term that runs "consecutively to any yet-to-be-imposed state court sentence." (R. 16). The language used by the two courts is almost identical, and it creates the same problem in that they both do not create a clear and definite commencement and termination date. Clayton, 927 F.2d at 492. It is assumed that Ms. Tortelli's federal sentence would begin immediately, however, upon the condition that it can and will be interrupted at any point when a state sentence is pronounced. At that time, Ms. Tortelli's federal sentence would be suspended while her state sentence is served, which could happen an

indefinite amount of times. Thus, Ms. Tortelli's federal sentence would become a stop-and-go procedure to turn upon the whims of state court judges and prosecutors.

Furthermore, the pronouncement of a sentence to be "consecutive to any yet-to-be-imposed state sentence" could have ramifications outside of what the District Court intended. (R. 16). According to the Respondent, the District Court in the instant case issued a consecutive sentence based on a predication that the state would file charges on marijuana possession. (R. 29). However, the state may not only file charges for possession of marijuana, but also charges for the same murder that she was convicted of in federal court. The doctrine of dual sovereignty prevents the defendant from claiming double jeopardy on charges brought by two different sovereigns, the state and the federal government. See U.S. v. Johnson, 169 F.3d 1092 (8th Cir. 1999). Therefore, the defendant would be forced to a state prison term consecutive to a federal prison term for the same crime, which was not the intention of the District Court. At best, there would be the need of a future court ruling to determine the intentions of the District Court's sentence because of its indefinite and unclear nature, violating the rule established by Smallwood. See Smallwood, 386 F.2d at 176.

The circumstances of Ms. Tortelli's sentence are clearly distinguishable from Ballard, Anderson, and Williams, and it fails the test articulated by Smallwood. The defendants in both Ballard and Anderson were being held on pending state charges, and were in the custody of the state. Ballard, 6 F.3d at 1510; Anderson, 405 F.2d at 492. On the contrary, Ms. Tortelli had no state charges pending and was not in the custody of the state. (R. 2). The defendants in Ballard and Anderson were made aware of when their federal prison term would begin; that is, when their state custody ended. Ballard, 6 F.3d at 1510; Anderson, 405 F.2d at 492. However, Ms. Tortelli is currently in incarceration limbo as she waits to see if any charges are brought against

her in state court. Also, Ballard, Anderson and Williams all have something in common. The district courts in all three cases clearly articulated their sentences would run consecutive to pending charges in specific states. Ballard, 6 F.3d at 1510; Anderson, 405 F.2d at 492; Williams, 46 F.3d at 59. The District Court in the present case did not make that clarification, and ordered the sentence to run consecutive to "any yet-to-be-imposed state sentence." (R. 16). Thus, the state charges the federal sentence should run consecutive to remains ambiguous. This is demonstrated by the fact that the District Court could not have properly anticipated what state charges would be filed, if any at all. Ms. Tortelli could be brought up on murder charges, possession of marijuana, or any other charge that the District Court had no knowledge of at the time of sentencing. Without addressing a particular pending case, Ms. Tortelli's sentence lacks the clarity and definiteness of Ballard, Anderson and Williams. Ballard, 6 F.3d at 1510; Anderson, 405 F.2d at 492; Williams, 46 F.3d at 59. The ramifications of the District Court's sentence would need to be clarified and recalculated as they leave much ambiguity in the event that Ms. Tortelli is given a state sentence. Since the sentence is not clear, definite and would need a future court ruling to interpret its ramifications, the sentence is invalid under the test articulated by Smallwood. See Smallwood, 386 F.2d at 176.

B. The District Court did not have the statutory authority under section 3584(a) to issue a sentence to run consecutive to a yet-to-be-imposed state sentence because doing so is contrary to the clear legislative intent of Congress and a plain language reading of the statute.

The Sentencing Reform Act, which is binding authority on when a federal sentence can be consecutive or concurrent, did not grant the District Court the authority to sentence Ms. Tortelli to a term consecutive with a yet-to-be-imposed state sentence. Sentencing Reform Act, 18 U.S.C.A. § 3584(a) (West 2006). The controlling law, hereinafter referred to as section 3584(a), reads, in part: "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 different times run consecutively unless the court orders that the terms are to run concurrently." Id. The first sentence, hereinafter referred to as clause one, is only applied to a defendant who is already serving a sentence and not to a defendant who is awaiting a state sentence. See Clayton, 927 F.2d at 492. The second sentence quoted above, hereinafter referred to as the final clause, only applies to cases that arise when a judge sentences a defendant who is already serving a state or federal sentence and fails to articulate whether the new sentence is to run consecutive or concurrent to the previous sentence. See Quintero, 157 F.3d at 1040, 1041. It does not apply to cases where a defendant is being sentenced in federal court and does not have a pending case in state court. See Id. Additionally, all courts that have interpreted the plain meaning of the statute in the opposing view have done so only for pending state charges. See Ballard, 6 F.3d 1502 at 1511. The District Court's sentence in the present case is not valid because the federal Sentencing Reform Act does not authorize a judge to sentence a defendant to a term consecutive to a yet-to-be-imposed state term, especially absent a pending state case.

The first clause of 18 U.S.C.A. § 3584(a) does not authorize a district court to sentence a defendant to a term consecutive with a non-existent term. Sentencing Reform Act, 18 U.S.C.A. § 3584(a) (West 2006). The first clause states: "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." Id. In the present case, Ms. Tortelli was not sentenced to more than one term at the same time and therefore the first part of the sentence does not apply. However, neither does the second part of the sentence. The second part states that the defendant can be sentenced to a

term consecutive "if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment." Id. The clear, plain language of "already subject to" is a defendant who is already serving another prison term, not a yet-to-be-imposed sentence. See McCarthy v. Doe, 146 F.3d 118, 121-122 (2nd Cir. 1998). Furthermore, a review of the legislative history of the Sentencing Reform Act shows that Congress intended the law to be applied this way. See Clayton, 927 F.2d at 492.

The Senate Committee report on the first clause establishes the legislative intent to grant a district court judge the authority to sentence a consecutive term only when the defendant is being sentenced for more than one charge at the same time or currently imprisoned on another charge. Id. at 492, 493; S. Rep. No. 98-634, at 125 (1984), as reprinted in 1984 U.S.C.C.A.N. 3182, 3308-3311. The Senate Committee report only refers to situations where the defendant is already incarcerated on another charge: "A term of imprisonment imposed on a person already serving a prison term is deemed to be concurrent with the first sentence if the first sentence is for a Federal offense, but is usually served after the first sentence if that sentence involves imprisonment for a State or local offense." S. Rep. No. 98-634, at 125 (1984), as reprinted in 1984 U.S.C.C.A.N. 3182, 3308-3311; See also Clayton 927 F.2d at 492. Ms. Tortelli was not in prison on a state charge at the time of her sentence and, therefore, the first clause does not apply to her. See Clayton 927 F.2d at 492.

Similarly, the final clause of section 3584(a) does not grant a district court the power to sentence a defendant to a term consecutive to a yet-to-be-imposed state sentence. Sentencing Reform Act, 18 U.S.C.A. § 3584(a) (West 2006). The final clause of section 3584(a) reads: "Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently." Id. The clear, plain language of the final clause,

read in light of the first clause, establishes that if a defendant is sentenced while serving another prison term and the district court fails to state if the terms are consecutive or concurrent the default rule is that the two terms are consecutive. McCarthy, 146 F.3d at 121-122; Quintero, 157 F.3d at 1040, 1041. The legislative history of section 3584(a) lends credibility to this plain language reading. Abdul-Malik v. Hawk-Sawyer, 403 F.3d 72, 75 (2nd Cir. 2005).

In the Senate Committee report concerning section 3584(a) Congress states that its intent behind the final clause is to create a default rule in cases where a district court fails to articulate if a sentence is concurrent or consecutive to a previous, already imposed sentence. Id; S. Rep. No. 98-634, at 125 (1984), as reprinted in 1984 U.S.C.C.A.N. 3182, 3308-3311. "If . . . multiple terms of imprisonment are imposed at different times without the judge specifying whether they are to run concurrently or consecutively, they will run consecutively . . . This . . . changes the law that now applies to a person sentenced for a Federal offense who is already serving a term of imprisonment for a State offense." S. Rep. No. 98-634, at 125 (1984), as reprinted in 1984 U.S.C.C.A.N. 3182, 3308-3311 Here, Congress states the legislative purpose of the final clause is to change the current law for defendants who are "already serving" a state prison term. See Abdul-Malik v. Hawk-Sawyer, 403 F.3d 72, 75 (2nd Cir. 2005). Furthermore, the report states that the final clause is "intended to be used as a rule of construction in the cases in which the court is silent as to whether sentences are consecutive or concurrent, in order to avoid litigation on the subject." S. Rep. No. 98-634, at 125 (1984), as reprinted in 1984 U.S.C.C.A.N. 3182, 3308-3311. Here, Congress establishes when the final clause can be enacted: when the court has discretion, under the first clause, to sentence a defendant to a term either consecutive or concurrent but fails to specify one when sentencing. See Quintero, 157 F.3d at 1040, 1041. The legislative history reveals that the legislative intent behind the final clause was to reconcile

problems arising when a district court sentences a defendant who is already incarcerated without specifying whether the new term is concurrent or consecutive to the old term. See Id.; See also Abdul-Malik, 403 F.3d at 75.

Some courts have adopted an opposing interpretation, but only without reviewing the legislative history. In Romandine the Seventh Circuit rejected the interpretation of McCarthy stating "We disagree. . . that the final sentence of § 3584(a) is limited to those situations also covered by the first sentence." Romandine v. U. S., 206 F.3d 731, 738 (7th Cir. 2000). Furthermore, in Williams the Tenth Circuit stated the "plain meaning" of section 3584(a) is if a sentence is imposed after an already established sentence the presumption is that the two sentences are consecutive. Williams, 46 F.3d at 59. In Mayotte the Eighth Circuit said the final clause "encourages consecutive sentences when prison terms are imposed at different times." U.S. v. Mayotte, 249 F.3d 797, 799 (8th Cir. 2001). However, the courts in these cases have ignored the legislative history of section 3584(a).

Furthermore, the Williams, Mayotte interpretation of the statute will lead to situations that are not anticipated nor intended by those courts. If the final clause maintains that a sentence is consecutive unless expressly made concurrent by the first sentencing judge, then all subsequent judges will be stripped of their authority under the first clause that grants them discretion on whether the second sentence should run concurrent or consecutive. This would, in effect, make the first clause not applicable to federal judges sentencing a defendant who is already serving a federal sentence. This is the exact opposite of the intentions of the statute and Congress. Some courts have avoided this problem by limiting the use of the final clause in yet-to-be imposed sentences to cases where there is a pending state case at the time of sentencing.

In Williams the Tenth Circuit said "The district court did not abuse its discretion in ordering defendant's sentence to run consecutive to any sentence imposed against defendant in any *pending* case." Williams, 46 F.3d at 59 (emphasis added). In Ballard the Eleventh Circuit stated "we hold that the district court was authorized to impose a federal sentence consecutive to an unimposed state sentence on *pending* charges. . ." Ballard, 6 F.3d 1502, 1510 (emphasis added). In Brown the Fifth Circuit held "The court did not abuse its discretion in determining that Brown's crime warranted a sentence consecutive to any sentence imposed in *pending* state proceedings." U.S. v. Brown, 920 F.2d 1212, 1217 (5th Cir. 1991) (emphasis added). Ms. Tortelli did not have any pending state charges against her at the time of sentencing, therefore, even when applying the opposing interpretation it would be difficult to find a court that would uphold Ms. Tortelli's sentence.

However, some courts have ruled that even if section 3584(a) does not grant a district court authority to sentence a defendant to a term consecutive to a yet-to-be-imposed state term, the district court still has that authority because section 3584(a) does not expressly prohibit such a sentence. See Mayotte, 249 F.3d at 799. It is true that a district court has a great amount of latitude when choosing between a consecutive and concurrent sentence, however, this is only due to the construction of section 3584(a). Section 3584(a) does grant a district court a great amount of discretion in choosing concurrent and consecutive sentences in the situations it outlines, however, that discretion does not extend to situations that are not expressly covered. See Quintero, 157 F.3d at 1041.

C. Even if the District Court's sentence was definite and authorized by statute it violates the doctrine of dual sovereignty by forcing a state court to issue a consecutive sentence in a state charge.

The doctrine of dual sovereignty bestows a power relationship upon state governments and the federal government with an equal right to create and implement their own laws. See Eastman, 758 F.2d at 1318. Therefore, the state cannot enact or implement federal law, nor can the federal government enact and implement state law. Also, neither entity can prevent the other from constitutionally implementing their laws. See Id. Under the doctrine of dual sovereignty a state has the right to "apply its own laws on sentencing for violations of state criminal laws." Id. A federal court ruling that mandates a state court to order a sentence consecutive to an already existing federal sentence is a violation of this doctrine.

A state court cannot force the federal government to order a federal sentence to run concurrent to an already existing state sentence. See Hawley v. U.S., 898 F.2d 1513 (11th Cir. 1990). Nor can a state court force a federal court to order a federal sentence to run consecutive to a state sentence. See Pinaud v. James, 851 F.2d 27, 30 (2nd Cir. 1988). The doctrine of dual sovereignty establishes that both sovereigns must equally enjoy the same freedom to implement their own laws, including sentences. See U.S. v. Johnson, 169 F.3d 1092 (8th Cir. 1999); See also Eastman, 758 F.2d at 1318. Therefore, the federal courts cannot order a state court to sentence a defendant to a state term consecutive with an already existing federal term.

Although the federal government cannot order a state court to sentence a defendant to a term consecutive to an already existing federal term, it may reserve the right to designate where a defendant is to serve the federal prison time. See Romandine, 206 F.3d at 738. By reserving this right, the federal government can deny time credit for a prisoner while in state custody by ordering the term to be served in a federal penitentiary. See Id. However, the federal government does not have the power to prevent a state from crediting a prisoner state time for time served in a federal penitentiary. See Id. Under existing law, the power to designate where a

prison term may be served is reserved solely to the Attorney General and the Bureau of Prisons. See Id.; See also 18 U.S.C.A. § 3621(b) (West 2006). Therefore, it violates dual sovereignty for a district court to order a state court to issue a consecutive sentence. See Romandine, 206 F.3d at 738. However, Ms. Tortelli could be refused any credit toward her federal sentence for time served in state prison, a decision solely for the Bureau of Prisoners and not the district court. See Id.